

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

IN RE: . Case No. 07-11337(KG)  
. .  
The SCO GROUP, INC., et al. .  
. 824 Market Street  
Debtor. . Wilmington, Delaware 19801  
. November 6, 2007  
. . . . . 10:00 a.m.

TRANSCRIPT OF HEARING  
BEFORE HONORABLE KEVIN GROSS  
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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For Alan P. Petrofsky:

By: ALAN P. PETROFSKY  
Pro se

1 THE COURT: Thank you, everyone, you may be seated.  
2 Good morning.

3 ALL ATTORNEYS: Good morning, Your Honor.

4 THE COURT: Good morning, Ms. Jones.

5 MS. JONES: Good morning, Your Honor. How are you?

6 THE COURT: Very well, thank you.

7 MS. JONES: Your Honor, for the record, Laura Davis  
8 Jones with Pachulski, Stang, Ziehl & Jones on behalf of The SCO  
9 Group et al.

10 Your Honor, we have a number of matters scheduled on  
11 the agenda for you this morning and does Your Honor have a copy  
12 of the notice of agenda?

13 THE COURT: I do, yes.

14 MS. JONES: Your Honor, if I may walk through that.  
15 And a number of the matters have been continued and/or  
16 otherwise are still the subject of discussion.

17 It's indicated on the agenda, Your Honor, Matters 1-3  
18 are continued. Matter 4, Your Honor, the application for the  
19 approval of Dorsey and Whitney, Your Honor, I understand that  
20 that has now been resolved. There were issues raised by the  
21 Trustee's office on that and there is a supplemental affidavit  
22 that has been filed. My understanding though is the parties  
23 are working through a form of order that they would submit  
24 under certification of counsel if that's okay with the Court.

25 THE COURT: That is perfectly fine. Thank you.

1 MS. JONES: Your Honor, Matter 5, our motion for  
2 approval of employment of a CFO Solutions to furnish a chief  
3 financial officer to the debtors, Your Honor, the Trustee's  
4 office has given us comments with respect to that and, indeed,  
5 provided a revised form of order this morning. Unfortunately,  
6 Your Honor, we're not there yet, on agreement on that order.  
7 So as we reflected on the agenda, if we haven't reached  
8 resolution, this matter would be continued over to the November  
9 16 day and, Your Honor, we seek to have that continued.

10 THE COURT: That's fine. We'll do that.

11 MS. JONES: Your Honor, the motion of SUSE with  
12 respect to filing exhibits under seal, my understanding is a  
13 certificate of no objection has been filed in connection with  
14 that.

15 THE COURT: Yes, and I don't know if anyone has a  
16 form of order at this point, but if not, I will be approving  
17 that. And that is fine. That order will be entered if it  
18 hasn't been already in chambers.

19 MS. JONES: Thank you, Your Honor. Your Honor, just  
20 to give Your Honor a preview of a couple other matters, we will  
21 be going forward and I'm going to yield to Mr. Spector  
22 momentarily with respect to Matter 7.

23 On Matter 8, Your Honor, the application for the  
24 employment of Mesirow Financial, Your Honor, that matter there  
25 had been issues raised by the U.S. Trustee. Those have been

1 resolved, Your Honor. There's the supplemental affidavit that  
2 has been filed. And I do have a proposed form of order that  
3 reflects comments from the Trustee's office, if I may approach.

4 THE COURT: You certainly may. Thank you, Ms. Jones.  
5 Mr. McMahon looks comfortable seated, so I'm not going to  
6 disturb him. And obviously he has approved the form of order  
7 and I am prepared to enter it.

8 MS. JONES: Thank you, Your Honor.

9 THE COURT: It's been entered. Thank you.

10 MS. JONES: Your Honor, we would be going forward on  
11 Matters 9 and 10. Let me jump ahead just for a second, though.  
12 On Matter 11, Your Honor, our application to seek the approval  
13 of the Boies Schiller firm. Your Honor, the Trustee's office  
14 had some issues with respect to that application. We have  
15 talked quite a bit about that. Mr. McMahon made another  
16 proposal to us right before the hearing. I'd like to have some  
17 time to digest that on our side of the table, Your Honor. So  
18 we're -- we may go forward with that today. We have to work  
19 through that.

20 THE COURT: That's fine. We can put that to the end.

21 MS. JONES: Thank you, Your Honor.

22 THE COURT: Or after a recess.

23 MS. JONES: And, Your Honor, also on the motion for  
24 the employment of the ordinary course professional, Your Honor,  
25 there were issues raised by the Trustee's office as well as an

1 individual who may be on the phone, Your Honor.

2 THE COURT: I believe he is, according to my roster.  
3 Yes. Mr. Petrofsky.

4 MS. JONES: Yes, sir. And, Your Honor, I believe we  
5 have resolved our issues with the Trustee's office. We sent a  
6 proposed form of order. I left a voice mail for Mr. McMahon to  
7 see if it was satisfactory and I know he's been busy this  
8 morning.

9 THE COURT: Good morning, Mr. McMahon.

10 MR. MCMAHON: Your Honor, good morning. Good to see  
11 you.

12 THE COURT: Good to see you. Thank you.

13 MR. MCMAHON: Joseph McMahon for the U.S. Trustee's  
14 Office. Your Honor, I would just like to have a few minutes to  
15 review the post form of order just to ensure that its  
16 consistent with my discussion with debtor's counsel. I just  
17 have not had the chance to do that prior to the hearing. But  
18 that's the request that I would make of the Court at this time.

19 THE COURT: That's fine. We can also, I think -- I  
20 know we do have Mr. Petrofsky on the phone and perhaps it would  
21 be well to hear from him before we proceed with what may be a  
22 lengthy hearing. Mr. Petrofsky.

23 MR. PETROFSKY: Yes, Your Honor.

24 THE COURT: Good morning.

25 MR. PETROFSKY: Good morning.

1 THE COURT: We do have your objection.

2 MR. PETROFSKY: Yes.

3 THE COURT: And if you would just like to be heard,  
4 this is your opportunity to do so.

5 (Appearing by telephone - difficult to discern)

6 MR. PETROFSKY: Thank you, Your Honor. Well, just  
7 quickly then, to recount what's in the written objection,  
8 there's two points. One is that the order (indiscernible)  
9 schedule of non-professionals. And all the parties have had a  
10 chance to view that list and file their objections, but through  
11 the back door in Paragraph 7 whereby, you know, 100 more  
12 professionals have been added to the list. And, no  
13 (indiscernible) voters would have any opportunity to object.  
14 And I don't see any reason for the noticed parties be summarily  
15 (indiscernible) and I don't think there will be any substantial  
16 burden in withstanding the noticed parties that have objected.

17 And then the second point is on the German  
18 litigation. This is not mentioned in the schedules and they  
19 claim that this is, you know, in ordinary course of business  
20 and that the business would somehow be fairly hindered if they  
21 could not (indiscernible). I just don't see any facts to  
22 support that. That's it, thank you.

23 THE COURT: You're most welcome. Ms. Jones, would  
24 you like to respond?

25 MS. JONES: A couple things, Your Honor. With

1 respect to providing notice of any supplement -- supplements to  
2 the OCP list, Your Honor, I don't know if the individual has  
3 added his appearance under Rule 2002, but that might be the  
4 simplest way to make sure that he has notice of any supplements  
5 that are submitted.

6 THE COURT: And I assume, Mr. Petrofsky, have you  
7 entered your appearance in this case?

8 MR. PETROFSKY: I have, Your Honor. The problem is  
9 is that the noticed parties are not just -- the order doesn't  
10 just say that those are the only people who get noticed. The  
11 order also says those are the only people who have the  
12 opportunity to object.

13 MS. JONES: Your Honor, we can made a point of making  
14 sure that if we have any supplements, that we'll add this  
15 individual. Your Honor, the order is very specific that if  
16 there are any supplements, there is an opportunity to review  
17 the affidavit.

18 THE COURT: Yes.

19 MS. JONES: And also to object, so I'm not sure I  
20 understand the individual's point. But, Your Honor, we can  
21 make sure that he does receive a copy of any supplements. And  
22 as I said, there is a period of objection in there.

23 THE COURT: Mr. Petrofsky, does that address your  
24 concern that there will be notice and, of course, it would be  
25 subject to the Court's review as well.

1 MR. PETROFSKY: Yes --

2 THE COURT: And specifically, notice would be given  
3 to you as a noticed party.

4 MR. PETROFSKY: Right. Okay.

5 THE COURT: All right. So that addresses that  
6 objection.

7 MR. PETROFSKY: Right.

8 THE COURT: And as far as the other litigation is  
9 concerned, Ms. Jones?

10 MS. JONES: Your Honor, I believe what I've heard is  
11 a concern about what is the German litigation about, Your  
12 Honor, not so much about the retention of the ordinary course  
13 professional. And Your Honor, I don't know if its something we  
14 want to do during the course of this hearing or if we can talk  
15 to this individual off-line and tell him what the German  
16 litigation is about. But, Your Honor, at this point, the  
17 debtor does believe in its business judgment that it does need  
18 the retention of the German firm. I don't think there's any  
19 dispute as the bona fides of that German firm. And we'd ask  
20 that they continue to be on th OCP list, Your Honor.

21 THE COURT: Mr. Petrofsky, what we'll do is I will  
22 have debtor's counsel speak with you about the German  
23 litigation. But I do think its appropriate to approve ordinary  
24 course counsel for that litigation. And to the extent you've  
25 objected on that ground, I'll overrule your objection. But

1 again, you will be advised by debtor's counsel of the nature of  
2 that litigation.

3 MR. PETROFSKY: Okay, thank you, Your Honor.

4 THE COURT: Certainly. Now, you are welcome to  
5 continue on the phone throughout what will be a lengthy  
6 hearing. Or you may excuse yourself at this point.

7 MR. PETROFSKY: Thank you. I'll stay on the line.

8 THE COURT: Okay.

9 MS. JONES: Your Honor --

10 THE COURT: So I, subject to Mr. McMahon's review and  
11 comment, I would be approving that order.

12 MS. JONES: That's fine, Your Honor, and we can  
13 submit that to the Court later in the hearing after -- once Mr.  
14 McMahon signs off on it.

15 THE COURT: That will be fine, thank you.

16 MS. JONES: Your Honor, at this point I would yield  
17 to Mr. Spector.

18 THE COURT: Okay. Thank you, Ms. Jones. Good  
19 morning, Mr. Spector.

20 MR. SPECTOR: Good morning, Your Honor. I rise  
21 primarily to introduce my partner, John Eaton --

22 THE COURT: Mr. Eaton.

23 MR. SPECTOR: -- who will addressing the next matter  
24 on the calendar.

25 THE COURT: Welcome.

1 MR. SPECTOR: I believe the next matter on the  
2 calendar is SCO's motion to enforce the automatic stay.

3 THE COURT: Yes.

4 MR. SPECTOR: With regard to the SUSE arbitration in  
5 Switzerland.

6 THE COURT: Thank you. Thank you, Mr. Spector. Mr.  
7 Eaton, good morning.

8 MR. EATON: Good morning, Your Honor. John Eaton on  
9 behalf of the debtor. Your Honor, the motion in question is  
10 one, quite frankly, that I'm surprised that the debtor was  
11 forced to file. It is simply a motion to enforce the automatic  
12 stay with respect to an arbitration proceeding that is pending  
13 in Switzerland that was instituted by SUSE Linux GMBH which I'm  
14 going to refer to simply as SUSE throughout this hearing.

15 The main issue, the primary issue is with respect to  
16 a fact that is not disputed. And that is who initiated the  
17 arbitration. And its undisputed that SUSE initiated the  
18 arbitration. And as Your Honor is well aware, under 362, the  
19 automatic stay applies to any and all proceedings, wherever  
20 located, that were brought against the debtor. And the Third  
21 Circuit in the Maritime Electric decision that we cited to in  
22 our motion and our reply specifically held that any and all  
23 actions against the debtor are stayed and cannot proceed  
24 forward. From our perspective, it's a very simple issue.

25 Unfortunately, Your Honor, the position that SUSE has

1 taken in the arbitration, and now before this Court, is that  
2 somehow the arbitration does not apply because the argument is  
3 made that their lawsuit, their arbitration claim, is defensive.

4  
5           They also claim, not wanting to get to the merits,  
6 that the Court doesn't have jurisdiction over them because they  
7 don't have the requisite minimum contacts and they weren't  
8 properly served.

9           Your Honor, from our perspective, I don't believe any  
10 of those arguments have merit. And I think we've addressed  
11 each and every one of them in our reply. And I will take a few  
12 minutes to go through each of them if the Court wishes, but I  
13 think, quite frankly, that the primary issue and the only one  
14 really that is an issue for the Court to decide today is, does  
15 the automatic stay apply. And the reason its important is  
16 because the current arbitration, Your Honor, is scheduled to  
17 proceed on December 3rd, and go from December 3rd to December  
18 14th.

19           THE COURT: Yes.

20           MR. EATON: The Swiss Arbitration Tribunal, as I  
21 understand it, have asked the parties to advise them as to what  
22 their respective positions are so as indicated that the  
23 automatic stay applies to the proceeding. And SUSE has  
24 indicated that it does not. And to a certain extent, as I  
25 understand it, they're looking -- "they" meaning the Tribunal

1 -- is looking for some guidance here so they know where it  
2 stands.

3           With that background, Your Honor, I think its  
4 important to understand what the nature is of the relief that  
5 SUSE is seeking in the Swiss arbitration. And there's several  
6 forms of relief that they're taking and its set forth in their  
7 statement of claim.

8           Specifically, Your Honor, they're seeking a  
9 declaratory judgment that SCO was precluded from asserting  
10 infringe -- copyright infringement claims, i.e. SCO cannot  
11 proceed with litigation that would be an asset of the estate.

12           They are seeking a declaration that two United Linux  
13 agreements divest SCO of ownership of certain alleged  
14 intellectual property rights in certain software. Again,  
15 divesting ownership with respect to an asset of the estate.

16           They are seeking an order to prevent SCO from making  
17 any public statements relating to certain software and other  
18 issues, specifically getting a preliminary injunction or a  
19 permanent injunction against SCO.

20           And finally, Your Honor, they're seeking damages of  
21 \$100 million which is big. The \$100 million aspect of the  
22 Swiss arbitration, Your Honor, as I understand it, is in a  
23 different phase than what is currently teed up because as I  
24 understand it, I don't think there's a dispute. The current  
25 Phase II is to contemplate a declaratory and injunctive relief

1 that SUSE is affirmatively seeking and also with respect to  
2 SCO's counter-claims against them.

3           The problem, Your Honor, is with respect to the SCO  
4 counter-claims, is that many of the counter-claims overlap with  
5 respect to defenses such that if there's a determination of a  
6 SCO counter-claim and it were against SCO, that wipe out a  
7 defense to an affirmative claim that SUSE is making.

8           So with that background, Your Honor, we get to the  
9 issues that are before the Court. And I think, as I already  
10 pointed out, Your Honor, the automatic stay applies to all  
11 proceedings that are blocked against the debtor. And I think  
12 that in and of itself demonstrates why the automatic stay  
13 applies. And the reason why we need an order from the Court is  
14 because SUSE doesn't believe -- SUSE doesn't believe that it  
15 applies and has affirmatively taken the position it does not.

16           With respect to their argument about service, Your  
17 Honor, the service issue was served on a number of different  
18 persons and entities when it was filed. The motion was served  
19 overnight on SUSE in Germany. It was served on SUSE's Swiss  
20 counsel by overnight mail. It was served by facsimile and on  
21 SUSE's United States attorneys in San Francisco, the Morrison  
22 and Foerster attorneys. And it was also served, Your Honor, on  
23 what we believe is SUSE's agent, their parent company, Novell,  
24 by hand-delivery on their counsel.

25           SUSE takes the position that the only way to

1 effectuate service was through use of the Hague Convention.  
2 And the Hague Convention would apply if you wanted to try to  
3 serve someone in Germany and do it through German. But the  
4 Hague Convention doesn't apply if you're trying to serve an  
5 agent that's located within the United States. And we believe  
6 we have properly done that. We've served SUSE's United States  
7 attorneys and we served Novell, its parent, in the United  
8 States.

9           There's no dispute that they were served. They're  
10 here. They filed a response. And I understand that their  
11 opposition reserve their rights on jurisdiction. But the  
12 bottom line is, the key is, they received notice and everybody  
13 is here in court today to address the substance with respect to  
14 the automatic stay.

15           SUSE's parent, Your Honor, is not just a company that  
16 owns SUSE. In 2004, the operations -- until 2004, SUSE  
17 operated in the United States. It was based in Oakland. It  
18 had employees in the United States. All of its contacts were  
19 here.

20           When Novell took over the operations, it functioned  
21 in the same fashion that SUSE did. It continued operating SUSE  
22 software. It did all of the activities in the United States.  
23 Novell officers were, in effect, the CEO of SUSE in the United  
24 States. And we've attached to our reply several website  
25 references that were public available to demonstrate some of

1 those contacts because at this juncture, we haven't had an  
2 opportunity to take any discovery to get into more specifics  
3 for an evidentiary hearing.

4           We've also served the Morrison and Foerster firm.  
5 And the Morrison and Foerster is not just -- its not just their  
6 attorneys in connection with the Swiss arbitration. Attached  
7 to our reply was a copy of a power of attorney that SUSE  
8 executed in favor of the Morrison and Foerster department. And  
9 I'm sure Your Honor's had a chance to look at it. It didn't  
10 just allow them to take any and all action necessary to protect  
11 their rights and to do things in connection with the Swiss  
12 arbitration. It also allowed an authorized debtor to do  
13 anything that was necessary to take action on their behalf and  
14 protecting their rights in related proceedings.

15           Well, this is a related proceeding, Your Honor. Its  
16 related to the debtor's assets. Its related to the debtor's  
17 creditors. And the assets that are in question include  
18 software, litigation rights which they're trying to go after,  
19 "they're" meaning SUSE is trying to go after during the Swiss  
20 arbitration.

21           So from our perspective, service has properly been  
22 effectuated already. But even if the Court believes that its  
23 not, there's still a way to resolve the issue, Your Honor, and  
24 that is through Rule 2004, or Rule 4(f)(3) which is  
25 incorporated through Rule 7004, which allows the Court to

1 authorize a different method of service. The Court could order  
2 an interim order declaring that we may serve SUSE through its  
3 agents in the United States, i.e. their Novell parent or its  
4 attorneys Morrison and Foerster. I don't think we need to go  
5 through that exercise because I think we've already properly  
6 served them and the Court could so find. But if the Court  
7 believes that an order through Rule 4(f)(3) is necessary, we  
8 would respectfully request that the Court makes such a ruling  
9 and make it nunc pro tunc to the time of the service so that we  
10 can get to the meet which is does the automatic stay apply.

11           Next order of attention, Your Honor, to the other  
12 argument they made which is that they don't have the requisite  
13 minimum contacts with the United States. And we believe we've  
14 laid out more than sufficient facts, not only to establish  
15 specific jurisdiction, but also general jurisdiction. But we  
16 don't need to have both. One is enough. And I think that for  
17 purposes here, we will focus our discussion on the specific  
18 jurisdiction and why the Court has it.

19           And in order to be subject to specific jurisdiction,  
20 it can take place and be found in any suit in which the actions  
21 relate to a single purposeful act in the United States or one  
22 that can have an effect in the United States, and specifically  
23 here on the bankruptcy case. And I believe one of the  
24 decisions they've cited to in their reply, the O'Conner v.  
25 Sandy Lane decision from the Third Circuit said that at least

1 one contact must relate to the plaintiff's claim.

2 Well, here, the claims are relating to the debtor's  
3 assets. Its relating to litigation. Its relating to the  
4 debtor's rights with respect to certain copyrights. And the  
5 action that they want to take is to divest the debtor of that  
6 and make a determination that the debtor doesn't have any  
7 rights and to prevent the debtor from enforcing or seeking  
8 recoveries on any litigation claims it may have.

9 They're affirmatively taking that position pre-  
10 petition. They are now trying an affirmatively taking that  
11 position post-petition. In fact, Your Honor, on October 30th,  
12 SUSE filed its memorandum with the Swiss Tribunal which laid  
13 out all of the reasons why the Court should find in its favor  
14 on all of its prayers for relief.

15 Now, we cited to a number of cases in our memorandum  
16 which show that taking action against property of the estate is  
17 enough to satisfy the requisite conduct that would necessitate  
18 and require in support of finding for minimum contacts. And  
19 I'm specifically referring, Your Honor, to the Lykes Brothers  
20 decision from the Middle District of Florida. And I'm also  
21 citing, Your Honor, to the Childs Power decision. And as well,  
22 Your Honor, the decision of McClain -- McClain decision. And  
23 here they have affirmatively taken those acts with respect to  
24 property of the estate. But they also have other contacts,  
25 Your Honor.

1           The Swiss arbitration is based upon, Your Honor, the  
2 United Linux agreements and alleged breaches by SCO of those  
3 agreements. The position that SUSE takes is that their  
4 arbitration -- if their arbitration doesn't relate at all to  
5 the Delaware LLC that was formed in which they had a 25 percent  
6 ownership interest. Its kind of surprising they've taken that  
7 tact because they've even alleged in their statement of claim,  
8 74 times, they make reference to the Delaware LLC which was a  
9 at all times envisioned to be the joint venture entity that  
10 would be the basis upon which those contracts would operate.  
11 And they know that they have the 25 percent ownership interest  
12 and that was going to be the vehicle that was going to be used.

13           The negotiations for the execution of the agreements  
14 that are the subject of the litigation in Switzerland, the  
15 arbitration in Switzerland, are admitted by SUSE to have taken  
16 place in Salt Lake City, New York and Atlanta. Its found in  
17 their own statement of claim. And we've provided the Court  
18 with the citations to those contacts.

19           There has been numerous emails and faxes and calls to  
20 SCO with SCO's attorneys in the United States with respect to  
21 those contracts. And all of those are set forth in the  
22 statement of claim that took place which, I don't believe is in  
23 dispute, its in their own statement of claim.

24           In the October 30th arbitration filing that SUSE just  
25 made, they make it a point to say that, well, you know what?

1 The Delaware LLC has nothing to do with the underlying  
2 arbitration which we find somewhat surprising in light of the  
3 previous 74 references in their own statement of claim. And I  
4 think the Court can just look at the statement of claim to see  
5 the importance of the Delaware LLC to the claims that are the  
6 subject of the arbitration in Switzerland to understand why  
7 those provide the requisite -- you know, part of the requisite  
8 contacts in the United States.

9           SUSE's arbitration is being pursued not just by Swiss  
10 counsel. Its also being pursued, the arbitration itself, is  
11 being prosecuted by their attorneys at Morrison and Foerster.  
12 Morrison and Foerster has participated in telephonic hearings  
13 from the United States. Its had conduct in -- excuse me, its  
14 had telephone calls and communications with SCO's attorneys in  
15 the United States, all pertaining to the Swiss arbitration  
16 which are the contacts in the United States which I think would  
17 be additional evidence or additional indicia of the minimum  
18 contacts necessary to satisfy specific jurisdiction, Your  
19 Honor.

20           And, Your Honor, the reason why I think its important  
21 with respect to the Delaware LLC, as I understand it, is that  
22 part of the argument that is being articulated by SUSE in the  
23 Swiss arbitration is that the Delaware LLC assigned to SUSE its  
24 use in the United States and worldwide for certain of the  
25 software that is in essence at issue in the litigation.

1           So, the Delaware LLC, which was a joint venture that  
2 had been contemplated by the parties as part of the very  
3 agreements at issue lies at the heart of that litigation and is  
4 a contact they have with the United States.

5           Your Honor, the Lykes decision and the McClain  
6 Industries decision and the Childs Power decision, Your Honor,  
7 I think all demonstrate that the minimum contact which allows  
8 this Court to exercise the jurisdiction over SUSE has been more  
9 than met simply with respect to the relief relating to the  
10 property of the estate, namely the copyright infringement  
11 claims and divesting ownership.

12           The other indicia that we've articulated and the  
13 other factors we've articulated relate to some of the other  
14 non-bankruptcy cases that we've set forth in our motion. But I  
15 think one or both, and certainly all show that they have the  
16 necessary contacts related to the specific issue of what is at  
17 issue in the Swiss arbitration and how it impacts the  
18 bankruptcy case and the effect on the bankruptcy here in the  
19 United States.

20           On the general jurisdiction, Your Honor, we set forth  
21 and attached to our reply a number of matters that have been  
22 the matter of public record, both interviews with former SUSE  
23 officers. We attached information that I understand is in  
24 German that reflect other indicia which were specifically  
25 officers and directors or officers of SUSE, how they were in

1 the United States and had United States operations on behalf of  
2 SUSE after, after Novell took over the operations.

3 I don't want to spend a lot of time going through the  
4 general jurisdiction other than to point out that we do believe  
5 its met. But I think we don't need to go there because that's  
6 really getting into more, and acknowledges more than  
7 evidentiary issue which would require a certain degree of  
8 discovery which has not been taken. But I didn't want the  
9 Court to believe or understand that we were not seeking to have  
10 a determination of belief that the general jurisdiction  
11 requirements have been met in this particular case.

12 THE COURT: And I understood that.

13 MR. EATON: And I appreciate that, Your Honor. So  
14 the one decision that was the focus, I think, of SUSE's  
15 response was the Fotochrome decisions from the Eastern District  
16 of New York in the Second Circuit which specifically dealt with  
17 a situation in which -- under the Bankruptcy Act, not the  
18 Bankruptcy Code -- in which there had been an arbitration  
19 pending in Japan. An arbitration award was made post-petition  
20 and then the Japanese entity came into the United States and  
21 sought enforcement of that arbitration in the bankruptcy court.  
22 And the court, in that particular case, held that they didn't  
23 have the requisite minimum contacts.

24 Interestingly, Your Honor, there was zero discussion  
25 as I saw in my reading of the cases of what contacts they had.

1 Here, we've established what the contacts are. So from a  
2 factual standpoint, the case is wholly in opposite and does not  
3 apply. But there's other interesting aspects to it, Your  
4 Honor, which show why it doesn't apply here. And one of the  
5 most important is, is (1) the focus was not on what the Third  
6 Circuit has held in Maritime Electronic which is the bread of  
7 the automatic stay in its worldwide application.

8           And also, Your Honor, there was a specific statement  
9 by the Second Circuit that shows why that decision doesn't  
10 apply here under the Bankruptcy Code. One, it had no statutory  
11 basis akin to the automatic stay of the worldwide application.  
12 And in fact, Your Honor, I believe the court in that case said  
13 there was not an issue there because the court said that the  
14 jurisdiction over the estate property was not exclusive.  
15 That's not the case, Your Honor, under the Bankruptcy Code.  
16 Your Honor's well aware that Your Honor has the exclusive  
17 jurisdiction of all property of the debtor.

18           So I don't think that the Photochrome decision really  
19 has any application in this particular case. And I think the  
20 bankruptcy cases that we've cited and have even been referred  
21 to by SUSE, the Lykes decision, the McClain Industry decision,  
22 the Childs Power decision reflect why, under the current Code,  
23 the minimum contacts can take place with respect to one  
24 particular act pertaining to property of the estate.

25           So that, Your Honor, brings us back to again the

1 point of why we're all here. Does the automatic stay apply.  
2 And I think the Court can simply just look to the Maritime  
3 Electric decision from the Third Circuit and which the Court  
4 specifically held that you look at the initiation of the  
5 lawsuit, or the arbitration as the case may be. Was it  
6 initiated against the debtor? Its admitted here, Your Honor.  
7 There is no dispute that they initiate it. The argument that  
8 it was defensive in nature to protect their rights, quite  
9 frankly, Your Honor, would apply to any lawsuit that a  
10 plaintiff brought because presumably any lawsuit is to protect  
11 their rights.

12           That's -- even assuming that is the law, its not the  
13 law in the Third Circuit in light of the Maritime Electric  
14 decision. And Your Honor, I would also point out that 362(b)  
15 sets forth about 28 different types of matters that are not  
16 subject to the automatic stay. Nowhere in there will you see  
17 anything relating to an arbitration in a foreign jurisdiction.  
18 There's nothing in there that says it doesn't apply to a  
19 defensive claim.

20           I think the Court can just simply look at the Third  
21 Circuit's decision in the Maritime Electric and see that in  
22 this particular case, its very clear that the automatic stay  
23 applies. Its very clear that we need to have a direction to  
24 SUSE and, more importantly, Your Honor, to the Tribunal in  
25 Switzerland letting them know that the automatic stay applies

1 so that debtor can move forward with its reorganization efforts  
2 and not have to deal with the time and expense relating to the  
3 Swiss arbitration.

4           We attached the form of a proposed order, Your Honor.  
5 I don't believe that evidence is required with respect to the  
6 matters to show the requisite context, the requisite service.  
7 We've attached the documents to our motion and our reply. To  
8 the extent that SUSE disputes it, we can certainly have a  
9 discovery schedule established by the Court. Discovery could  
10 be taken. I think that would be expensive. I think its not  
11 necessary when the Court has before it and has before it, the  
12 parties, the specific issue relating to the applicability of  
13 the automatic stay. And for that reason, Your Honor, we simply  
14 request that the motion be granted.

15           THE COURT: Thank you, Mr. Eaton. Mr. Lewis.

16           MR. LEWIS: Good morning, Your Honor. Thank you.  
17 Adam Lewis of Morrison and Foerster. If I may just take a  
18 moment with you today.

19           THE COURT: Please.

20           MR. LEWIS: Mr. Nestor from Young Conaway.

21           THE COURT: Yes, Mr. Nestor.

22           MR. NESTOR: Good morning, Your Honor.

23           MR. LEWIS: And my co-partner and co-counsel, Mr.  
24 Jacobs --

25           MR. JACOBS: Good morning, Your Honor.

1 THE COURT: Welcome.

2 MR. LEWIS: -- who's been involved in the patent  
3 litigation from Morrison and Foerster. And my associate Julie  
4 Dyas --

5 MS. DYAS: Good morning, Your Honor.

6 THE COURT: Good morning.

7 MR. LEWIS: -- is helping on this case.

8 THE COURT: Thank you, Mr. Lewis.

9 MR. LEWIS: Probably the secret behind it.

10 THE COURT: Thank you.

11 MR. LEWIS: And I appreciate appearing in front of  
12 the Court for the first time.

13 THE COURT: Thank you. It's a pleasure to have you  
14 here, Mr. Lewis.

15 MR. LEWIS: Your Honor --

16 THE COURT: I don't want to interfere, but as you're  
17 making your presentation, I think a principal concern of mine  
18 is the argument that this is a defensive action taken by -- may  
19 we call them SUSE? Is that acceptable to --

20 MR. LEWIS: Sure, sure, Your Honor. That's fine.

21 THE COURT: -- to your -- fine.

22 MR. LEWIS: Your Honor --

23 THE COURT: And I don't ask you that you address that  
24 right off the back, but just in certainly making your argument.

25 MR. LEWIS: Well, as it happens, Your Honor, that's

1 exactly what I was going to do because I think once we've gone  
2 over what that arbitration's all about with some care, you will  
3 see, I hope, that it is not covered by the automatic stay  
4 except in the very limited way and we're prepared to deal with  
5 that limited way this morning. So let me go over that very  
6 briefly.

7           You can break the arbitration issues into three  
8 components. The first component is the debtor's claims against  
9 SUSE. Those are clearly not barred by the automatic stay. The  
10 debtor claims, well, gee, they're so related to the other  
11 claims that are barred by the automatic stay that there's some  
12 kind of presto chango protection that comes with the automatic  
13 stay to the extent that it applies to SUSE's claims. But  
14 there's nothing in the law that says that.

15           So far as we're concerned, the debtor's admitted the  
16 automatic stay, in its own papers, is not covered although it  
17 took a different position initially with the Arbitral Tribunal.  
18 The fact is, it is not covered by the automatic stay and  
19 whether they proceed in the Arbitral Tribunal with their claims  
20 against SUSE, their counter-claims, is between them and the  
21 Tribunal and to some extent us as parties, that is SUSE, to the  
22 proceeding in Switzerland. So that's not covered. That's out.  
23 You don't have to discuss that this morning.

24           The second component is SUSE's damage claim. I want  
25 to come back to that at the end because I think in some ways

1 it's the least important. The third component which I want to  
2 talk about now is probably the one the Court is the most  
3 interested in and the most controversial. And I want to talk  
4 about how that arose. And to do that, I have to talk a little  
5 about SUSE and then about O'Dell because I think it helps to  
6 throw some light on the situation.

7           As the Court is aware from the pleadings, the  
8 litigation in Utah was stayed with respect to the arbitration  
9 issues. And here's the reason why. The debtor's, in the Utah  
10 litigation, made various claims against Novell. Some of them  
11 had to do with Novell's use of IP, intellectual property, that  
12 it had licensed from SUSE. And the way that Novell handles  
13 those claims is by raising its license from SUSE as an  
14 affirmative defense. Not as an affirmative claim, just an  
15 affirmative defense.

16           What's going on in Switzerland is the very same thing  
17 except up the line one step. That is, the party involved is  
18 the party that licensed to Novell. And although its made an --  
19 its brought a declaratory relief action against the debtor in  
20 the arbitration, the declaratory relief action really is all  
21 about the affirmative defenses that nobody claims are stayed in  
22 the litigation in Utah that Novell has raised. It's the same  
23 defenses.

24           So while SUSE has taken the initiative in Utah, its  
25 really taken the initiative, in effect, saying, well, SCO,

1 we're not going to wait for you to sue us like you sued Novell  
2 in Utah and then raise these as affirmative defenses. We're  
3 just going to get this thing underway because you're messing  
4 with our business in Europe. And that's all its about.

5           And, indeed, to the extent that SUSE -- that the  
6 debtor claims that Novell and SUSE are one in the same,  
7 essentially, for purposes of the jurisdictional and automatic  
8 stay issues, how can they then argue that its not really a  
9 defensive claim because its really just exactly what Novell is  
10 doing that there's argument about, is defensive in Utah and is  
11 not barred by the automatic stay.

12           SUSE's answer to that question is, well -- I mean,  
13 the debtor's answer to that question is, well, you started it  
14 in Europe. That's what it amounts to. And we come down to  
15 that work against in section 362(a). And the question is,  
16 what's the real key language in that provision of 362. And  
17 they say that the key language is "brought". And so the key  
18 issue is who started it, who filed the complaint, who started  
19 the proceeding.

20           We believe that that's trivializing that statute.  
21 What the "against" means is attempts to recover from the  
22 debtor, whoever starts it. And if the Court agrees with us on  
23 that score, that the statute has to be interpreted in terms of  
24 whether you're trying to recover from the debtor, not who just  
25 started the litigation, that's almost irrelevant, then the stay

1 simply does not apply to those claims that are brought, the  
2 declaratory relief part, of the arbitration. Its as simple as  
3 that.

4           Now, we've heard a lot about the cases, the Maritime  
5 case, but if you look at the Maritime case, Your Honor, the  
6 underlying issue there was a claim against the debtor, to  
7 recover from the debtor. All of the cases that the debtor has  
8 cited in its favor involve either outright claims against the  
9 debtor which came up in various ways, or claims against  
10 property that everybody admitted that the debtor owned, like  
11 the insurance proceeds in the one particular case. That was  
12 property of the estate. It was just this party trying to get  
13 its hands on it.

14           We're not arguing over trying to get our hands on  
15 property of the estate. The issue really here, ultimately, in  
16 the arbitration, is whether its property of the estate at all.  
17 And we don't have to wait around until the debtor is ready to  
18 deal with that anymore than we do in Utah in order to protect  
19 our rights and protect our business. And that surely is what  
20 the automatic stay is about.

21           Otherwise, the argument is -- reduces itself to the  
22 argument that, well, the real purpose of the automatic stay is  
23 to save the debtor litigation costs. But if that were the  
24 purpose of the automatic stay, then the automatic stay would  
25 stay all litigation, including brought by the debtor, until

1 somebody, either the debtor or somebody else, sought relief.

2 And that's not what Section 362(a) says.

3           And I remind the Court that its not simply a matter  
4 of what the debtor chooses or not -- chooses not to do with  
5 respect to the automatic stay. Remember, anybody who is barred  
6 by the automatic stay from doing something has to get relief  
7 from the bankruptcy court. The debtor cannot unilaterally go  
8 the court and say -- or on its own, without going to the court,  
9 and say to the other party to litigation that the debtors  
10 initiate it, well, even though this is barred by the automatic  
11 stay, we're willing to go ahead, so let's go ahead. The debtor  
12 would have to come to this court for that relief.

13           And so, two, if the automatic stay really barred --  
14 was really designed to simply stay litigation costs, there is a  
15 larger interest at -- that would be at issue then simply what  
16 the debtor chose to do. There's preservation of the estate for  
17 the benefit of all creditors meaning that the debtor would have  
18 to come to this court to ask this court's guidance on whether  
19 its wise to get stay relief to be able to continue with its own  
20 claims. But of course, the automatic stay doesn't cover claims  
21 that they've brought.

22           And the claims that have been brought in Switzerland  
23 are no more than the defensive claims that everybody admits are  
24 still at issue and can still be litigated in Utah that Novell  
25 has raised as affirmative defenses. They are the same claims,

1 just raised up the line.

2           So the debtor's interpretation of the word "against"  
3 trivializes the automatic stay and makes that statute  
4 meaningless. And also, I think, is not consistent with the  
5 actual facts of the cases, whatever the broad language is that  
6 is sometimes used in some of those cases may say in a kind of  
7 general way. In everyone of those cases, the automatic stay  
8 was held to apply because assets of the estate, money that --  
9 either the other property was seeking money or was seeking  
10 property that everybody admitted belonged to the estate. We  
11 don't have that here and I don't think those cases serve as  
12 precedent.

13           Incidentally, the debtor spent some time arguing that  
14 we claimed that the automatic stay doesn't apply to  
15 arbitration. We never made any such claim.

16           So, now we have two components that I've talked about  
17 so far of the Swiss arbitration. The first is the debtor's  
18 claims, the counter-claims. And clearly they're not barred by  
19 the automatic stay. In fact, we sort of just talked about, at  
20 a second time, in a way, in talking about the second component  
21 which is the defensive declaratory relief action that is simply  
22 the Novell defenses, affirmative defenses in Utah repackage by  
23 SUSE so that it doesn't have to wait around while the debtor  
24 continues to bad mouth its business in Europe and interfere  
25 with its business in Europe.

1           The third issue is the damage claims. And we  
2 acknowledge, Your Honor, that the damage claims would be  
3 covered by the automatic stay. Let me, at first, however, just  
4 say that the notion that the damage claims are \$100 million is  
5 a complete misstatement of what's in the record. A \$100  
6 million is determined as follows.

7           Under the Swiss arbitration rules, we have to put a  
8 value on the case, as it were, in order to determine what the  
9 fees are to be paid to the arbitrators. We did that. Not by  
10 asserting a damage claim, but by calculating what the injury to  
11 our business would be if this went on and on and on. That's  
12 where the \$100 million came from. Its not the damage claim.

13           But that said, we acknowledge that the affirmative  
14 claims for monetary relief is barred by the automatic stay. A  
15 couple of points about that. The first is as everybody  
16 acknowledges, its not teed up yet. And we're prepared to ask  
17 this Court for stay relief at the right time if we need to do  
18 that. The Court can always just grant us that if the Court's  
19 otherwise inclined to let the arbitration go forward as we  
20 think it should.

21           Second thing is, if we need to, we are prepared to  
22 consider waiving that damage claim so that the arbitration can  
23 go ahead in some sensible fashion.

24           And that leads to the next point here. It will take,  
25 perhaps, 6 to 12 months to get another arbitration proceeding

1 set if we can't go forward as scheduled right now. Subject, of  
2 course, to whatever the Arbitration Tribunal wants to do. We  
3 don't control that.

4 THE COURT: When was the arbitration proceeding  
5 commenced? On what date? Do you recall?

6 MR. LEWIS: I think it was commenced in 2006, is that  
7 right? I think it was April 10th, maybe, in 2006.

8 So on the third point, it's a non-issue in this  
9 instant. We acknowledge that the automatic stay would apply  
10 here. We'd ask the Court to consider granting stay relief sua  
11 sponte today. And if not, to simply postpone the issue until  
12 it comes up because its not ripe yet. Because no one is at  
13 that phase of the arbitration proceedings. The phase we're at  
14 is, the critical phase, who has what. Who owns those  
15 copyrights. The same critical issues that we're asking this  
16 Court to allow to finish off in Utah, that are critical to this  
17 case, to the debtor as the debtor's own recent motion to sell  
18 reflects and critical to the creditors.

19 THE COURT: Could this have joined in the Utah  
20 litigation? I'm sorry, could SUSE --

21 MR. LEWIS: I'm going to defer to Mr. Jacobs on that.

22 THE COURT: Oh, that's fine. Mr. Jacobs, thank you.  
23 Could SUSE not have joined in the Utah litigation?

24 MR. JACOBS: I don't know the answer to -- we didn't  
25 look at that specific question because of the scope of the

1 United Linux agreements, which is what's at issue in the Zurich  
2 arbitration, is an arbitral issue by the terms of those  
3 agreements. So the exact sequence was counter-claim -- amended  
4 complaint by SCO in Utah asserting copyright infringement  
5 against Novell by virtue of Novell's distribution of SUSE  
6 Linux, step one.

7           Step two, SUSE files an arbitration in -- its an ICC  
8 arbitration in Zurich. Files an arbitration demand seeking,  
9 among other things, declaratory relief that SCO doesn't have a  
10 claim relating to SUSE Linux by virtue of the United Linux  
11 agreements.

12           Novell goes into the district court in Utah and says,  
13 these issues -- there are issues now in the litigation that are  
14 referable to arbitration within the meeting of the federal  
15 arbitration acts, asks the district court to stay those issues.  
16 The district court parses through the complaint that's not  
17 operative in Salt Lake City and says, I see, yes, these claims  
18 relating to SUSE Linux, they are arbitral under the United  
19 Linux agreements, makes a preliminary reading of those  
20 agreements, decides, in fact, that those issues are referable  
21 to arbitration and stays component of the Utah litigation.

22           So there's two different stays at issue here. It's a  
23 little bit complex. The point, I think, that we're driving at  
24 is the automatic stay doesn't apply to SCO's affirmative claim  
25 against Novell in Salt Lake City for copyright infringement

1 because that's their claim. That's an affirmative claim  
2 they're making. And this is in the nature of a precondition to  
3 the assertion by Novel of the affirmative defense. The scope  
4 of the United Linux agreements drives the scope of Novell's  
5 affirmative defense in Salt Lake City. Hence, the defensive  
6 nature of the declaratory relief claim.

7           One way to -- there's a little riddle I was realizing  
8 as Mr. Lewis was talking. If we went back to -- if we went  
9 back to Judge Kimball in Salt Lake City and said, you know,  
10 this affirmative claim from SCO isn't stayed by the automatic  
11 stay. So, you can continue on with that. The automatic stay  
12 applies to our counter-claim. You have the lift stay motion.  
13 But this affirmative claim by SCO isn't stayed. He would say,  
14 but how can I proceed with that claim. The issues are  
15 referable to arbitration in Zurich. The arbitration has to be  
16 completed first.

17           It should be the result, we submit, that because of  
18 the defensive nature of the arbitration claim, the automatic  
19 stay doesn't apply to that component of SUSE.

20           THE COURT: I understand. Thank you.

21           MR. LEWIS: Does that answer your question, Your  
22 Honor?

23           THE COURT: Yes. Thank you, Mr. Lewis, that was a  
24 good answer you gave me.

25           MR. LEWIS: I can think of other situations where

1 both domestic and legal where I would like to send Mr. Jacobs  
2 to represent me as.

3           Okay. So I think that's my argument on the merits of  
4 the scope of the stay. And I guess my basic point, once again,  
5 is we just don't think the stay applies except to very limited  
6 extent we're prepared to live with whatever the Court decides  
7 to do about that limited extent. Although we would recommend  
8 that since the stay doesn't apply to the defensive, the  
9 territory relief action that SUSE has brought and certainly  
10 does not apply to SCO's affirmative claims in the arbitration,  
11 if those are going to go forward, then we might as well have  
12 everything go forward together. Let's get it done together and  
13 let's get it done and we'll all know better where things stand.

14           This is not the kind of thing to put off for 6 or 12  
15 months. The parties are ready, or should be ready. They've  
16 had plenty of notice. And it would make much more sense to let  
17 this go forward where the parties agree that would be decided  
18 with their arbitration clause which referred it to Swiss  
19 arbitration and its governed by Swiss law. And I don't think  
20 there's any dispute about that.

21           So with that said, let me turn now to the  
22 jurisdictional issues and let me start by saying that we don't  
23 contend that the Court couldn't authorize the kind of service  
24 that the debtor affected in this case. But the debtor didn't  
25 affect that service in this case with this Court's authority

1 which is what the rule requires. What the debtor didn't do was  
2 go and look at the rule which is in black and white in the  
3 Federal Rules as adopted by the Bankruptcy Rules about what  
4 they had to do.

5           One thing they could have done if they read the rule  
6 was come to this Court in the first place and ask for authority  
7 to serve whomever. And that would have been decided and we  
8 probably would have agreed. We probably wouldn't have opposed  
9 an attempt to service counsel once we'd had a chance to confer  
10 with our client. I don't know what would have happened for  
11 sure because we didn't get the chance.

12           But they didn't do that and that's what the rule says  
13 they're suppose to do and they're attitude seems to be, well,  
14 rules, rules, you know, we all know what's really going on  
15 here. Let's just not play by the rules. We'll just kind of  
16 make it up as we go along. You know, we're the debtor and we  
17 need special care and attention. And we ask you to give us  
18 that special care and attention. That's not how it works.  
19 That's not due process. Its not in accordance with the rules.

20           The debtor claims that we, Morrison and Foerster,  
21 through the power of attorney in the arbitration somehow  
22 consented to this, to having Morrison and Foerster served in  
23 this bankruptcy case because this is a, quote, related  
24 proceeding. Well, as in other arguments they've made, the  
25 debtor trivializes the language. There's no reason a debtor

1 would be suing a non-debtor except as it somehow related to the  
2 debtor's welfare. Its not enough to say that it's a related  
3 proceeding because the debtor's now in bankruptcy and the  
4 assets are somehow related to what's going on. No one is  
5 envisioning bankruptcy. We're talking about related  
6 proceedings on the merits. That's what that's -- that's what  
7 that provision means.

8           And to read it otherwise is, again, to say that  
9 somehow the -- SUSE is saying, well, whatever happens, whatever  
10 may come, fine, you can serve Morrison and Foerster if it has  
11 the slightest connection now or in the future with the  
12 arbitration proceedings out of which the power of attorney  
13 grows. You have to read that in connection with the proceeding  
14 in which its filed and to which it refers in its very first  
15 sentence.

16           Now, the debtor also argues that we have all kinds of  
17 contacts because we're controlled by Novell and so on and so  
18 forth. And the debtor admits it doesn't really have any  
19 evidence here. No admissible evidence, no competent evidence.  
20 It has a lot of speculation and stuff its pulled of Google.  
21 And we all appreciate Google, but Google is not admissible  
22 evidence.

23           But just a couple of comments on this. The debtor's  
24 argument amounts to the -- amounts to claiming in many ways  
25 that because we're a wholly-owned subsidiary and because we

1 happen to share certain management personnel that we're one in  
2 the same as Novell, in essence. That's an alter ego argument.  
3 There's no evidence for alter ego grounds here. Every related  
4 company -- surely in Delaware, this is something that we all  
5 know -- every related company, every subsidiary is going to  
6 share some officers and managers. And there's going to be some  
7 relationship in how they're run. You wouldn't buy a subsidiary  
8 if you didn't want to try to influence its affairs. If that's  
9 enough, then every company is an alter ego of its parents and  
10 every company can be served however you want to. That's not  
11 what the law is.

12           And so, the mere fact that Novell -- and I remind the  
13 Court that SUSE is not a direct subsidiary. Its -- there's a  
14 number of intervening companies between Novell and SUSE. The  
15 fact that they share some management, that they share some  
16 strategic visions and objectives, that they talk to each other,  
17 that's not enough to turn them into nothing more than Novell.  
18 And I don't think the law says anything to the contrary. On  
19 the --

20           THE COURT: Did they not operate, though, in the  
21 United States?

22           MR. LEWIS: They -- what they do in the United  
23 States, its my understanding, is they basically sell through --  
24 they have no office in the United States. They may have at one  
25 time, they no longer do. They sell through Novell exclusively

1 in the United States. They have no people in the United States  
2 on any permanent basis. People may come and go on occasion to  
3 the United States.

4 But to turn occasional contacts and sort of some form  
5 of minimal commercial intercourse into minimal contacts for the  
6 purposes of suit would be back public policy to say the least.  
7 And that's all we have in front of the Court in terms of  
8 evidence right now.

9 The debtor argues that the -- that somehow the fact  
10 that the Delaware LLC is involved in some way is significant.

11 THE COURT: Yes. The joint venture.

12 MR. LEWIS: Let me explain to the Court as best I can  
13 how the Delaware LLC is involved. As the Court recalls, four  
14 parties formed the Delaware LLC. So there's the LLC agreement  
15 copy which is attached, too.

16 THE COURT: Yes.

17 MR. LEWIS: There are some other agreements, however,  
18 between those same four parties. And in those -- those other  
19 two agreements. There's an identical provision in each of the  
20 two that does not appear in the LLC agreement. And in that  
21 agreement and those provisions they say, in essence, each party  
22 will license its software to the other party. And the licenses  
23 will either be through LLC or directly, okay.

24 So, its true that -- and part of the arbitration is  
25 over whether those -- what those licenses are and where they

1 are and who they are and so on. But the point here is that the  
2 Delaware LLC is a mere conduit for those licenses. I think --  
3 and I'm not expert in patent law, but I've learned some stuff  
4 over the years and there's a doctrine, I believe, in patent law  
5 called an implied license. This is a license that's deemed to  
6 have been given when the parties agreed it would be given and  
7 it would be unjust not to, regardless of whether there's  
8 actually a writing, a specific written license which would be  
9 nice, because its evidence. Makes the third parties feel more  
10 comfortable. And -- but its not required in this situation.  
11 And I think this would be the kind of situation where you'd  
12 have an implied license, that is, a license by operation of law  
13 given what these two agreements say.

14           There may also be expressed licenses. There may also  
15 be licenses that are direct and we're not sure which of these  
16 would the be ones that would be at issue in Switzerland. So it  
17 may be that there's no involvement of the LLC at all in the  
18 licenses in Switzerland if they're direct licenses. But if it  
19 is involved as a licensor, its involved as a licensor only by  
20 operation of law because it's a conduit under these agreements.  
21 Its not actively involved in anyway.

22           And so whether its referred to 74 times or 150 times  
23 in the other pleadings, as the Court can see, that's kind of  
24 inevitable. But its not enough to say how many times its  
25 referred in some pleadings in the Swiss arbitration. Its also

1 important to understand what the references are about. And now  
2 the Court understands what the references are about. They are  
3 about, to the extent that licenses from the LLC are involved in  
4 the Swiss arbitration. And they may not be. They are involved  
5 because they are automatic. And the Swiss -- and the LLC is a  
6 mere conduit for the creation of these licenses and not because  
7 it was involved in active business dealings or transactions.

8           So the LLC is really not involved. And the mere fact  
9 that the company SUSE is a shareholder, a 25 percent  
10 shareholder in the Delaware LLC, its not enough, I think, to  
11 raise minimum special or general minimum contacts for purposes  
12 of jurisdiction anymore than any particular shareholders role  
13 as a shareholder would be enough. Again, and I know Delaware  
14 is very familiar with corporate law and that would be a pretty  
15 bad rule under corporate law if every time you were a  
16 shareholder in a company that was a U.S. company, people could  
17 serve you because you were a shareholder out of state, let's  
18 say. And we're not even talking about international.

19           So that would be -- that's, I think, our main point.  
20 There are, as the debtor says, various factual issues regarding  
21 the relationship of the parties. If those need to be  
22 elaborated, I guess they'll be elaborated through a discover.  
23 But again I suggest to Your Honor that we don't need to get  
24 there because the stay doesn't apply to the Swiss arbitration  
25 except in a very limited way, a way the Court can deal with

1 this morning. Either we can stay all damage issues or the  
2 Court can grant stay relief now or we can simply postpone the  
3 issue on our representation it will come back to the Court to  
4 seek stay relief on the damages if and when we get there. But  
5 that's down the line.

6           The alternative is for us to wait 6 to 12 months to  
7 try to get some critical issues decided here that are also  
8 critical to the Utah litigation and that we'll be talking about  
9 a little bit later on, all of which in turn are critical to  
10 this Chapter 11 case and to the parties, both the debtor and  
11 the non-debtors. Any questions, Your Honor, that I can answer  
12 now?

13           THE COURT: No, I may have some for Mr. Eaton, but  
14 you've been very clear, Mr. Lewis.

15           MR. LEWIS: Thank you so much, Your Honor, I  
16 appreciate the time.

17           THE COURT: Thank you. Thank you. Mr. Eaton.

18           MR. EATON: Thank you, Your Honor. And to the extent  
19 there are specific questions, Your Honor, about the Swiss  
20 arbitration --

21           THE COURT: Well --

22           MR. EATON: -- I may have to turn over to some  
23 colleagues who are more familiar with that. But I want to  
24 address --

25           THE COURT: The defensive issue, if you would,

1 please.

2 MR. EATON: Yeah, I did want to go there --

3 THE COURT: Yes.

4 MR. EATON: -- because the argument was made that it  
5 only -- the argument at this stage is really only going to  
6 apply when you're trying to recover from the debtor. If that's  
7 the case, then injunctive and declaratory relief would never,  
8 ever be stayed. That's not the law. Okay. Its just not. And  
9 we've cited to the cases specifically that address that  
10 particular point.

11 And I understand what counsel believes we'd like the  
12 law to be or what the policy reasons are about trying to get  
13 the estate assets. Let's just look to what the Third Circuit  
14 said in Maritime Electric. And Your Honor, I'm turning to page  
15 1204 of the decision.

16 "Whether a specific judicial proceeding falls within  
17 the scope of the automatic stay must be determined by looking  
18 at the proceeding 'at its inception'," citation omitted. "That  
19 determination should not change depending on the particular  
20 stage of the litigation at which the filing of the petition in  
21 bankruptcy occurs."

22 Thus the dispositive question is whether a proceeding  
23 was originally brought against the debtor. It doesn't talk  
24 about whether it was to get money or recover from the debtor.  
25 It was whether or not the litigation was brought against the

1 debtor. End of story.

2           They chose to bring a Swiss arbitration, whatever the  
3 reason, because there was a Swiss -- there was an arbitration  
4 provision, whatever. The fact is they made the decision to  
5 commence an action against the debtor. And under the Third  
6 Circuit, which is what we have to go by, that is stated. And I  
7 think -- I don't know how else I can address the point with  
8 respect to the defensive nature, Your Honor. There is no  
9 dispute that they initiated the action. And from our  
10 perspective, that's the end of the story.

11           There was an argument made, Your Honor, that -- well,  
12 the damages claims aren't being tried now. That's Phase IV.  
13 There's one problem with that. As I understand it, a  
14 determination of liability now with respect to Phase II will be  
15 applicable with respect to when it came to determine damages in  
16 Phase IV. And that is with respect to the affirmative claims  
17 at this point. And for that reason, Your Honor, it does have  
18 an impact. Even if they say they're not going forward with  
19 damages now, it absolutely relates to that issue and is  
20 impacted by that issue.

21           The argument is made that, well, we're already to go.  
22 Everybody's geared up. Its set for December 3rd, it may take 6  
23 to 12 months. I don't know whether, in fact, its true that  
24 nobody can get in front of the arbitration in 6 to 12 months  
25 assuming a proper motion for stay relief is filed.

1           But the fact is, as of right now, SCO does not have  
2 counsel retained with respect to the Swiss arbitration. Our  
3 Swiss counsel has resigned. We do not have Swiss counsel. So  
4 from the debtor's perspective, from just a logistical  
5 standpoint, we don't have anybody ready to go now. And  
6 furthermore, Your Honor, we're talking about a litigation that  
7 will take from December 3rd to December 14th which will require  
8 substantial resources, which will require attendance by the  
9 debtor, when right now, we're going through the drilling with  
10 issues -- fundamentals of the reorganization which Mr. Spector  
11 will talk about a little bit later.

12           But the bottom line is, we're not in a position to go  
13 forward right now. And quite frankly, that's not the issue at  
14 all in determining whether or not the automatic stay applies.  
15 Its just -- respectfully, its just not relevant to that  
16 particular point.

17           Your Honor, I think there's been an acknowledgment.  
18 I thought I heard that they really -- if the debtor had filed a  
19 motion under Rule 4(f)(3) they probably would not have  
20 objected. Respectfully, Your Honor, I think we can do that  
21 now, nunc pro tunc. We've all addressed the merits. So I  
22 think that particular concession by counsel, and I appreciate  
23 it, kind of gets us to the merits that we were discussing  
24 earlier.

25           And I do believe the power of attorney that was

1 reflected with respect to Morrison and Foerster is a little bit  
2 broader. Its not just to represent in the arbitration  
3 proceeding. It is any related proceedings. The related  
4 proceeding that we're talking about is not a lawsuit against  
5 SUSE to recover money. Its not any type of action to divest  
6 them of any property right or to take anything from them. Its  
7 simply to get a determination that the arbitration that it  
8 instituted, being prosecuted by its United States attorneys,  
9 should go forward when they're making their position  
10 affirmatively in the arbitration that it is not so.

11           And in light of that, Your Honor, I think it is  
12 specifically related for the matters upon which they have been  
13 retained, which is to prosecute that action. So I think that  
14 addresses the point that counsel's making, that the -- excuse  
15 me, that the power of attorney did not apply.

16           As to the argument on Novell and that what we're  
17 really trying to do is some sort of alter ego. We're not  
18 making that point, Your Honor. It has nothing to do with alter  
19 ego analysis. It has nothing to do with piercing the corporate  
20 veil analysis. The point that we're simply making is that  
21 Novel can be considered and deemed to be their agent for  
22 purposes of jurisdiction, not that they are one in the same,  
23 but that Novell would be considered SUSE's agent for purposes  
24 of establishing the requisite minimum contacts with the United  
25 States sufficient to exercise jurisdiction over them with

1 respect to the very agreements in question.

2           I thought I heard counsel state -- Your Honor asked  
3 the question, didn't they operate in the United States. They  
4 did. They operated in the United States after they entered  
5 into the very agreements in question, Your Honor. And from my  
6 perspective, that in and of itself, shows why there is not just  
7 the specific jurisdiction, it also shows the continuous  
8 jurisdiction necessary to establish general jurisdiction over  
9 them.

10           And finally, Your Honor, the argument with respect to  
11 the Delaware LLC and the LLC agreement not being really subject  
12 to the litigation. As I understand it, Your Honor, all of  
13 these agreements that were entered into were done at the same  
14 time or on or around the same time. All of them were part of  
15 the intention of these four entities to have a joint venture  
16 that was going to be created through the U.S. entity to operate  
17 in the United States and worldwide. You can't parse them out  
18 and separate them out. It was all part of one concept that  
19 actually came to fruition, occurred, and as counsel indicated,  
20 it related and resulted in the company actually operating in  
21 the United States.

22           So, Your Honor, I think for all of the reasons that  
23 we've set forth here today and in our briefs, I believe that  
24 the motion as filed should be granted.

25           THE COURT: Thank you, Mr. Eaton.

1 MR. LEWIS: Your Honor, may I respond briefly?

2 THE COURT: You may.

3 MR. LEWIS: Thank you, Your Honor.

4 THE COURT: Yes, you may.

5 MR. LEWIS: Your Honor, to turn to the Maritime case  
6 first, its, as I think in someways the lynch pin here.

7 THE COURT: Yes, please, because that's the central  
8 case. Yes.

9 MR. LEWIS: The debtor has read some language from  
10 the Maritime case where it says it doesn't matter what the  
11 stage of the case is. It matters whose -- who is proceeding  
12 against whom. And its that word "against" that I think is the  
13 key. That's been my whole point. Its not who starts it. Its  
14 not who initiates the litigation, who's first to court. It's  
15 the nature of the litigation.

16 And in this case, the nature of the litigation is  
17 defensive. Why should it matter for purposes of the stay who  
18 starts it. Why should it matter whether its just because  
19 Novell raised it as an affirmative defense. It can -- you  
20 know, those claims are not stayed, no one's saying they are.  
21 But because SUSE, not willing to wait around while its business  
22 continues to be affected by the debtor's activities decides its  
23 not going to wait to be sued to raise the same affirmative  
24 defenses, in essence, that Novell has raised. It makes no  
25 sense.

1           We're talking about attributing a sensible provision  
2 to Congress's intent which we're required to do. That would  
3 not be sensible. I think I've talked about that some as well,  
4 that Congress would otherwise have simply stayed everything  
5 because they only reason for such a provision would be to stop  
6 the expenditure of attorneys' fees generally. Congress didn't  
7 do that.

8           Now, on the question of the nature of the claims in  
9 the Swiss arbitration where counsel says, well, the affirmative  
10 claims, while the damage claim is, you know, may not be going  
11 forward, to allow the defensive claims to go forward would be  
12 effecting the damage claims. But the fact is, SCO has to  
13 continue with its claims in the Swiss arbitration.

14           The automatic stay, and the debtor has not argued  
15 this and couldn't, those claims, those counter-claims that SCO  
16 brought are still alive. They're going to get into the merits  
17 of the same kinds of issues that the declaratory relief action  
18 is going to get into anyhow. So its going to happen one way or  
19 the other. We might as well have it all happen together.

20           THE COURT: But they're not seeking to pursue those  
21 claims at this time.

22           MR. LEWIS: Your Honor, they have to get the  
23 arbitrators agreement not to do that. That hasn't happened  
24 yet. And those -- there's nothing which allows them  
25 unilaterally to stay the arbitration anymore than they can --

1 if they had sued Novell in Utah and Novell had not made any  
2 counter-claims, the debtor would not be in a position to  
3 unilaterally to tell Judge Kimball, well, fine, we're just  
4 going to wait. We -- you know, we'd be able to make a motion  
5 for failure to prosecute if we wanted to.

6           So those are still alive and they're still set to go  
7 forward. And it may be that their appeals to the Arbitral  
8 Tribunal based upon the recent resignation of their Swiss  
9 counsel might get the Arbitral Tribunal's attention. But  
10 that's up to the Arbitral Tribunal. That's not here today.  
11 And their resignation of counsel took weeks -- took place weeks  
12 after the case was filed. And I just find very puzzling to  
13 have happen at the last possible moment when it looks like  
14 everything else failed to try to stop the Arbitral Tribunal  
15 from proceeding as it may intend to do.

16           They had the ability to be ready. They had the  
17 ability, for example, also to ask for other counsel, go to  
18 their Swiss counsel right away and say this is critical, will  
19 you be with us. And if not, we need to find somebody else  
20 sooner than later. None of that evidently happened. And all  
21 of a sudden, out of the clear blue, after Swiss counsel did  
22 write some letters, I might point out, in the arbitration,  
23 post-bankruptcy to the tribunal, apparently happy to continue  
24 to represent them for a while, all of a sudden, out of the  
25 clear blue, says at the last possible moment, well, we don't

1 want any part of this bankruptcy. And I don't know what their  
2 real reasons are. They just say they don't want to be  
3 supervised by the bankruptcy court. Whatever their real  
4 reasons are, maybe those are, maybe they aren't.

5           So -- and I think the important point here again is  
6 these claims need to be decided. We can't wait to have them  
7 decided. The debtor's motion to sell, which has now been put  
8 off, only points that up further. We'll probably discuss that  
9 more on the stay with these motions.

10           THE COURT: Sure.

11           MR. LEWIS: But its really the same point. You just  
12 can't pretend that this case doesn't even know about these  
13 issues regarding their critical assets. Who owns them. What  
14 their money is going to be. All of those kinds of things which  
15 we'll talk about more later are in essence encapsulated to some  
16 extent in the Swiss arbitration anyhow. So we should get on  
17 with it.

18           The notion that we're somehow going to distract from  
19 the attention of the debtor, the debtor apparently has been  
20 quite able to put together this sale motion. We see no signs  
21 of a plan. If at some point or another later on that becomes  
22 an issue, the debtor can always come back here and ask for some  
23 kind of further relief or can go to the Swiss Arbitral Tribunal  
24 and ask for further relief. I think we ought to get on with  
25 what needs to be done in this case for all concerned, not just

1 for the debtor. Not for the debtor's narrow interest because  
2 other interests are stake, namely the interest of other  
3 creditors including Novell and SUSE.

4           The argument that we're just arguing that Novell is  
5 the agent of SUSE and we're not arguing alter ego is  
6 technically correct, but if you look at the motion, its not  
7 accurate. The reason they're arguing that Novell is SUSE's  
8 agent is they're arguing that Novell is, in essence, SUSE. The  
9 evidence that they adduce or purport to adduce on that subject  
10 is that kind of evidence. And that's the only evidence. And  
11 even there, there's not -- most of its not real evidence. Most  
12 of its just some speculation which may or may not be true.

13           On the Delaware LLC, once again, their argument  
14 originally was, well, gee, the LLC is intricately involved and  
15 therefore there is jurisdiction. As we've shown, the LLC is  
16 not intricately involved. It's a virtual bystander. And so  
17 the mere fact that the parties created the LLC doesn't really  
18 matter anymore than if there was a complete stranger  
19 corporation of some sort.

20           So, again, I'd ask the Court to find the stay does  
21 not apply to the arbitration insofar as it concerns the  
22 defensive aspects of the arbitration. It clearly does not  
23 apply to the debtor's claims in the arbitration. And if it  
24 applies, as it does, to the affirmative damage claims which are  
25 nowhere near \$100 million, then we ask the Court to either

1 grant stay relief, to just say its stayed if that's what the  
2 Court prefers to do, or to let us bring that issue back to the  
3 Court at some later date when its really and issue.

4           If, for example, in the unlikely event, in our view,  
5 we lose the arbitration, then we won't have to worry about the  
6 damage claim at all. I don't think that's going to happen, but  
7 it just makes the point.

8           Thank you, Your Honor. I appreciate the time.

9           THE COURT: Of course, Mr. Lewis.

10          MR. EATON: Your Honor --

11          THE COURT: Mr. Eaton, you want to address the issue  
12 of the debtor proceeding with the counter-claims in the  
13 arbitration?

14          MR. EATON: Yeah, Your Honor, and I think to the  
15 extent that the Court has specific questions about the interim  
16 relationship between the Swiss arbitration and the claims being  
17 asserted in the Utah litigation. I think Mr. Singer can of  
18 address those because he's been primarily -- but the bottom  
19 line is, as we put in our motion and as we even told the  
20 Tribunal, we are prepared to stop with the prosecution of the  
21 counter-claims for the very reasons we've articulated, that  
22 they are interrelated because the -- they do have an impact on  
23 the defenses that are being asserted with respect to their  
24 claims. And Mr. Singer can address the specifics as to what --  
25 of how that works.

1 THE COURT: That would be helpful.

2 MR. EATON: But we have specifically said, we are not  
3 intending to go forward with our counter-claims in the Swiss  
4 arbitration. We have told that to this Court and we have told  
5 it to the Tribunal as well, Your Honor.

6 THE COURT: Thank you, Mr. Eaton. Mr. Singer, would  
7 you like to come to the podium and I don't know the procedures,  
8 of course, for the arbitration and how simple it is just to  
9 tell the panel that we're not proceeding with the counter-  
10 claim.

11 MR. SINGER: Thank you, Your Honor. First of all,  
12 I'm Stuart Singer from Boies Schiller & Flexner and counsel,  
13 both, in the Utah litigation and in the arbitration.

14 THE COURT: Yes, welcome to you.

15 MR. SINGER: Thank you. We have indicated to the  
16 panel that we do not intend to pursue the counter-claim in  
17 light of our belief that the whole proceeding, or the claims  
18 against the debtor, are stayed. And there's been no indication  
19 from the panel that they will not accept that, no indication  
20 from the panel that they would do what would be unusual in  
21 going forward with those -- with that counter-claim piece  
22 especially since its factually integrated with certain defenses  
23 to the claims of Novell if the action is stayed. We have no  
24 reason to believe that the panel would do that.

25 With the Court's permission, may I make two further

1 statements regarding the interaction of the arbitration and the  
2 Utah litigation?

3 THE COURT: Yes, please.

4 MR. SINGER: First of those is that the affirmative  
5 defenses in the Utah litigation are not nearly as broad as the  
6 SUSE arbitration claims. While its true that in -- as an  
7 affirmative defense, Novell raised to SCO's copyright  
8 infringement claims, they have pled the affirmative defense of  
9 license.

10 The claims in the arbitration go far beyond that.  
11 They are seeking a worldwide injunction against SCO proceeding  
12 to make any steps to enforce its intellectual property against  
13 SUSE Linux. That would be far greater relief than simply an  
14 affirmative defense to a copyright infringement action in the  
15 United States based on Novell's distribution of SUSE Linux.

16 They have also sought to have a declaration that our  
17 intellectual property rights and certain Unix intellectual  
18 property were contributed to the joint venture. That's not  
19 raised at all by an affirmative defense with respect to  
20 licensing.

21 And, of course, they're trying to set in this phase  
22 at least a predicate for damages in whatever amount they're  
23 seeking. We only can go by the addendum amount that they  
24 chose, but in whatever amount they're seeking, the predicate  
25 for that would be the decision in this phase that we have acted

1 wrongly in seeking to enforce our intellectual property rights  
2 in light of the joint venture agreements and the associated  
3 agreements.

4           The other point, Your Honor, I wanted to raise was in  
5 connection with the assertion that the timing of this  
6 arbitration is critical with respect to the resolution of  
7 intellectual property issues that Novell and others have an  
8 interest to see resolved. And I think that that is not the  
9 case, respectfully, in like of Judge Kimball's ruling in August  
10 of this year with respect to the ownership of the copyrights.  
11 We disagree, very much, with the correctness of that ruling.  
12 But Judge Kimball ruled that we do not own the copyrights in  
13 Unix and Unix<sup>2</sup> as of the time of the asset purchase agreement  
14 in 1995 when Novell sold those entire Unix business to our  
15 predecessor in interest.

16           That issue, that decision on summary judgment, which  
17 hopefully will be reviewed by the Tenth Circuit, is what will  
18 decide the ownership of intellectual property rights that are  
19 key here. In fact, if we were arguing today the issue of stay  
20 relief, we would argue that it hardly makes sense for an  
21 arbitration as a prudential matter to go forward with the  
22 question of whether we gave away to the joint venture  
23 intellectual property rights that a U.S. District Court judge  
24 has ruled we didn't own in the first place.

25           So the arbitration isn't needed to go forward to

1 resolve those issues. Thank you, Your Honor.

2 MR. LEWIS: Your Honor --

3 THE COURT: Yes, Mr. Lewis.

4 MR. LEWIS: -- I'm going to send Mr. Jacobs into  
5 battle here.

6 THE COURT: Mr. Jacobs.

7 MR. LEWIS: Its sort of see you one and raise you one  
8 response. But before --

9 UNKNOWN PERSON: Touche, Your Honor.

10 MR. LEWIS: But before I do that, I just want to  
11 comment on the comment about an injunction as part of the  
12 relief.

13 THE COURT: Yes, please, yes.

14 MR. LEWIS: Your Honor, nothing in the Bankruptcy  
15 Code allows the debtor to go about interfering with other  
16 people's businesses post-petition just because it's a  
17 bankruptcy debtor anymore than it can continue to impose a  
18 nuisance. Each new infringement, as the Court knows, is a new  
19 violation. And so, the debtor's position here that somehow the  
20 fact that we're also seeking injunctive relief magically  
21 changes into something else is just wrong. We're entitled to  
22 defend ourselves and to defend our business. And that may  
23 include obtaining, not a mandatory injunction, but a  
24 prohibitory injunction, a classic defensive maneuver.

25 Thank you, Your Honor. I'll turn --

1 THE COURT: But that has to be brought here, doesn't  
2 it? In this court?

3 MR. LEWIS: No, I don't believe it does, Your Honor.  
4 I don't -- I think if someone was interfering with our business  
5 post-petition, I think under, what is it, 959 we could bring  
6 that anywhere, 28 USC 959, just as we could bring a nuisance  
7 claim against someone anywhere, in any court of competent. We  
8 can sue the trustee. And I don't think that's any different  
9 here, nothing in the Bankruptcy Code or the automatic stay give  
10 the debtor the power to sort of lay about and interfere with  
11 other businesses and other property interests just because it's  
12 a debtor.

13 And now I'll turn it over to Mr. Jacobs. Thank you,  
14 Your Honor.

15 THE COURT: Thank you, Mr. Lewis. Mr. Jacobs,  
16 please.

17 MR. JACOBS: Your Honor, I think -- thank you, Your  
18 Honor, for all the time on this somewhat complicated procedural  
19 question.

20 THE COURT: Its helpful.

21 MR. JACOBS: I think they're in a bit of pickle, that  
22 is the debtor SCO. They're in a bit of a pickle because as Mr.  
23 Singer indicated, in the Utah case, they want to get that  
24 ruling up on appeal. But one of the causes of action is stayed  
25 pending the outcome of an arbitration in Switzerland.

1           Before filing bankruptcy, SCO went to Judge Kimball  
2 and said, take your summary judgment ruling and certify it for  
3 appeal. Judge Kimball said, no, I'm not going to parse this  
4 ruling. We're going to get all the issues decided at the  
5 district court level.

6           Now, they could still conceivably go back and say, if  
7 you were to grant us stay relief so we can go back on our  
8 affirmative -- on our counter-claims for dollars with Judge  
9 Kimball, maybe they'd go back to him and say certify it even  
10 though this copyright infringement claim is stayed.

11           We'd resist that. We would say, they had all the  
12 opportunity in the world to resolve the -- to get the  
13 arbitration done, to resolve the issues that have been referred  
14 to arbitration that relates to this claim in Utah. They went  
15 to you. They asked you for -- to shut down the arbitration.  
16 Its their own fault for dividing up the causes of action in  
17 this -- in the district court case in Utah and making it  
18 impossible to reach a final judgment on all causes of action.  
19 So we would oppose certification, partial certification and  
20 entry of final judgment so that the case could go up on appeal.

21           So in order -- even for them to accomplish their  
22 appellate objections, it seems to us the arbitration should go  
23 forward and the scope of the United Linux intellectual property  
24 provision should be decided. Once those are decided, we can go  
25 back to Judge Kimball on the copyright infringement claim.

1           There will be two reasons, if we are successful, why  
2 he should grant judgment to Novell on the copyright  
3 infringement claim; (1) Judge Kimball decided they never owned  
4 the Unix copyrights in the first place; (2) if they did, under  
5 the United Linux agreements, they were divested or licensed to  
6 SUSE and, hence, no affirmative claim against Novell.

7           So when you look at this litigation, we step back and  
8 look at what SCO needs to accomplish, even by their own terms  
9 because they're out there publically, I think we submitted this  
10 to Your Honor, the CEO of SCO is saying, we're going to appeal,  
11 we're confident. Judge Kimball, like he says, you know, gets  
12 it wrong all the time. And so this case has to get on the road  
13 and get done. That's the first high-level point.

14           The second point, I don't think they're really  
15 grappling with this point. The counter-claims are not subject  
16 to the automatic stay. The counter-claims in the arbitration  
17 are not subject to the automatic stay. They can protest to the  
18 Tribunal all they want, that the Tribunal should not go forward  
19 with the arbitration in December even if you grant their motion  
20 on the automatic stay with respect to our affirmative claims.

21           They can protest all they want. The Tribunal, these  
22 are distinguished arbitrators. They zealously guard their  
23 jurisdiction. It wouldn't surprise you to learn that, I  
24 suspect. And they will make their own decision on whether --

25           THE COURT: But if I grant their motion and stay you

1 from proceeding in the arbitration, I can't imagine you won't  
2 be in there yelling that the counter-claims should not proceed.

3 MR. JACOBS: We want the counter-claims to proceed,  
4 absolutely. I will say that on the record. You can -- they  
5 can hold me to this. You can hold us to this. We would just  
6 -- we would very much like to try those counter-claims in  
7 December, Your Honor. And I'll be very straight up with you  
8 about why they're very weak, number one. But number two, we  
9 really -- getting three busy international arbitrators together  
10 with counsel is a scheduling train wreck. And so to lose that  
11 hearing date is something that we're very concerned about.

12 And, candidly, yes, as counsel for the debtor  
13 acknowledged, there's a lot of overlap between the counter-  
14 claim issues and the, what we're calling, the defensive  
15 affirmative claim that SUSE has brought. Essentially, their  
16 counter-claim is that SUSE acted in bad faith and by asserting  
17 the intellectual property provisions that it has.

18 So, there's some technical bankruptcy issues that I  
19 think bankruptcy counsel has very well addressed, Your Honor.  
20 But just thinking about how to get this -- the issues resolved  
21 so that the bankruptcy can be resolved it seems to us that the  
22 stay should not be -- the stay motion should not be granted.  
23 In any case, the counter-claims will go forward if the Tribunal  
24 chooses to do so. They have no real answer to that conundrum.  
25 That's up to the Tribunal.

1 THE COURT: Thank you.

2 MR. JACOBS: There's one other thing, Your Honor, I  
3 wanted to mention. We did not submit, but it seems to us it  
4 could be helpful to Your Honor to have Judge Kimball's ruling  
5 on the motion to stay the copyright infringement claim pending  
6 the United Linux arbitration outcome because Judge Kimball  
7 parsed through these agreements sufficiently to decide what  
8 issues on their affirmative copyright claim were referable to  
9 arbitration. So, if that would be helpful, I have copies here  
10 of that.

11 THE COURT: Any objection?

12 MR. EATON: I have no objection, Your Honor.

13 THE COURT: Thank you. I would certainly accept  
14 them.

15 MR. JACOBS: May I approach?

16 THE COURT: Yes, you may. Thank you very much, Mr.  
17 Jacobs. Thank you, sir. Yes, thank you. Thank you for doing  
18 that.

19 MR. EATON: Your Honor, I don't know whether the  
20 counsel's finished, I want to --

21 MR. JACOBS: Yes, I am. Thank you very much.

22 MR. EATON: I didn't mean to interrupt you. Your  
23 Honor, if Your Honor is going to look at any of the case law  
24 and probatively look at the issue, I would ask the Court to  
25 take a look at a Third Circuit decision called ACandS, Inc. v.

1 Travelers, we cite it with respect to the motion for stay  
2 relief of Novell, 435 F.3d 252 in the Third Circuit which  
3 addressed an arbitration and the court discussed some of the  
4 meshing that takes place in an arbitration setting delineating  
5 to counter-claims and defenses and incidently held that the  
6 arbitration should have stopped once it became apparent that  
7 regardless of how you couch things, it would affect and impact  
8 on the debtor's estate and that the decision of the arbitration  
9 panel was worth (indiscernible) analysis.

10 THE COURT: Have you had an opportunity to review  
11 that case, Mr. Lewis?

12 MR. LEWIS: No, Your Honor, I actually just had a  
13 small point that I wanted to raise that I've been reminded we  
14 failed to address specifically in our last part of the  
15 argument. And that is the debtor got up again and said, well,  
16 we think you can do it nunc pro tunc in terms of authorizing  
17 the service.

18 I just wanted to say, we don't think the Court can.  
19 And while it may look like we're being hyper-technical, I think  
20 its important to us that this case from the start, in all  
21 respects, follow some reasonable due process procedures. We  
22 don't want to set a precedent whereby the debtor is always say,  
23 well, gosh, doesn't really matter. We're all here and so on.  
24 I think its important to adhere to the rules that are set  
25 forth. We will try to do so and we ask that the debtor be

1 required to do so as well.

2           If the Court wishes to authorize service by service  
3 on Morrison and Foerster at the debtor's request pursuant to a  
4 motion, I think we can deal with that when the time comes. We  
5 don't think there's any authority to do it nunc pro tunc. It  
6 would make no sense to talk about the power to bring a party  
7 before the Court in the first instance after the fact. Thank  
8 you.

9           THE COURT: I don't disagree with that, but just  
10 practically speaking, assume that they did file such a motion  
11 and I granted authority. We would just be back in the same  
12 posture and perhaps --

13           MR. LEWIS: Yes, Your Honor. And I think we're  
14 prepared to discuss the possibility that we might just consent.  
15 I think we just need a moment or two to do that. But I do ask  
16 the Court to take seriously our concern about the employment of  
17 proper procedure from now on.

18           THE COURT: Well, I do, I certainly do. And I share  
19 your view on a nunc pro tunc application certainly.

20           MR. LEWIS: Thank you, Your Honor. If we'd just have  
21 a chance to consult maybe at the end of the hearing this  
22 morning, we've had a chance to whisper a little bit, we can  
23 tell the Court how we feel about that.

24           THE COURT: Thank you.

25           MR. LEWIS: Thank you. I appreciate the inquiry.

1 THE COURT: I was thinking of taking a short recess  
2 just to review my notes here and the arguments of counsel. And  
3 just to see where I would like to proceed from here as far as  
4 whether we need an evidentiary hearing or if, in fact, I might  
5 even be prepared to rule at this time. So if we could take  
6 maybe a 15-minute recess and the parties can also relax a  
7 little bit before we proceed further. Thank you.

8 MR. LEWIS: Thank you, Your Honor.

9 (Recess)

10 THE COURT: Thank you, everyone, you may be seated.

11 MR. LEWIS: Your Honor, if I may, before the Court  
12 does whatever the Court's about to do.

13 THE COURT: Yes, Mr. Lewis.

14 MR. LEWIS: I may sometimes be right and sometimes be  
15 wrong, but I'm always a man of my word when I try to be. We've  
16 talked about the service issue.

17 THE COURT: Yes.

18 MR. LEWIS: And a couple of other items. And so  
19 before the Court rules, if that's what the Court's about to do,  
20 I think we can spare the Court certain kinds of problems, if  
21 they were.

22 First of all, we're prepared to -- for purposes of  
23 this motion only --

24 THE COURT: Yes.

25 MR. LEWIS: -- stipulate to the form of service and

1 the issue of personal jurisdiction without prejudice in any  
2 other proceeding to whether the same facts or any of those  
3 facts would be relevant or decisive. And so, the Court doesn't  
4 need to deal with that. And to the extent the Court was  
5 thinking about future proceedings after discovery on those  
6 issues, I don't think we need to do that.

7           We're also prepared to waive the damage claim in the  
8 arbitration in Switzerland outright. Thank you.

9           THE COURT: Thank you, Mr. Lewis. Well, I am  
10 prepared to rule, I think, at this time. I think its  
11 appropriate. I think that the arguments and materials  
12 submitted to the Court were just excellent and helpful. Didn't  
13 necessarily make the decision easier, but certainly, I think  
14 helped highlight the issues and hopefully to make the decision  
15 more correct.

16           And based upon the stipulations of counsel relating  
17 just to this motion on the appropriateness of service and the  
18 jurisdiction that the Court has, I certainly can, I think, get  
19 more directly to the issues at hand. In fact, it shortens the  
20 ruling significantly.

21           So I am going to address the applicability of the  
22 automatic stay to SUSE's claims in the Swiss arbitration. We  
23 all know what Section 362 of the Bankruptcy Code provides and  
24 so I'm not going to quote from it. But I'm referring, of  
25 course, to 11 United States Code Section 362(a)(1).

1           And clearly the scope of the automatic stay is broad  
2 and by necessity it is broad. And Associate of Saint Croix  
3 Condominium Owners v. Saint Croix Hotel Corp., a decision by  
4 our Third Circuit, 682 F.2d 446, provides as such. And we do  
5 have, I think, agreement from SUSE that this arbitration -- an  
6 arbitration is also subject to the automatic stay, but I think  
7 its very clear that that is the law in any event. All  
8 proceedings are stayed including arbitration, license  
9 revocation, administrative and judicial proceedings. And that  
10 language is taken from the House of Representatives Report, No.  
11 95-595.

12           However, the clear language of Section 362(a)  
13 indicates that it stays only proceedings against a debtor. And  
14 again Saint Croix is the authority for that point. The statute  
15 does not address actions brought by the debtor which would  
16 inure to the benefit of the bankruptcy estate.

17           In determining whether a proceeding is subject to the  
18 automatic stay, courts must look at whether the proceeding was  
19 originally brought against the debtor. Saint Croix, 682 F.2d  
20 at 449. And in making that determination, courts must look at  
21 the proceeding at its inception. And again, that is Saint  
22 Croix as the authority.

23           That determination should not change depending on the  
24 particular stage of the litigation at which the filing of the  
25 petition in bankruptcy occurs. Saint Croix is again authority.

1 At its inception, the Swiss arbitration at issue here was  
2 commenced by SUSE against the debtor. Thus it falls within the  
3 scope of the automatic stay.

4 SUSE argues that the arbitration is not subject to  
5 the stay because SCO has asserted counter-claims in that  
6 proceeding. However, the fact that SCO has asserted the  
7 counter-claim in the arbitration is of no consequence. And I'm  
8 going to quote from the Maritime Electric v. United Jersey Bank  
9 decision by our Third Circuit which has been argued here at  
10 length.

11 "All proceedings in a single case are not lumped  
12 together for purposes of automatic stay analysis. Even if the  
13 first claim filed in a case was originally brought against the  
14 debtor, Section 362 does not necessarily stay all other claims  
15 in the case. Within a single case, some actions may be stayed,  
16 others not. Multiple claim and multiple party litigation must  
17 be disaggregated so the particular claims, counter-claims,  
18 cross-claims and third party claims are treated independently  
19 when determining which of their respective proceedings are  
20 subject to the bankruptcy stay."

21 Now SUSE argues that the automatic stay does not  
22 apply to the arbitration because their claims are defensive in  
23 nature. However, the Court notes that most actions, most  
24 lawsuits that are filed are, in effect, protective in nature.  
25 And I think that this litigation which clearly was brought

1 against the debtor is an assertive -- an offensive if you will,  
2 action. And it goes far beyond protecting their legal rights  
3 to, in effect, seeking specific relief which would impact the  
4 bankrupt estate. And accordingly, I find that the defensive  
5 nature of the case argument, the protective argument made by  
6 SUSE does not control.

7           Accordingly, the Court holds that the Swiss  
8 arbitration is subject to the automatic stay and SUSE is  
9 enjoined from proceeding in that arbitration during the  
10 pendency of the bankruptcy case.

11           MR. EATON: Your Honor, if I may approach? We have a  
12 copy of the order that was submitted along with our motion.

13           THE COURT: Yes.

14           MR. EATON: If I may approach, Your Honor?

15           THE COURT: I don't know if you've reviewed the form  
16 of order, Mr. Lewis?

17           MR. LEWIS: I think we -- I'd like to just take a  
18 real quick look at it, but before I do that --

19           THE COURT: Yes.

20           MR. LEWIS: -- I just want to be sure that I'm clear  
21 what the Court's ruling is. The Court's ruling, as I  
22 understand it is that the arbitration insofar as it involves  
23 our claims, our declaratory relief claims is stayed.

24           THE COURT: Yes.

25           MR. LEWIS: And the monetary claims presumably as

1 well.

2 THE COURT: Correct.

3 MR. LEWIS: But that it is not stayed insofar as it  
4 involves SCO's claims against SUSE, seeking relief against  
5 SUSE, is that correct?

6 THE COURT: Well, let me hear from Mr. Eaton before I  
7 indicate my position on that.

8 MR. LEWIS: Okay.

9 THE COURT: Mr. Eaton.

10 MR. EATON: Your Honor, as we'd indicated and argued  
11 earlier and in the Court's ruling, its our position the  
12 arbitration is stayed for the very reasons we discussed  
13 earlier, mainly that the counter-claims also overlap with  
14 respect to the affirmative defenses such that if the Court  
15 ruled against us on our counter-claims, it is ruling on the  
16 affirmative defenses to SUSE's affirmative claims that the  
17 Court has already upheld and applied with respect to the  
18 automatic stay. The ACandS case that I gave to the Court also  
19 stayed the entire arbitration and that's why we believe that  
20 the order (indiscernible) applies to the entire arbitration as  
21 well, including the counter-claims.

22 THE COURT: Mr. Lewis, that is the nature of my  
23 ruling, yes, that the entire arbitration proceeding is stayed.

24 MR. LEWIS: Okay.

25 THE COURT: And -- proceed.

1           MR. LEWIS: Yeah. I guess from our point of view,  
2 you know, no one made SCO make its counter-claims. It can  
3 withdraw them, it can drop them, it can do whatever it wants to  
4 do, but they are SCO's claims against us and if it wants to  
5 have those stayed, I don't see why its not -- I understand  
6 there are relations between the issues.

7           THE COURT: Yes.

8           MR. LEWIS: But SCO chose to create those relations  
9 between the issues and its brought the action and just as it  
10 did in Salt Lake City. And it needs to decide what its going  
11 to do. And I obviously have lost that argument, but you know,  
12 I respectfully have to say I don't agree with that aspect of  
13 the Court's ruling in any case.

14          THE COURT: I appreciate that and I certainly  
15 understand that you would not agree.

16          MR. LEWIS: Yeah, okay.

17          THE COURT: But I do think that the interrelationship  
18 between the claims by necessity and the impact on the debtor  
19 requires that the entire arbitration proceeding be stayed.

20          MR. LEWIS: Your Honor, as far as the order is  
21 concerned, I think the order goes way beyond whatever was at  
22 issue in this case. The Court orders -- this order purports to  
23 enjoin SUSE from doing a whole lot of things that no one's ever  
24 talked about us doing someday through itself or its agents. I  
25 mean, the issue in this proceeding was is the arbitration

1 stayed.

2 THE COURT: Correct.

3 MR. LEWIS: To the extent that the order purports to  
4 go beyond that issue, and I'm not telling the Court that we're  
5 going to be running around to some other forum, but I really  
6 think its excessive here for the order to do anything.

7 THE COURT: Perhaps Mr. Eaton could be helpful in --

8 MR. EATON: Your Honor, what I was going to suggest  
9 is that we will get together after the hearing, work out the  
10 form of the order that we can submit that's in accordance with  
11 the Court's ruling.

12 THE COURT: I would appreciate that, yes.

13 MR. EATON: We will, Your Honor.

14 MR. LEWIS: Thank you, Your Honor. I appreciate  
15 that.

16 THE COURT: Yes. Thank you. And to the extent that  
17 you can't, then you certainly may submit alternative forms of  
18 order for my consideration.

19 MR. LEWIS: Very well, thank you, Your Honor.

20 MR. EATON: We can do that, Your Honor. Thank you  
21 very much, Your Honor. Thank you for allowing (indiscernible)

22 --

23 THE COURT: Of course, Mr. Eaton. Thank you, sir.

24 (Pause)

25 THE COURT: I'd like to make a suggestion as we

1 proceed. I know that the motion to lift stay, Novell's motion  
2 to lift the automatic stay will take some time. And I'm  
3 wondering if we couldn't perhaps address a motion that might --  
4 the remaining motion on the compelling the payment of the  
5 royalties that has been filed. Perhaps that might fit a little  
6 bit better prior to, you know, a lunch recess that I think the  
7 parties should take and I must confess to you, I was here until  
8 after 2:00 this morning mediating a case. So I could use a  
9 luncheon break myself and I think that perhaps just from an  
10 orderliness standpoint, rather than start and interrupt the  
11 hearing on the motion to lift stay, perhaps we could move  
12 forward onto the payment motion?

13 MR. LEWIS: Your Honor, we certainly have no  
14 objection to that if the debtor has no objection. And I think  
15 it's a good suggestion because it should be fairly simple.

16 THE COURT: Yes.

17 MR. LEWIS: Its not a very complicated motion.

18 THE COURT: Yes.

19 MR. LEWIS: I think the facts are undisputed that the  
20 debtor is receiving money that belongs to us, not the debtor's  
21 money, our money. Its our property. Its not property of the  
22 estate in any sense. I don't think there's any real issue  
23 about that. The question is, are we at risk with respect to  
24 what's going to happen to that money. And the related question  
25 is, is there a way for this Court to fashion appropriate

1 relief.

2           Let me start with the latter question first, that is  
3 is there a way for this Court to fashion appropriate relief.  
4 The debtor argues, well, the contract says what the contract  
5 says and the Bankruptcy Code can't be used to do things that  
6 are inconsistent with the Bankruptcy Code's objectives, neither  
7 of which, it seems to me, are of any relevance to the ultimate  
8 argument here.

9           We agree that the contract says what the contract  
10 says. Bankruptcy courts all the time fashion specialized  
11 relief under various circumstances that is not specifically set  
12 forth in the Code. Sometimes it is, like adequate protection  
13 and this is analogous to that. It doesn't apply here because  
14 adequate protection has to do with property that's the estate's  
15 property. But its an analogous concept.

16           THE COURT: Let me ask just one factual question  
17 before you proceed.

18           MR. LEWIS: Yeah, yeah.

19           THE COURT: Is the debtor current on its payments?

20           MR. LEWIS: As I understand it, the debtor is current  
21 on its payments at the moment. And we do apologize for the  
22 mistake in the declarations. Its not something we like to do,  
23 it wasn't intentional.

24           THE COURT: No, I think both sides were operating  
25 under a misimpression on that.

1 MR. LEWIS: Yeah, apparently everybody had the same  
2 misunderstanding. In any case, we do apologize for that to all  
3 concerned.

4 So I think there's authority in Section 105(a) and  
5 we've cited a couple examples of cases in the Code where  
6 there's no specific provision of the Bankruptcy Code but the  
7 bankruptcy court can, under 105(a), fashion a remedy as long as  
8 its not inconsistent with the purposes of the Code.

9 This is not inconsistent with the purposes of the  
10 Code. One of which is to specifically exclude certain property  
11 as property of the estate. Section 541. We're not doing  
12 anything that hurts the debtor in that sense. Or that is  
13 somehow not provided for in the Bankruptcy Code in some other  
14 way. We're just asking the Court to provide us some -- with  
15 some additional protection for assets that are excluded from  
16 the estate.

17 So then, the other issue becomes what's the big deal.  
18 The debtor says, well, the contract, what it says, what it says  
19 and that's true, but again, bankruptcy contracts that say what  
20 they say are overridden all the time, both under the Statute  
21 itself under specific provisions, like Section 365 is  
22 overriding of, you know, anti-assignment clauses, but also when  
23 the bankruptcy court fashions the various kinds of relief.

24 Adequate protection is a classic example of that.  
25 There's no specific provision in the adequate protection

1 statutes necessarily for the various kinds of remedies the  
2 Court can fashion for adequate protection. Although a couple  
3 are suggestive, its not limited there. And the Court can  
4 create a remedy that suits the circumstances.

5           Are we at risk? Well, the debtor says no, what's the  
6 big deal, we're paying. The debtor never really says in its  
7 response that, yeah, we're in good shape, there won't be an  
8 issue. And that's really our concern here. And the more the  
9 debtor resists the idea of turning the money over to us, the  
10 more we think that the debtor plans to use that money and then  
11 replace it. Its not authorized to do that. Its suppose to put  
12 that money aside and give it to us, not put the money aside,  
13 use it and then like, you know, taking a little money out of  
14 the drawer and put it back in the till next week, nobody will  
15 ever know the difference.

16           And the debtor's resistance to turning the money over  
17 to us suggests that our concerns about its financial condition  
18 which itself says is a troublesome situation are justified.  
19 And all we're asking is that the debtor turn the money over to  
20 us as it comes in.

21           If that isn't an appropriate remedy for some reason,  
22 then at least let's have the debtor escrow the money or set it  
23 aside or have an order that expressly forbids the debtor from  
24 using the money for any purpose whatsoever. Just let it sit in  
25 the account if that's what the debtor really feels it needs to

1 do for some reason I can't fathom, and then pay it to us every  
2 month. Surely its not that hard to cut a check once in a  
3 while, a little bit more frequently as money comes in.

4 I think that's the essence of the motion, Your Honor.  
5 Thank you.

6 THE COURT: Thank you, Mr. Lewis. Mr. Singer.

7 MR. SPECTOR: Good afternoon now, Your Honor.

8 THE COURT: Good afternoon.

9 MR. SPECTOR: It's so rare we can get an opportunity  
10 and its so sweet to take that opportunity about --

11 THE COURT: I said Mr. Singer. I meant Mr. Spector,  
12 I'm sorry.

13 MR. SPECTOR: I've been called worse and I'm sure I  
14 will be. Its so sweet when you get an opportunity to turn it  
15 around. We were admonished by Novell and SUSE not long ago  
16 about following the rules. And the Court didn't bother to say  
17 -- explicitly give us an admonition do it right the next time,  
18 stupid. And we will, however, take that to heart.

19 But its so sweet to be able to say same to you. But  
20 we're not going to make this. I just want to tell you the  
21 issues so we can say we give up on it. We never raised them.  
22 Actually, we raised them only to say we waive them.

23 But first, they're asking for an injunctive relief.  
24 They're asking the Court to order us to do something under Rule  
25 7001. That's a request for equitable relief that has to be

1 brought by an adversary proceeding. Everyone of the cases that  
2 they cited in their papers that talks about 105(a), the Court  
3 has these broad equitable powers, they were all in the context  
4 of adversary proceedings.

5           We could be coming in here, and I've done it in other  
6 cases where I had different circumstances, and I said, Judge,  
7 this has to be brought in an adversary proceeding. And I know  
8 courts frequently, you know, write opinions and say, well, the  
9 parties as stipulating and arguing on the merits and therefore  
10 I'll go ahead and do it.

11           In this case, we would say in another court, we are  
12 not waiving that issue, we're raising the issue and we don't  
13 think the court can entertain this motion. We are waiving  
14 expressly here, Judge. We want to get to the thinness of the  
15 merits.

16           What else? They also say that the premise of this  
17 case is its their money, its their money, its their money, its  
18 their money. Therefore we win. That's the premise. The fact  
19 that its their money or its their asset that we are in  
20 possession of by contract because they put us in possession of  
21 their money doesn't answer the question. It just sets up, it  
22 frames the question.

23           However, some courts would entertain the notion and  
24 we would in other places and if there were more at stake, we  
25 would be pressing the argument just because the contract says

1 its your asset doesn't necessarily make it so. We are  
2 conceding that point for these purposes, Judge, because whether  
3 they have a contractual right which is what we say they have,  
4 or a property right which is what they say they have to these  
5 funds, good for you. We're going to give you these funds. We  
6 don't intend not to give you these funds. We're fighting about  
7 nothing.

8           But we don't have to roll over just because Novell  
9 files a motion demanding that we jump through their hoops.  
10 They set up the hoops 12 years ago in the contract, Your Honor.  
11 They said, this is our property and we want you to say so, too.  
12 So the predecessor-in-interest is suppose to say, okay, okay,  
13 okay, we'll say its your property.

14           But did they set up a segregated account system? No.  
15 Did they set up an escrow? No. Did they say in the original  
16 contract you can hold our funds for three months and change, I  
17 don't know how many, 45 days past the end of the quarter, you  
18 can hold our funds. And it doesn't say, and therefore, you  
19 can't use those funds and then pay us 45 days at the end of the  
20 quarter. You can possess our funds. That was the setup.

21           So what's changed since then other than now we're  
22 monthly because there was an amendment and we all missed that  
23 one. Although the clients probably didn't miss it, the lawyers  
24 missed it. What's changed since then? Well, we're in  
25 bankruptcy now and we're in these dire financial straits. We

1 only have \$9 million to cover this months \$45,000 note. That's  
2 what it comes down to.

3           They're saying -- their basis for injunctive relief,  
4 the prejudice to them if they don't get this important ruling  
5 is that maybe on December 1st, the November money won't be  
6 there, the \$41,000 that is there money, won't be there to pay  
7 them unless we set up procedures to cover that.

8           I thoroughly enjoyed the arguments of Mr. Lewis and  
9 Mr. Eaton and their friends and relatives this morning on a  
10 very important, you know, academically challenging issues that  
11 Your Honor dealt with. I'm embarrassed to say we're arguing  
12 over this. I think we should just simply deny it before I get  
13 into the rest of my story and let us take a lunch break and  
14 come back on something also academically challenging.

15           THE COURT: Mr. Lewis, you response, please.

16           MR. LEWIS: Your Honor, the odor you smell in the air  
17 is lunch which is just a moment or two off. Again, I revert to  
18 the question of if this is not money at risk, if the debtor's  
19 not worried about where its going to go, why is it holding onto  
20 it so fiercely. And the answer is, I think has to be, its  
21 holding onto it fiercely because its hoping to use the money  
22 along with its other money because it needs the money to  
23 operate. And then it will replace it as it comes in.

24           That's the risk we face. And if it happens and there  
25 isn't money at the end, it will be too late to do something

1 about that. That's our concern, Your Honor, and we're not  
2 asking to impose a really great burden on the debtor. Thank  
3 you.

4 THE COURT: Thank you.

5 MR. SPECTOR: All right. I'm getting help.

6 THE COURT: The rest of the story?

7 MR. SPECTOR: Not giving you the whole rest of the  
8 story. The papers really adequately state it. I mean, you  
9 talk about 365, if you're talking about analogous situations  
10 when an equipment lessor puts equipment into the debtors hands  
11 and says, but that's our equipment and not the debtors  
12 equipment, you don't entertain them when they come in and say  
13 give it back to us now because we're worried they're going to  
14 go out of business or they won't have the money to pay the  
15 lease payments. You don't do that when a warehouse -- a  
16 customer of a warehouse debtor has put its stuff in the  
17 warehouse and says well, now they're bankrupt, I want my goods  
18 out when they were told they have a contract to be there for  
19 nine months or six months.

20 I'm not going to go and argue the cases about that  
21 and I don't think I cited cases on that point. The point is  
22 Novell gets a monthly report of the debtor every month. If you  
23 ever see -- if Novell ever sees that we are so desperate that  
24 we don't have next months \$41,000 based on a \$500,000 annual  
25 divided by 12, we don't have that \$41,667 available, well maybe

1 they should come running back on an emergency relief basis.

2 But this is sill.

3 THE COURT: Thank you.

4 MR. SPECTOR: It's a DIP report.

5 THE COURT: Pardon me?

6 MR. SPECTOR: The form of the report is a DIP report.

7 THE COURT: The monthly operating report?

8 MS. JONES: Yes.

9 THE COURT: Yes. Well, I understand certainly  
10 Novell's concern. But there's been no breach of the  
11 relationship between the parties, no breach of -- the debtor  
12 has not breached its contractual obligations to Novell.  
13 There's no clear evidence of any irreparable harm here. And  
14 the Court is available to entertain an emergency application by  
15 Novell in the event a payment is -- a required payment is not  
16 promptly forthcoming. And I invite Novell to make such an  
17 application and I can assure Novell that the Court will  
18 entertain that emergency motion as it should immediately.

19 But at the moment, there is no evidence upon which  
20 the Court could, in effect, modify the contract and I think  
21 that certainly the debtor's arguments on the relationship with  
22 Section 105 under which Novell sought the relief and other  
23 provisions of the Bankruptcy Code is persuasive to me. And  
24 accordingly I am going to deny Novell's motion. Its denied, as  
25 I say, subject to necessity of making an emergency application.

1 And that is what the Court is here for and I'll be available.

2 MR. LEWIS: Thank you, Your Honor.

3 THE COURT: But as of today, I just don't see a basis  
4 upon which to modify the contractual relationship between these  
5 parties.

6 MR. SPECTOR: Thank you, Your Honor. We'll hand up  
7 the order. We'll send the order on Monday?

8 THE COURT: Very well. Is there anything else that  
9 we should consider perhaps on somewhat of a housekeeping basis?  
10 I know that we had I believe it was the retention of Boies  
11 Schiller, that application.

12 MS. JONES: Yes, sir. There are two other matters on  
13 the agenda I think we can deal with very quickly, Your Honor,  
14 as a matter of housekeeping. One, Your Honor is correct with  
15 respect to the retention of the Boies Schiller firm. Your  
16 Honor, we had a few more discussions with Mr. McMahon and I  
17 think what we'd like to do is go back and discuss it in a more  
18 fulsome manner --

19 THE COURT: Okay.

20 MS. JONES: -- and, Your Honor, continue that matter  
21 over until the November 16 hearing if that's okay with the  
22 Court.

23 THE COURT: That is perfectly acceptable.

24 MS. JONES: Also, Your Honor, with respect to the  
25 ordinary course professionals, Mr. McMahon has had the

1 opportunity to review the form of order and I understand is now  
2 satisfied with that order. I'd like to approach if I may?

3 THE COURT: Please. Thank you.

4 (Pause)

5 THE COURT: I'm signing the order.

6 MS. JONES: Thank you.

7 (Pause)

8 THE COURT: Mr. McMahon, yes, sir.

9 MR. MCMAHON: Your Honor, good afternoon.

10 THE COURT: Good afternoon.

11 MR. MCMAHON: One comment with respect to the order  
12 that I just want to note for the record. It expressly reserves  
13 the rights of our office and parties-in-interest who object to  
14 the employment and compensation of a specific ordinary course  
15 professional when they file an affidavit seeking to be  
16 retained. So notwithstanding the debtor's preview of the  
17 ordinary course professionals to come on Exhibit A, those  
18 rights are expressly reserved under the form of the order.

19 THE COURT: And I assume that is not agreed,  
20 necessarily, to by the debtor's, but understood that that --  
21 that the U.S. Trustee is reserving its rights?

22 MS. JONES: Yes, sir.

23 THE COURT: Okay. Thank you. I've signed that  
24 order.

25 MS. JONES: Your Honor, I think that on the agenda

1 then, that just leaves the motion for relief of stay which we  
2 can take up after lunch.

3 THE COURT: Very well. All right. Let us recess  
4 until -- oh, excuse me.

5 MR. SPECTOR: Your Honor, Mr. Petrofsky may be on the  
6 phone still.

7 THE COURT: Oh, Mr. Petrofsky, are you still on, sir?

8 MR. PETROFSKY: Yes, I am, actually.

9 THE COURT: I'm trying to think of the best way to  
10 handle this from your standpoint. You can either call back in  
11 at 1:30 or I can just leave the line open for a bit.

12 MR. PETROFSKY: I think on that end, I'll find out  
13 from the Courtcall people, I think calling back in would work.

14 THE COURT: Okay. Then we will be returning at  
15 1:30.

16 MR. PETROFSKY: Okay.

17 THE COURT: So you might call in maybe ten minutes  
18 earlier.

19 MR. PETROFSKY: Okay, thank you.

20 THE COURT: Thank you. We'll stand in recess then  
21 until 1:30. Thank you, counsel.

22 (Lunch recess)

23 THE COURT: Thank you, everyone. Please be seated.  
24 Good afternoon.

25 MR. LEWIS: Good afternoon, Your Honor.

1 THE COURT: Well, I think the next matter on the  
2 agenda is Novell's motion to life stay.

3 MR. LEWIS: Thank you, Your Honor. Adam Lewis again  
4 of Morrison and Foerster for Novell this time.

5 THE COURT: Yes, Mr. Lewis.

6 MR. LEWIS: Again. This is, I think, a pretty  
7 straightforward stay relief motion. There's certainly plenty  
8 of authority which we've discussed for stay relief under these  
9 circumstances. The obvious factors in favor are you have a  
10 court in Utah that's intimately familiar with the parties, the  
11 background, the underlying fact, all of which will have some  
12 bearing on the determination of the rest of the issues before  
13 that court.

14 Its obviously a far advanced piece of litigation.  
15 There's really no reason to have it redealt with or retried or  
16 any of those issues redecided in this court given the status of  
17 things in that court. Discovery is complete. Really all that  
18 remains is the trial. Trial briefing is done. Witnesses are  
19 done. Exhibit lists are done. People just have to show up  
20 with their witnesses for a few days in order to complete those  
21 proceedings.

22 There may be other things that can be done in  
23 connection with what remains to be decided short of a trial.  
24 There could be, for example, summary judgment motions on this  
25 issue or that issue that might also more streamline the outcome

1 and maybe even narrow what happens in the district court.  
2 Those are all possibilities and we've asked simply for sort of  
3 a blanket stay of relief to do what makes sense as any party  
4 would do were there no stay.

5           And so, the next question is why stay relief and why  
6 now. And the answer is that the issues that remain to be  
7 decided in the district court and also have to be decided  
8 before there can be any appeal, either side to what happens in  
9 the district court, intimately affect what the debtor's estate  
10 is, what there is to do, what the debtor could possibly propose  
11 as a plan, what the -- any proposed sale of assets could look  
12 like, what could or could not be sold especially free and  
13 clear.

14           All issues that, you know, when we filed the motion  
15 were obvious issues. The debtor has now made the point for us,  
16 in a sense, by filing its motion to sell where we filed our  
17 objections. That's been continued by the debtor, I guess,  
18 until the 16th.

19           THE COURT: Yes.

20           MR. LEWIS: But the fact remains that some of the  
21 very points we were making in our stay relief motion are  
22 illustrated by that sale motion. What do they have to sell?  
23 You know, what are people buying? What are they really going  
24 to pay for it? Can they sell it. Those kinds of questions.  
25 All are tied up with the question of what remains to be done in

1 the district court. And the sooner we're able to do that, the  
2 better off, I think, everyone will be. And --

3 THE COURT: Tell me how far Judge Kimball has gone in  
4 connection with the, if you will, Phase II of that Utah  
5 proceeding.

6 MR. LEWIS: Well, let me do this, Your Honor. Again,  
7 I'm going to perhaps defer to Mr. Jacobs who is much more  
8 intimately familiar with it. We do know there's a summary  
9 judgment decision that has decided the ownership of the  
10 copyrights.

11 THE COURT: Yes.

12 MR. LEWIS: Partial summary judgment. Its not yet  
13 appealable. Ownership of the copyrights and certain related  
14 issues. And what remains to be decided is allocation. If I  
15 can put this in a layperson's, that is a non-patent lawyer's  
16 terms.

17 THE COURT: Please.

18 MR. LEWIS: There's allocation -- that's right. We  
19 have to stick together. There's allocation of old -- of new  
20 products, so to speak, developed by the debtor that involves  
21 some old code and some new code and who owns what. And  
22 therefore, proceeds as well go to whom from those. There's the  
23 whole constructive trust issue that remains to be decided  
24 although Judge Kimball has found that the conditions for a  
25 constructive trust exists. And I can read the Court -- this is

1 on page 97 on his opinion which we've attached as an exhibit.

2 THE COURT: Yes.

3 MR. LEWIS: And what Judge Kimball says, this is  
4 beginning in the second full paragraph, "To prove a  
5 constructive trust cause of action, Novell must demonstrate the  
6 'existence of a race (some property or some interest in  
7 property), the plaintiff's right to that race and the  
8 defendant's gain of the race by fraud, accident, mistake, undue  
9 influence or other wrongful conduct.'" And there's a citation  
10 to the Pegg case.

11 The court then goes on to say in the last most  
12 paragraph on that page, "In this case, the res is the XVRS --  
13 SVRX royalties to which Novell retains all right, title and  
14 interest. This res is traceable to the monies received from  
15 Sun and Microsoft agreements. SCO's conduct also amounts to a  
16 breach of fiduciary duty convergent, unjust enrichment and  
17 breach of expressed contract, all of which are sufficient  
18 wrongful conduct to impose a constructive trust."

19 So what the judge, Judge Kimball has said plainly in  
20 his opinion, which I take to be law of good case, is that the  
21 criteria for the imposition of a constructive trust have been  
22 proven in the summary judgment motion. The only remaining  
23 issue is how much, that is the tracing, of the funds. But --

24 THE COURT: Well, the reason I asked the question I  
25 did --

1 MR. LEWIS: Yes.

2 THE COURT: -- and I'm not looking to interrupt to  
3 bring Mr. Jacobs up just yet because I want you to be able to  
4 complete your argument first, but what you've discussed so far  
5 is the significant impact of the remaining issues to be  
6 resolved, their impact upon the bankruptcy case.

7 MR. LEWIS: Yes, Your Honor.

8 THE COURT: So the question that obviously has to  
9 come to my mind is should the case from here forward proceed in  
10 Utah before Judge Kimball? Or should it be -- or should these  
11 issues be tried before me. And one of the issues I have, of  
12 course -- and particularly because of this significance of a  
13 constructive trust to the debtor's estate and its creditors.  
14 So the question I've got is how much, if you will,  
15 ahead in the work is Judge Kimball than I might be?

16 MR. LEWIS: Well, Your Honor --

17 THE COURT: And when I say that I might be, at the  
18 moment, you know, I'm still at the beginning. But I don't know  
19 how far Judge Kimball has advanced on these issues.

20 MR. LEWIS: A fair question, Your Honor, and we did  
21 try to address it in the brief --

22 THE COURT: Yes.

23 MR. LEWIS: -- but I'll try to address it now as  
24 well. And I think the short answer is very far along. The  
25 passage I've just read you, just talking about the constructive

1 trust issue, remember there are other issues as well. The  
2 allocation issue of code and therefore of revenues from other  
3 licenses, those are separate issues from the constructive trust  
4 issue. But also those issues are underlined (phonetic) by his  
5 findings about who owns the code and he's going to know what  
6 the code is all about. He's going to be the one who's in a  
7 position, therefore, to try and determine which part of the code  
8 in these new licenses is really old code and which part is code  
9 that they were authorized to develop and did develop.

10           So he's got the background for that already because  
11 of his decision -- the summary judgment decision he's already  
12 made. This Court would have to retrace all of those steps.  
13 I'm not sure what the purpose would be or whether that would  
14 really be appropriate because it's been done. And it's been done  
15 and has been fully and fairly litigated. And what we'd really  
16 be talking about here is essentially a second bite at the  
17 apple.

18           And I understand the interest in protecting debtor's  
19 estates, but even that interest, it seems to me, has some  
20 limitations in terms of fairness and a rational process that  
21 respects prior litigation which, after all, it's the debtor  
22 that brought this litigation. We didn't. And the parties may  
23 cross summary judgment motions so the debtor hoped to get a  
24 result of which it would not be complaining had it not lost so  
25 far, wouldn't be asking this Court to decide the rest of the

1 issues. It'd be happy to have it stay in Utah.

2 That shouldn't be the reason why this Court does or  
3 does not grant stay relief. It really comes down to forum  
4 shopping and that's just not appropriate.

5 Let's talk about the constructive trust for a moment.  
6 The passage I just read you, Your Honor, indicates that Judge  
7 Kimball has made findings on the factual predicates for  
8 everything about a constructive trust except applying the  
9 lowest intermediate balance rule to decide what the exact  
10 dollars are.

11 THE COURT: Yes.

12 MR. LEWIS: Now, the oldest intermediate balance rule  
13 is frequently a -- pretty much a mechanical thing. I know it  
14 can get a little tricky now and again. But even there, there  
15 would be some questions about what money is coming from which  
16 of the assets and some tracing that would presupposed some  
17 background in the proceedings. But in terms of them asking  
18 this Court to retry the constructive trust issue, which is  
19 really what the debtor is asking this Court to do, that it  
20 seems to me to be as wholly inappropriate.

21 He's already done that. He's already found that  
22 there's a res. He's found that the res is traceable to monies  
23 from the two -- the Microsoft and Sun licenses. He's found  
24 that. And he's found that the -- its traceable as a result of  
25 a breach of fiduciary duty, conversion, unjust enrichment and

1 breach of expressed contract. He's made these factual  
2 findings.

3           Why would this Court want to, or should it, reinvent  
4 that wheel that's been fully and fairly litigated before Judge  
5 Kimball? Now, the debtor may disagree with that result.  
6 Obviously does. And will, at someday, I assume, proceed with  
7 an appeal if we get that far. But that's a different  
8 (indiscernible) than this Court, exceeding to the debtor's  
9 request to allow you to, in effect, second guess what Judge  
10 Kimball did.

11           Because whether this affects the bankruptcy estate or  
12 not, the test for a constructive trust is the same. It doesn't  
13 change. Judge Kimball's applied that test and he's found that  
14 its satisfied. And it shouldn't matter, in theory, it  
15 shouldn't matter which judge applies the test. It should be  
16 applied in the same way at the same -- by any judge because  
17 it's the same test. There's no bankruptcy aura to the tests if  
18 this Court applies it. At least, I'm aware of -- unaware of  
19 any law that says that.

20           And so, the bottom line here is, Your Honor, this is  
21 far advanced. Judge Kimball has determined a whole lot, both  
22 in making rulings, but also in the process of making those  
23 rulings, he knows an awful lot about this case and the parties  
24 and the facts and the background.

25           We've had proceedings that have lasted four years. I

1 can't, of course, tell the Court it would take four years to do  
2 it all over again. But neither are we talking, Your Honor,  
3 about some little quick, mini-motion that this Court would  
4 preside over to decide whatever is left to be decided in that  
5 case, even just the constructive judgments. And there's no  
6 reason to redo that other than the debtor doesn't like the  
7 outcome. That's what appeals are for, Your Honor, not  
8 bankruptcies.

9           And so, I think in that sense, this is a case that  
10 should proceed as expeditiously as Judge Kimball can do so with  
11 stay relief here to resolve the rest of the issues by whatever  
12 means are appropriate, whether it's the further trial, whether  
13 it's partial summary adjudication on certain issues.

14           Maybe the parties will settle if stay relief is  
15 granted, I don't know. That might be an incentive to them to  
16 do that, too. But all of that remains to be seen. That would  
17 be the usual outcome following the granting of stay relief to  
18 complete litigation in another forum that's specialized  
19 litigation. We're talking patents here. That is before a  
20 judge that is wholly familiar, that's very far advanced with  
21 very little left to do. Literally very little left to do  
22 unless you're going to do it all over again.

23           And so, that would be the reasons for granting stay  
24 relief. And as I say, the motion that the debtor has filed  
25 with respect to its sale, its proposed sale of certain assets,

1 only illustrates the point. Even if the debtor withdraws that  
2 motion or the debtor revises the motion, the points are still  
3 the same. What has the debtor got to sell? What have people  
4 got to buy? What are over-bidders going to be looking at? You  
5 know, can the debtor sell property it doesn't even own? The  
6 case law, I think, on that is pretty darn clear that it can't.  
7 And until the debtor knows what it owns, it certainly can't  
8 sell that kind of stuff.

9           And in terms of a distraction from the debtor's  
10 current efforts, first of all, once again, I want to emphasize,  
11 there's not that much left to do if we do it in Judge Kimball's  
12 court because most of its been done and we won't be starting  
13 all over again.

14           You're talking about a five-day trial. A couple  
15 additional days, maybe, for preparation of a witness here and  
16 there, but not everybody's sitting around twiddling his thumbs  
17 in some hotel room for, you know, two weeks waiting from this  
18 trial to take place and waiting for his ten minutes with -- to  
19 be prepared for it. Again, Mr. Jacobs, I think, can probably  
20 speak more, and other counsel I'm sure will, to exactly what we  
21 can envision here.

22           THE COURT: And the timing is an obvious concern  
23 since --

24           MR. LEWIS: The timing is we don't know the answer on  
25 unfortunately, other than we won't know the answer until we're

1 free to find out the answer. And the longer it takes us to get  
2 this teed up, the further out the trial will be. Whatever that  
3 delay is going to be.

4           If we have stay relief now to go back to Judge  
5 Kimball and see what we can do about getting these issues  
6 resolved, I suppose if something developed that turned out to  
7 be a real problem for the debtor in terms of distractions, one,  
8 we might be able to make an arrangement with Judge Kimball to  
9 deal with that voluntarily; or two, if the debtor continues to  
10 be disaffected, it could come back here and ask for further  
11 relief.

12           But to speculate about the effect of this litigation  
13 on the debtor's management when we don't even really have  
14 anything in front of us yet is to let the tail wag the dog on  
15 the stay relief motion. That is the tail. This has to be  
16 decided. These issues have to be decided. I don't think  
17 anybody's arguing against that.

18           And more importantly here, these issues have to be  
19 decided because the estate needs to know and its creditors need  
20 to know in order to assess whatever the estate's planning to do  
21 what there is. Who owns what. What future income might be.  
22 To assess a sale price, you'd have to know those kinds of  
23 things or at least have some pretty good idea on them.

24           At some point, if there's a plan, we need to know who  
25 much money is in the till. That includes what the debtor may

1 be able to generate from the sale, but it also includes how  
2 much of the money is in that constructive trust. Those issues  
3 have to be decided, too. And sooner than later. This is not  
4 just some peripheral claim that some creditor really would like  
5 to have liquidated.

6           This is the claim of a party who's proceedings are,  
7 in that sense, essential to this case. Its not just another  
8 creditor. And for all of those reasons we think stay relief at  
9 this juncture so we can go back to Judge Kimball, see what we  
10 can do, do it with the least interference with everybody's  
11 interests and if an issue arises with the debtor, genuinely can  
12 make a case to this Court that a specific proceeding is a real  
13 problem for the debtor given exactly what its doing at that  
14 point, then the debtor can come back to this Court and ask for  
15 some further relief if they can't work something out with us  
16 and Judge Kimball.

17           Any other questions, Your Honor?

18           THE COURT: I don't think so. I would like to hear  
19 from Mr. Jacobs.

20           MR. LEWIS: Please, thank you, Your Honor.

21           THE COURT: Thank you, Mr. Lewis. Because what I'm  
22 really interested in is, Mr. Jacobs, is the timing and a sense  
23 of how complicated the issues are that remain to be tried or at  
24 least resolved by a court even on the summary judgment.

25           MR. JACOBS: I think that the most accurate answer on

1 your latter question, Your Honor, is those of us who have been  
2 living with the case thing that now its pretty simple because  
3 we have worked through many of these issues. The hardest  
4 issues were addressed by Judge Kimball's summary judgment  
5 ruling. And I think what you're probably thinking is, okay, if  
6 I take the summary judgment ruling and I pick up from there,  
7 what would I really have to do.

8 THE COURT: Correct.

9 MR. JACOBS: And the -- so it may be helpful to know  
10 that Judge Kimball decided 11 motions after the summary  
11 judgment ruling. One I think was a motion for reconsideration,  
12 the SCO file.

13 THE COURT: Yes.

14 MR. JACOBS: So that's already -- that presumably  
15 would be stable. There were some seven in limine motions and  
16 then three other motions I just got a tally from my office. So  
17 there was -- so there are a lot of trial-related motions that  
18 Judge Kimball decided that have the affect of clarifying for  
19 the parties what the evidentiary issues were going to be, what  
20 the expert testimony issues would be limited to. And as the  
21 trial was approaching, it was getting clearer and clearer  
22 exactly what we were going to do at that trial. The trial was  
23 getting shorter and shorter.

24 In fact, I think we were all thinking four days at  
25 the most by the time the trial was ready to go. The exact

1 sequence was we were going to start the trial on Monday and SCO  
2 went into bankruptcy on Friday. So we were all gathered for  
3 the trial to begin. That's how far along we were.

4 THE COURT: Okay.

5 MR. JACOBS: And it was a bench trial. So it was not  
6 -- we had -- he had -- one of the motions he decided after the  
7 summary judgment ruling is that our claims are fundamentally  
8 equitable and not legal. There was some shaping of the  
9 pleadings that lead to that ruling.

10 And so the two big issues for trial, and I think this  
11 is important, Your Honor, to understand where the constructive  
12 trust issue fits. The two big issues for trial were, one, a  
13 question whether SCO had the authority to enter into an  
14 agreement with Sun and Microsoft that led to SCO's collection  
15 of a lot of money that we claim is ours. Its an authority  
16 issue.

17 And then the second issue is having entered into  
18 those license agreements, having collected a lot of money, and  
19 then having entered into about a million dollars worth of what  
20 we might call miscellaneous license agreements, how much of  
21 that money should be apportioned to Novell under Judge  
22 Kimball's view of the way the asset purchase agreement works.  
23 So it was an apportionment trial which was going to decide the,  
24 if you will, the gross amount of Novell's claim from your  
25 vantage point as a creditor in the bankruptcy.

1           Then there was going to have to be subsequent phase  
2 in which we would address the exact amount of the constructive  
3 trust. We anticipated doing that on motion. The two are  
4 severable in that sense. What Judge Kimball would be deciding  
5 is the gross amounts, if we went back to him for trial. And  
6 then we would be going back to him and saying, okay, apply the  
7 lowest intermediate balance rule and figure out how much is in  
8 the bank account that's traceable and that's our constructive  
9 trust. That is, we think, fairly mechanical.

10           So that's where we were. That's where we would be if  
11 you lifted the stay. If your -- if the focus -- the focus of  
12 their opposition is the constructive trust.

13           THE COURT: Yes.

14           MR. JACOBS: And which is sort of -- which is  
15 interesting because they really didn't resist the question of  
16 whether we should be back to him for an apportionment trial or  
17 a trial, or perhaps we're thinking now a motion for summary  
18 judgment on this authority question. The focus was the  
19 constructive trust.

20           You could lift the stay for an apportionment trial  
21 and to decide that authority question. And then we can come  
22 back to you and we can decide what to do about the construction  
23 trust after that's done.

24           THE COURT: Thank you. That was helpful, Mr. Jacobs.  
25 I appreciated it. Mr. Lewis, have you completed your

1 presentation?

2 MR. LEWIS: I did, Your Honor, thank you.

3 THE COURT: All right. Thank you. Mr. Spector.

4 MR. SPECTOR: Your Honor, I've been listening now for  
5 23 minutes, two different lawyers, two able lawyers, and I  
6 haven't yet heard how Novell is being harmed by allowing the  
7 debtor what every other debtor gets in Chapter 11, a breathing  
8 spell from litigation so it can do its Chapter 11. And I think  
9 that's probably because they can't show that they are in harm  
10 by waiting a few more months.

11 They keep telling us, let's go. This is for your own  
12 interest. This is for your own good. Don't you want to know  
13 what you have to sell? Don't you want to know what your plan  
14 is going to look like? Thanks, but we don't need their help.  
15 We have our own ideas of how we're going to come out of  
16 bankruptcy and how we're going to file the plan and how we're  
17 going to sell certain assets and do other things of a  
18 reorganization nature that will help us get creditors paid.  
19 And you know what? Maybe, if we win the litigation, get  
20 stockholders paid because they're in this game, too.

21 Let me plainly state what we believe the status of  
22 the litigation in Utah is. And you know, I don't quibble with  
23 able counsel from Novell. They really have it pretty close to  
24 what we would agree.

25 In the court's summary judgment ruling, it delivered

1 to what the Novell reply brief euphemistically called the  
2 software community.

3 THE COURT: Yes.

4 MR. SPECTOR: The -- what it wanted to do, the big  
5 issue being who owns the Unix and Unixware copyrights. The  
6 court decided that question. It's a big question.

7 THE COURT: Yes.

8 MR. SPECTOR: It's the question that the software  
9 community thinks there's a public interest in, okay. What they  
10 don't think there's a -- and again, that's my argument. I'll  
11 wait for my argument. Point two, it also ruled that the  
12 requisite wrongful act to set up a constructive trust existed  
13 in the form of SCO's breach of its contract. The Novell  
14 agreement was a contract between Novell and Santa Cruz  
15 Operations which is a predecessor for SCO, of SCO. And it was  
16 a very difficult contract.

17 I think -- and, Your Honor, we are not trying to  
18 retry the case, but to speak fairly, anybody looking at that  
19 contract would think that Santa Cruz operations bought the  
20 copyrights from Novell. There's a body of evidence that would  
21 suggest that it did. The judge ruled otherwise. That's the  
22 law of the case. We have to live with that until and unless  
23 its reversed on appeal.

24 Nevertheless, based on years of experience and never  
25 having been told otherwise, SCO understood that it had the

1 rights to do what it did, sold certain rights to Sun  
2 Microsystems and Microsoft Corporation. Those funds, it turns  
3 out in retrospect, were received because apparently SCO got it  
4 wrong. They didn't have the rights that Novell claims that it  
5 owned. And therefore, that was the wrongful act.

6 Now, the judge, in his opinion, called it conversion,  
7 called it breach of fiduciary duty, called it mopary  
8 (phonetic). Whatever, it was bad enough to be the wrongful act  
9 it has to find, the court has to find in order to even set up  
10 an argument for constructive trust.

11 But let us be clear. On the same page that Mr. Lewis  
12 asked you to look at, page 97, the court stated, "The Court  
13 denies SCO's motion for summary judgment" --

14 THE COURT: Yes.

15 MR. SPECTOR: Pardon me. The Court denied both  
16 Novell's and SCO's motions regarding the constructive trust  
17 issue. So Novell's motion for the imposition of a constructive  
18 trust was denied. So please, don't tell me that the judge set  
19 up a constructive trust. He didn't. He was asked to and  
20 didn't.

21 That doesn't mean that the court didn't already make  
22 certain findings of fact, as Mr. Lewis put it or Mr. Jacobs put  
23 it, I forget who, with regard to the predicates coming up with  
24 that.

25 THE COURT: Correct.

1 MR. SPECTOR: And we don't agree with them of course.

2 THE COURT: Right.

3 MR. SPECTOR: But we agree that if Your Honor would  
4 -- were to take any part of this case and move on from there,  
5 you would have to start from those findings of fact. We don't  
6 ask you to reexamine them or second guess them.

7 The court also said with respect to the constructive  
8 trust issue that the res is, as stated by counsel, the  
9 royalties received by SCO from the Sun Microsystems and  
10 Microsoft Corporation agreements. And perhaps the million  
11 dollars worth of miscellaneous sales as well.

12 One of the reasons it did not grant summary judgment  
13 on the constructive trust issue in favor of Novell, and you  
14 know, if you've read that opinion --

15 THE COURT: I have.

16 MR. SPECTOR: -- there's precious little that we can  
17 take out of that and see if it was something that we could live  
18 with. The one thing that we did get there is the court denied  
19 the constructive trust summary judgment motion by Novell. One  
20 of the reasons why is the court says, well, there's a res but I  
21 don't know what size of a res.

22 What Mr. Jacobs didn't fully explain and I apologize  
23 because I'm probably the last one that ought to be trying this,  
24 but in what SCO licensed to Sun Microsystems and Microsoft  
25 Corporation, and I may be using that term "licensed" broadly

1 and I hope I have license to do so, is some of that product  
2 really was, and everybody, I think, agrees, some of that was  
3 SCO's product. And because this is in code, some of it may be  
4 attributable to Novell.

5 THE COURT: Right.

6 MR. SPECTOR: So there's a portion of it, we'll call  
7 the questioned royalties, that the judge will have to determine  
8 goes to Novell and maybe some of it stays with SCO. So the  
9 court couldn't, didn't grapple in the summary judgment with  
10 that allocation or apportionment as they put it.

11 THE COURT: Correct.

12 MR. SPECTOR: Okay. So the court denied summary  
13 judgment. And for reasons the court probably didn't know  
14 about, but had it known, it probably would have said, and the  
15 second reason why is those funds that SCO got in 2003 I'm sure  
16 were long since spent. The company was losing money forever,  
17 right? Except maybe the year 2003 when it got that money. But  
18 that money's gone. The res is gone.

19 Of course, that money went -- it was money. It went  
20 into a bank account. And since that bank account received  
21 those funds, new monies from customer sales and a \$40 million  
22 recapitalization occurred. So maybe some of those funds could  
23 still be there using the lowest intermediate balance test and  
24 the court didn't know because it really wasn't teed up, it  
25 wasn't really addressed. There really wasn't any discover or

1 argument on the issue of how the lowest intermediate balance  
2 test would apply in this case. And so that would be another  
3 reason, if he knew about it, that Judge Kimball would have  
4 said, well, I can't grant summary judgment here.

5           The trial was set to being on September 14th, was, as  
6 stated by Novell in its motion, intended to decide nothing more  
7 than how much of the royalties received by SCO are royalties to  
8 which Novell was entitled. In Novell's September 14th trial  
9 brief to the court, prepping the court on how we perceive this  
10 case should be handled from hereon, they said, in essence, the  
11 tracing issue is a discreet issue and we should cover it after  
12 we finish the five-day trial on the apportionment and the  
13 authority issues that Mr. Jacobs just talked to us about. That  
14 was their suggestion and that's what would have happened  
15 because that wasn't teed up for the five-day trial.

16           So Your Honor, this gets me to the answer that you  
17 were asking before. What is it for this Court to do if the  
18 Court were inclined to do anything with regard to this case?  
19 Well, we would say, you take everything that precedes, we grit  
20 our teeth and bear it, and then you say, okay, there's going to  
21 be a constructive trust in the amount of whatever its been  
22 determined elsewhere, whatever that number is. And here's how  
23 much of that is now being held by SCO. And that's how much,  
24 through the lowest intermediate balance test, that's how much  
25 would be potentially set asideable, if that were a word, for

1 Novell.

2           This Court could do that. It doesn't need to  
3 reinvent the wheel. It doesn't have to pour through 1500 pages  
4 of summary judgment briefing or anything else. It's a simply  
5 -- its not simply at all. A statement of the issue is simple,  
6 but the actual going through it is not simple at all. It is  
7 evidence specific. It's difficult because the funds were  
8 originally placed four years ago, going on five years ago, I  
9 guess. So it would take some time. But it would take time  
10 wherever it is. And it's not even proposed to be part of the  
11 five-day trial anyway.

12           So, that's where the status, I believe, of the Novell  
13 litigations in Utah are all about right now. And as I said  
14 before, we don't contest it, I've said it enough times.

15           THE COURT: Now, you mentioned that I would  
16 essentially take the allocation determined -- is that how you  
17 stated it? Determined elsewhere.

18           MR. SPECTOR: Yeah, we're not asking you to do that,  
19 Your Honor.

20           THE COURT: Okay.

21           MR. SPECTOR: I mean, we're not being ridiculous.  
22 They're right. Its simply, we don't fight everything. They're  
23 right. We wouldn't ask this of Your Honor, to go and try to  
24 disassemble the string of code and then determine how much of  
25 that was Novell's source and how much of that was SCO's. We

1 wouldn't put you through that. So, if there's going to be a  
2 trail --

3 THE COURT: But it's a timing issue is what you're  
4 basically saying.

5 MR. SPECTOR: Well, that's one thing. If -- I've  
6 already discussed why -- well, I haven't discussed wholly why  
7 the constructive trust issue is important that it be separated  
8 out even though Novell already did separate it out. But we  
9 think it ought to be separated out and tried here. But the  
10 timing issue is the other issue.

11 I'll go to that first since Your Honor raised it.  
12 Novell has multiply stated that SCO is trying to avoid  
13 certainty or finality and they're the engines of finality and  
14 certainty. If you'll only let us get to Judge Kimball and we  
15 can have this five-day trial, it would be wonderful. We would  
16 have the finality that's necessary and then the debtor would  
17 know.

18 Well, excuse me, the debtor would then know? All it  
19 would know is some portion of those evil questioned royalties  
20 really do belong to Novell. A dollar amount would be  
21 established. It's a liquidation of a claim, that's what it is.  
22 Because the judge already made the major determination of who  
23 owns that code, that software. Who owns the copyrights for  
24 that, I should say.

25 That's the major issue in the case. That's the issue

1 of public interest. That's the issue. If they want finality,  
2 they should have stipulated to a 54(b) certification and we  
3 would be already arguing our appeals to the Tenth Circuit. If  
4 they were really interested in finality and certainty, we  
5 wouldn't heard Mr. Jacobs this morning and say, well, you know,  
6 really, the way it ought to go is we ought to go back to  
7 Switzerland, try the arbitration, then come back to Utah, fit  
8 that result into the Utah litigation. Then -- of course, we  
9 would have already had a five-day trial on allocation. Then  
10 there are other issues that have to be decided based on what  
11 happened in Switzerland. And then, we can have our appeal go  
12 up.

13           If we go down that pathway, Judge, we don't get  
14 certainty in our lifetime, or we'll be a lot older. Why not do  
15 it the way bankruptcy courts and debtor's-in-possession do it  
16 in Delaware all the time and New York all the time and lots of  
17 other places all the time.

18           We know this litigation. We proceed in Chapter 11  
19 which is a breathing spell from litigation. We come up with a  
20 plan that will resolve if not the litigation in a way that the  
21 opponents would be satisfied, at least we say, here's the  
22 alternative, Judge. If the company, the debtor, wins this  
23 litigation, this is what we're going to do with the proceeds.  
24 If we lose the litigation, stockholders are going to most  
25 likely be wiped out and what remains are going to go to Novell

1 if it gets a money judgment, which I was told, in order to get  
2 -- and this is an side -- I was told that in order to get the  
3 waiver of the jury trial that was -- is a big issue recently,  
4 in September, they waived, Novell waived their money damages  
5 claim. And I'll stand corrected if counsel wants to correct me  
6 on that. Is that incorrect?

7 MR. JACOBS: That is incorrect.

8 MR. SPECTOR: Okay. Then they would have a claim in  
9 the estate if they should win. I just wanted to clarify that.

10 So if we -- if the plan was to, say, we'll look at  
11 the alternatives. If we lose the litigation, Novell wins.  
12 They'll have a claim and here's how we'll deal with their claim  
13 as well as everybody else's, okay. That isn't unusual.  
14 Northwest just pulled a plan like that. There's -- our firm  
15 represents a creditor with a very, very large antitrust claim  
16 and that's going to go to trial post-confirmation in Detroit.  
17 There are other creditors with large claims like that. They're  
18 going to go to trial post-confirmation in wherever. One of  
19 them also is in Detroit. That Your Honor I'm sure knows, that  
20 that is not terribly unusual.

21 We propose that we should be given the same  
22 opportunity and not have this case chopped up into little  
23 trials all over the world. Switzerland, Utah, then come back  
24 here and try to fit that into a plan.

25 When would we be fitting those results into the plan?

1 The day after Judge Kimball rules on that five-day trial?

2 Well, that's not final. You know darn well, we'd want to  
3 appeal that if we can. It may be that Judge Kimball's going to  
4 agree with Novell, oh, I'm sorry, we don't have the result of  
5 the SUSE arbitration in Switzerland. I can't send this up for  
6 appeal yet.

7 We'd be here forever waiting for that day. We don't  
8 think creditors, stockholders or the Court should be held  
9 hostage to that type of trial schedule. We should proceed with  
10 our Chapter 11 and we shouldn't be held up by that type of  
11 litigation.

12 THE COURT: But Novell says you're about to sell our  
13 property.

14 MR. SPECTOR: Well, you know, its very difficult when  
15 you have to deal with generalities because sometimes exceptions  
16 and specifics overrule them. You know, he says that -- counsel  
17 stated that you can't -- its well-known, the law's plain, you  
18 can't sell what you don't own.

19 THE COURT: Right.

20 MR. SPECTOR: Sometimes that's true. I know a lot of  
21 Chapter 7 trustees who sold causes of action of -- ridiculous  
22 causes of action to people. There's really nothing there.

23 I've seen quit claim deeds and personality quit claim deeds  
24 type in realty. You buy whatever it is we have. We have with  
25 us today some folks that have some interest in this issue. Mr.

1 Scott McNutt, counsel from San Francisco representing York  
2 Capital Management.

3 THE COURT: Hello, Mr. McNutt.

4 MR. SPECTOR: He flew in because he saw the kind of  
5 bad-mouthing his client received on the backhand meant for us  
6 and would be happy to address the Court on that particular  
7 issue if the Court were willing to listen to more of that.

8 THE COURT: Yes, I would be. Yes, thank you.

9 MR. SPECTOR: Oh, I'm sorry.

10 THE COURT: Mr. Rosner.

11 MR. ROSNER: For the record, Fred Rosner, Duane  
12 Morris.

13 THE COURT: Yes.

14 MR. ROSNER: I'd just rise to introduce Mr. McNutt of  
15 McNutt and Litteneker who's admission pro hoc vitae, we'll file  
16 the appropriate papers.

17 THE COURT: That's fine, Mr. Rosner.

18 MR. ROSNER: Thank you.

19 THE COURT: Thank you, sir. Mr. McNutt, welcome.

20 MR. MCNUTT: (Attorney not near microphone) Thank  
21 you, Your Honor. I represent York Capital. York Capital is  
22 the leading investment fund. It has many, many millions of  
23 dollars in assets. York's Private Equity Fund specializes in  
24 turnarounds in general and software businesses in particular.  
25 York had devoted substantial time and resources for achieving a

1 transaction along the lines of the term sheet attached as an  
2 exhibit in the sales procedure motion that's just been  
3 continued from this date to the 16th.

4           Since 2005, York has followed SCO's struggles and has  
5 dedicated a team of investment professionals with deep software  
6 experience to analyze the value in the SCO business, the  
7 SCO/Unix business, the (indiscernible) business and to try to  
8 take apart and put back together the different, many different  
9 moving pieces in a high technology, software kind of business  
10 with 35 years of history, maybe more since this Unix product  
11 was conceived in the early 60s.

12           Essential to achieving York's objective to acquire  
13 Unix is the assembly of the experienced management team, York  
14 has committed substantial resources, identified management  
15 teams. That team has extensively participated in due diligence  
16 and would be spread equal and prepared to take over the Unix  
17 business if we are the successful bidder at the auction sale of  
18 the assets.

19           THE COURT: Okay. Thank you. Thank you, Mr. McNutt.

20           MR. SPECTOR: Thank you, Your Honor. And York  
21 Capital Management is one. There are others and we're going to  
22 get into that when we get to the bid procedures motion.

23           THE COURT: Of course.

24           MR. SPECTOR: The only thing I want to say is there's  
25 been an extreme amount of due diligence. This case, the Novell

1 case is a matter of wide public -- I don't want to say  
2 interest, but at least, its like notoriety we'll say. And a  
3 lot of people in the so-called software community have been  
4 following it for years. And a lot of the other bidders out  
5 there know that there's a terrible decision out of Utah in the  
6 case and they didn't -- it didn't stop them from coming and  
7 trying to purchase the assets. You'll hear all the details of  
8 that when that comes before you.

9           So can a debtor sell what it doesn't own? I think  
10 we'll leave that to the marketplace. Let the buyers come in  
11 and say, you know what, Judge, whatever it is they own, we'll  
12 take a chance and we'll pay a few million dollars on that  
13 change. So that -- and we'll get to that issue also.

14           But if the question was, Judge, what do we have to  
15 get to make it marketable to people like York Capital  
16 Management? Do we have to get the imprimatur of -- and the  
17 reversal of Judge Kimball's ruling? If we need to do that  
18 before we can sell it, well, we're talking a long way.

19           Now, I may have misspoken when I said after the five-  
20 day trial we might have to wait for SUSE's arbitration. That's  
21 just by way of argument about Novell's position because that's  
22 the position they espoused this morning. Judge Kimball, I am  
23 told, actually has stated, at least he has officially ruled in  
24 an order, he basically stated, I'm told, that when our 54(b)  
25 motion was denied and the judge sustained their objection to

1 that, he said, well, when the five-day trial is over, we may  
2 think otherwise.

3           So it may be possible that if the stay were lifted or  
4 if, after the plan is confirmed, we would have a trial in the  
5 five-day -- you know, the allocation issue, that apportionment  
6 issue. Perhaps the judge will, indeed, give us a 54(b)  
7 certification to go up on appeal at that point.

8           But right now, where we are with the real  
9 reorganization engines going, with 363, 4 and 5 relief and a  
10 plan behind it, all coming to the fore in the next month or so,  
11 we don't want to be distracted. And most debtors-in-possession  
12 wouldn't be forced to distracted to go back to the litigation  
13 hell-hole they came from. We do want a resolution. We have to  
14 have a resolution. But we don't think this is the time for  
15 that resolution.

16           The constructive trust issue argument, I spoke about  
17 earlier, briefly. But I have to reiterate that the issue is  
18 one of the exclusive jurisdiction, not concurrent jurisdiction.  
19 But the bankruptcy court has exclusive jurisdiction over  
20 property of the estate under 28 USC Section 1334. Implicit in  
21 that is the determination whether something is or is not  
22 property of the estate.

23           We are not asking Your Honor to do the apportionment  
24 issue. We're not asking Your Honor to do a lot of the  
25 technical question issues that will be in the Utah case. But

1 we are asking this Court, if there's going to be an issue about  
2 the constructive trust tracing, that this court, which is the  
3 court you would expect to be the one to do it.

4           So who is it that's asking for or is seeking forum  
5 shopping? Not us. We never said that the apportionment issue  
6 should come here and you should try the case over again. We  
7 never said that. Who's asking for forum shopping is Novell  
8 asking this Court to advocate its role as the arbiter of what  
9 is and is not property of the estate and run off to Utah and  
10 have the judge who hasn't begun to focus on the issue.

11           In the 102 page decision, there was one word, it was  
12 this "traceable to", but it was not in the context of tracing.  
13 On page 97, I think he says the bad act was traceable to the  
14 royalties that were recovered. That isn't the same issue of  
15 how do you trace it to what's in the hands of SCO at the  
16 present time. It was never addressed.

17           I understand that there hasn't really been any focus  
18 by the parties in the discovery process to do any of the work  
19 necessary to do the tracing. And so I'll say it again, that is  
20 an issue for this Court. Judge Kimball is no farther ahead  
21 than this Court is. This Court has greater expertise, I would  
22 surmise, in doing the exercise as do most bankruptcy courts  
23 because the issue comes up in a lot of context in bankruptcy.  
24 And we see no good reason why that should go off to Utah for  
25 trial.



1 opinion, of course, doesn't carry a lot of water. It's the  
2 opinion of the Tenth Circuit that matters.

3           This litigation is an enormous asset of the estate.  
4 Although SCO believes that the Novell ruling leaves various  
5 causes of action against IBM intact, IBM and Novell have  
6 argued, no, it basically guts our case against IBM. You  
7 haven't heard anything about IBM yet.

8           THE COURT: No.

9           MR. SPECTOR: But its another major litigation. And  
10 I'm sure that given one outcome of today's ruling, we may be  
11 seeing them a week later. The IBM litigation could bring  
12 hundreds of millions of dollars to the estate for creditors and  
13 for stockholders. If -- what Novell and IBM, therefore,  
14 jointly are trying to do in all -- in our estimation, it should  
15 be plain, is to seek the demise of SCO before they can get  
16 their day in court, the Tenth Circuit. And after Tenth  
17 Circuit, remand to -- for a new trial or a trial.

18           We think that's the end game. We think that they  
19 don't want this case to ever see a real trial with a real --  
20 well, maybe it won't be a jury. Maybe it will be reversed on  
21 appeal and there will be a jury. That may be one of the  
22 issues. But that's really the game plan here is to kill the  
23 case anyway they can because then we won't ever get our rights  
24 and the benefits for the stockholders and creditors before a  
25 court.

1           So we think the Court should deny the motion for  
2 these reasons and the reasons stated in our response.

3           THE COURT: Thank you, Mr. Spector. Mr. Lewis.

4           MR. LEWIS: Thank you, Your Honor. There's a lot  
5 that's just been said that just has no basis in anything that  
6 anybody has said. The alleged scheme between IBM and Novell is  
7 pure fantasy. If IBM wanted to be here, they would be here  
8 today.

9           And further more, by asking for stay relief to  
10 litigate the case, we're not trying to kill the case before it  
11 can be litigated. We're trying to get the case litigated. I  
12 mean, that's just nonsense. Its foolishness.

13           We're glad to hear that SCO has changed what its  
14 position is. We've just heard that SCO, oh, no, we just want  
15 to try the tracing issue. That's not what SCO said in its  
16 brief. And let me read you, Your Honor, this is from page 19  
17 of their brief. "This Court therefore should make" -- "This  
18 Court should, therefore, make any determination as to what or  
19 what is not property of the estate and if a constructive trust  
20 can be imposed and in what amount."

21           They were asking this Court to redo the constructive  
22 trust issue. But evidently they've abandoned that now and  
23 that's fine because we don't think the Court should and they  
24 evidently agree. But let's not kid ourselves about what they  
25 were arguing. They were arguing this Court should do that

1 because they think of this Court as a more favorable forum.  
2 And that is the point I want to make because it also reflects  
3 on the motives for a lot of their arguments. They think this  
4 Court is a forum.

5           Its not a question of what's a more favorable forum.  
6 It's a question of who is familiar with this case and what  
7 studying up would be need -- to do in order to do what remains  
8 to be done. If the Court wants to do the tracing issue, as  
9 such, once everything else is done, if its that important, I  
10 guess that's what will happen. We don't see why Judge Kimball  
11 shouldn't just do that, too.

12           Debtor said its pretty much mechanical. I think I  
13 agree. I think I said that. There can be complications. I  
14 think we can trust Judge Kimball to do that notwithstanding the  
15 debtor's disagreement with Judge Kimball's rulings. Not  
16 surprising, they lost and lost badly. But I understand that.

17           But the fact remains, most of what remains to be done  
18 really should be done by the judge who is familiar with the  
19 case and there's no reason not to let him just do the  
20 mechanical tracing thing.

21           If you look at the case law in the lowest  
22 intermediate balance, there is -- there are, of course, cases  
23 in bankruptcy court. But there are also just scads of cases in  
24 the district courts and in other courts. And there are  
25 articles all over the place on the lowest intermediate balance.

1           Normally, its not rocket science. It is what it is.  
2 There can be tricky questions. Judges know those tricky  
3 questions do come up occasionally and have to make some  
4 decisions. But just because the debtor lost in front of Judge  
5 Kimball has no reason to say to this Court, well, we should  
6 really have you do that instead.

7           In term to the harm to us, remember, too, there is  
8 also the question of what's happening to the money in the  
9 meantime. We've just heard counsel say, well, gee, there's --  
10 we don't think there's anything left. Well, I wonder how that  
11 happened, Your Honor. And if the issue of a constructive trust  
12 gets delayed and they claim it's a million dollars or less and  
13 we claim its more, what's going to happen when that money isn't  
14 there at the end. Where's it going to go? Are we going to  
15 hear more tracing arguments? Well, we had a million dollars  
16 when we filed this case, Your Honor, but you know, we  
17 successfully resisted stay relief. We spent all that money in  
18 the meantime. We've got lots more money in from other things.  
19 We got the sale money. And all that money's gone. All the  
20 rest of it, whatever was there.

21           I don't want to be hearing that when the time comes.  
22 Lets get the issue decided now while the bank account is  
23 discernible. And what we -- and we know what's in it. And we  
24 can -- don't add another six or eight months or a year to the  
25 tracing problem.

1           So, in terms of the harm -- and then the public harm,  
2 yes, the major issue about who owns the copyright has been  
3 decided. But there are other public interest issues like how  
4 much of the other code which somebody might choose to try to  
5 license belongs to whom? Some of those licenses from SCO to  
6 someone else where the allocation issue, the apportionment  
7 issue was still alive, what are those people going to do in the  
8 meantime about trying to sublicense or relicense or defend  
9 themselves. There are more interests here at stake than simply  
10 the estate's interest.

11           Now, the debtor says, well, gee, we don't need  
12 anybody to tell us how to run our case. Your Honor, I submit  
13 that may not be true in general and probably is not true in  
14 this case. If you look at the motion that was filed for sale,  
15 in my opinion, it was an ill-advised motion. Maybe there's all  
16 this activity behind it that we haven't been told about until  
17 we heard today that there allegedly is. Why wouldn't you  
18 include that? This is a motion that was filed out of the  
19 clear blue by a debtor that said its main interest was in  
20 coming out at the other end as an operating company. That's  
21 not where we're going apparently and we're talking about sale  
22 that's basically going to set the course of this case.

23           Now, maybe the debtor wants to retain control over  
24 who it gets to negotiate with and so on. But other parties-in-  
25 interest, and we're not the only ones, might like to know more

1 about what's going on, might like to have a more responsible  
2 process, might want to know what else there is in the estate  
3 and what can be sold.

4           York has gotten up here today and said, we've looked  
5 at this and we're comfortable buying it. We don't know what  
6 other parties feel about it. Maybe York's the only one that  
7 thinks that way, but other creditors might say we'd really like  
8 to have some further exposure here on a reasonable basis, not  
9 on a short notice basis. I don't want to argue the sale motion  
10 here, but the point is, in terms of how this case is conducted  
11 and whether there should some additional checks on that and  
12 whether people might want to have some knowledge about the  
13 outcome of this litigation, that is for today. And my points  
14 are really directed at that.

15           Even the York comments, we're told they've been  
16 looking at this for a long time, they tell us. But they  
17 haven't even been able to reach an asset purchase agreement  
18 which we were told was going to be available for the 6th in  
19 their motion and apparently, may or may not be available by the  
20 16th. We'll see about that when the time comes.

21           So there are other larger interests that I think this  
22 Court ought to take into consideration when deciding this stay  
23 relief motion, interests that might like to see something more  
24 definitive develop with respect to the litigation and what its  
25 outcome will be and what's going to be in the till before they

1 decide on whether to approve a sale. Or decide what position  
2 to take on a proposed sale.

3           And that's why there's a larger public interest in  
4 this as well, as well as the interest of other parties in what  
5 they have that they can license or sublicense. Until those  
6 apportionment issues are decided, they're not in a -- they're  
7 holding up not only their own boat, they're holding up a lot of  
8 boats. And the public interest, it seems to me weighs on the  
9 side of opening up the locks and letting that water flow so  
10 that we know where we stand.

11           And if some of this can be done by summary judgment,  
12 that won't be all that distracting. We've all prepared summary  
13 judgment motions and we harass our clients to read a draft and  
14 we harass our clients to look at draft declarations if we need  
15 them. But that isn't having people sitting around, twiddling  
16 their thumbs, doing nothing at all. And as Mr. Jacobs said,  
17 they were literally ready to go. We have four or five days.  
18 And we're probably not talking about four or five days  
19 tomorrow. I'm sure Judge Kimball's not going to crook his  
20 finger and wag it at us and say, you all come on in, we'll try  
21 this tomorrow.

22           But if we don't get stay relief today, we're just  
23 going to be that much further down the road and I, again, I  
24 submit, Your Honor, give a stay relief today. Let's get these  
25 issues tried. There's no secret about our wanting to do the

1 tracing in the district court as well. If the Court wants to  
2 do that, that's fine. We're not concealing that as the debtor  
3 has somewhat disingenuously suggested in its argument. We've  
4 always said that openly, that we want to do whatever it takes  
5 to finish that litigation. That would include that.

6           And if that problem develops, let us come back before  
7 this Court and deal with that problem. But if we don't at  
8 least open the flood gates, then we'll be having these  
9 arguments and having to deal with all those problems -- these  
10 problems in six months or a year or two years. Thank you, Your  
11 Honor.

12           THE COURT: Thank you, Mr. Lewis.

13           MR. SPECTOR: You know, sometimes when you're in  
14 litigation, you wind up saying things and you say, oh, gee, did  
15 I really say that then, I didn't mean it. And Novell  
16 previously told Judge Kimball that he ought to grant an  
17 immediate injunction to freeze those funds because you know  
18 what happens if they go into bankruptcy, we'll never be able to  
19 get them because there's no right to them there.

20           They now say, and they're probably right, they  
21 overstated their case at that point because there is relief in  
22 the bankruptcy court in that case. However, its putting the  
23 cart before the horse to say its their money and therefore, the  
24 Court should immediately lift the stay so they can run off and  
25 get their money. It doesn't work that way either.

1           You know, lifting the stay is a serious matter. I  
2 know I don't -- I don't want to sound pedantic. The Court  
3 knows that lifting the stay is a serious matter.

4           THE COURT: Certainly.

5           MR. SPECTOR: We've been in bankruptcy six weeks,  
6 Your Honor, six weeks. This is a serious matter. We knew it  
7 was coming. On the first day they told us it was coming and we  
8 were gearing up for it frankly from that first day when they  
9 put us on notice.

10           But we were doing other things. We were doing the  
11 business-type things that you want a debtor to do. We were out  
12 there -- when we walked out of court, we got phone calls from  
13 people saying let's do business. And one of them is now in  
14 court through counsel. There are others that thought there was  
15 some promise in this company. We stated we owe it to our  
16 customers that there be a stable business to continue running  
17 the Novell operating system.

18           One of the things that actuated the board of  
19 directors to choose York, and it could have chosen others as  
20 well, is that they have a confidence this is a company of heft  
21 and they will be responsible to the customers and feel  
22 comfortable -- the board of directors feel comfortable that  
23 McDonald's will still be able to sell hamburgers and maybe  
24 missiles will still be able to get to their targets and the  
25 like because those are the things that the Unix platform

1 provide.

2           So this is all consistent. They try to point out in  
3 their reply we're being inconsistent, we want -- we never said  
4 we were going to keep the Unix business forever. We told you a  
5 lot about the future. The Unix business is a legacy business.  
6 There are people out there that think they can make something  
7 out of it. The board of SCO thinks maybe reorganization and  
8 Chapter 11 is a good way to look -- to get rid of the past and  
9 look to the future. And we're vesting money, as you can tell  
10 from the agreement, which you haven't seen yet, that there will  
11 be money being used to the future investment of ME, Inc. and  
12 the things that come with that.

13           So, this is what reorganization is about. That's  
14 what we are about. And we don't think its asking too much to  
15 ask the Court to allow us the breathing spell to get this off  
16 the ground. I believe that's all I have, Your Honor.

17           THE COURT: Thank you. Thank you, Mr. Spector.

18           MR. LEWIS: I have nothing further, Your Honor, thank  
19 you.

20           THE COURT: Nothing further? I'm going to take this  
21 one under advisement and I won't take long because I recognize  
22 that to take long is to deny the relief you've requested and  
23 I'm certainly not about to do that. But I would like to just  
24 give the matter a little bit more thought based upon the  
25 helpful arguments, go back and look at the record a little bit

1 and I'll issue an opinion as quickly as I can here.

2 MR. LEWIS: Thank you, Your Honor.

3 MR. SPECTOR: Thank you, Your Honor. We appreciate  
4 the care and attention.

5 THE COURT: Absolutely. And with that --

6 MR. LEWIS: We appreciate the time you've allotted to  
7 us, too.

8 THE COURT: Pardon me?

9 MR. LEWIS: We appreciated as well the time you've  
10 allotted to these matters as well.

11 THE COURT: Absolutely. They're important matters  
12 and its an important case. And I appreciate counsels hard work  
13 on the papers. They were just excellent and very helpful. And  
14 I thank you and good day.

15 ALL ATTORNEYS: Thank you, Your Honor.

16 \* \* \* \* \*

17 C E R T I F I C A T I O N

18 I, Susan Holcomb, court approved transcriber, certify  
19 that the foregoing is a correct transcript from the official  
20 electronic sound recording of the proceedings in the above-  
21 entitled matter.

22

23 /s/ Susan Holcomb

Date: November 13, 2007

24 Susan Holcomb AAERT CET \*\*00273

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