

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

Case No. 07-11337

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In the Matter of:

THE SCO GROUP, INC., ET AL.,

Debtors.

- - - - -x

U.S. Bankruptcy Court  
824 North Market Street  
Wilmington, Delaware

November 20, 2009  
2:04 p.m.

B E F O R E:

HON. KEVIN GROSS

U.S. BANKRUPTCY JUDGE

ECR OPERATOR: JENNIFER PASIERB

1 MOTION of Chapter 11 Trustee for Entry of an Order Authorizing  
2 Modification of Retention Order for Boies, Schiller and Flexner  
3 LLP Nunc Pro Tunc to August 6, 2009

4  
5 MOTION for an Order Amending Administrative Order Establishing  
6 Procedures for Interim Monthly Compensation of Professionals

7  
8 MOTION of Chapter 11 Trustee Pursuant to 11 U.S.C. Section  
9 105(a) and Fed. R. Bankr. P. 9019 for Approval of Settlement  
10 Agreement With Autozone

11  
12 MOTION of Chapter 11 Trustee to File Under Seal Exhibit A to  
13 the Trustee's Motion Pursuant to 11 U.S.C. Section 105(a) and  
14 Fed. R. Bankr. P. 9019 for Approval of Settlement Agreement  
15 With Autozone

16  
17 MOTION of Wayne R. Gray for Entry of an Order Lifting Automatic  
18 Stay to Permit the Debtor, The SCO Group, Inc. to Participate  
19 in Florida Federal Court Action and Pending Eleventh Circuit  
20 Court of Appeals Proceeding

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24 Transcribed By: Esther Accardi

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A P P E A R A N C E S :

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A P P E A R A N C E S : (continued)

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE UNITED STATES TRUSTEE

844 King Street

Wilmington, Delaware 19801

BY: JOSEPH MCMAHON, ESQ.

APPEARING TELEPHONICALLY:

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ALAN P. PETROFSKY, PRO SE

## P R O C E E D I N G S

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THE CLERK: Please rise.

THE COURT: Good afternoon, everyone. Please be seated. And, thank you.

Ms. Fatell, good afternoon.

MS. FATELL: Good afternoon, Your Honor. Nice to see you.

THE COURT: Good to see you again.

MS. FATELL: Thank you.

THE COURT: Yes.

MS. FATELL: Bonnie Glantz Fatell from Blank Rome on behalf of Ed Cahn the trustee for The SCO Group, Inc.

We're here on our agenda, Your Honor. We're going to move it around a little bit if that's okay with the Court.

THE COURT: Absolutely. Absolutely it is.

MS. FATELL: First matter is item number 1, which is the trustee's motion to modify the retention of Boies Schiller.

THE COURT: And I did sign that order.

MS. FATELL: We appreciate that, Your Honor. And I just wanted to point out, and the order's fine, but there was just a misstatement in the application itself, in that on page 3 where it laid out the terms of the agreement that was correct, but in the chart on page 4, the first box said litigation recoveries exceeding the aggregate sum of 100 million. It should have been litigation recoveries up to 100

1 million.

2 THE COURT: Okay.

3 MS. FATELL: So it's just -- it's a typo but I just  
4 wanted to make sure there was no confusion there.

5 THE COURT: Thank you.

6 MS. FATELL: Okay. The second item, Your Honor, is a  
7 motion that was filed by Berger Singerman to -- excuse me.

8 This is number 2, a motion filed by Berger Singerman  
9 to modify the compensation order for professionals to enable  
10 them to apply their retainer that they were holding.

11 THE COURT: Yes.

12 MS. FATELL: And we had reached an agreement with  
13 them.

14 THE COURT: Yes.

15 MS. FATELL: And we do have a form of order to hand up  
16 if that's okay.

17 THE COURT: Excellent, all right.

18 (Pause)

19 MS. FATELL: Sorry, Your Honor, I thought we had the  
20 form of order. Just to advise the -- we'll submit it under  
21 certification of counsel.

22 THE COURT: All right. And you don't even have to do  
23 a certification if it's the form of order that -- I guess I  
24 haven't seen it, have I?

25 MS. FATELL: You haven't seen it.

1 THE COURT: All right, I'm sorry.

2 MS. FATELL: It's the form of order that was agreed to  
3 by the parties. Basically, they've agreed that they can apply  
4 their retainer amount to the amount owed, and that they have  
5 agreed that they will wait until later in the case to get any  
6 further payments on their outstanding fees.

7 THE COURT: Yes, very well.

8 MS. FATELL: So that was it.

9 THE COURT: That's fine.

10 MS. FATELL: A good resolution for the trustee.

11 THE COURT: Exactly.

12 MS. FATELL: The next items, Your Honor, number 3 and  
13 number 4, actually are tied together. The trustee has reached  
14 a settlement with Autozone with respect to the litigation that  
15 had been outstanding. And we filed a motion to have that  
16 settlement kept under seal.

17 THE COURT: Yes.

18 MS. FATELL: And then we received some informal  
19 objections from the trustee. We thought we had resolved those  
20 before we got over here, but we have not. So Mr. McMahon is in  
21 another hearing right now and asked if we could defer that  
22 until the end of the hearing, because we do have another  
23 contested matter, and then he'll be able to come back and  
24 hopefully either we can resolve it or we'll have to go forward  
25 on the seal issue.

1 THE COURT: Okay.

2 MS. FATELL: We do not have any -- there were two  
3 parties-in-interest, IBM and Novell, who were the large parties  
4 in the litigation with the debtors. They did request that they  
5 be permitted to see the settlement agreements. They filed a  
6 confiden -- signed a confidentiality agreement. With  
7 Autozone's permission they have reviewed the settlement  
8 agreement, they do not have any objections to it.

9 THE COURT: Excellent.

10 MS. FATELL: So we just need to resolve the seal issue  
11 with the United States Trustee.

12 THE COURT: All right.

13 MS. FATELL: Okay.

14 THE COURT: Yes.

15 MS. FATELL: Number 5, Your Honor, is a motion of  
16 Wayne Gray seeking to lift the automatic stay, and I will defer  
17 to counsel for Mr. Gray.

18 THE COURT: Thank you.

19 MS. FATELL: Thank you.

20 THE COURT: Mr. Duhig, good afternoon.

21 MR. DUHIG: Good afternoon, Your Honor.

22 Peter Duhig of Buchanan Ingersoll & Rooney for Mr.  
23 Wayne Gray. With me here is Mr. Thomas Steele who will be  
24 presenting the motion. Your Honor recently entered an order  
25 granting his admission pro hac vice.

1 THE COURT: Yes, I did.

2 MR. DUHIG: And I will cede the podium over to Mr.  
3 Steele.

4 THE COURT: Thank you. Thank you very much.

5 Mr. Steele, welcome. And take time to get yourself  
6 organized. We're supposed to get a bigger podium, but it has  
7 not arrived yet.

8 MR. STEELE: I don't believe that's going to affect my  
9 presentation, Your Honor. Mr. Gray, Wayne Gray is with me, and  
10 I assume it's all right if he sits at counsel table.

11 THE COURT: It certainly is. Mr. Gray, it's good to  
12 have you here, sir.

13 MR. STEELE: Thank you, Your Honor.

14 THE COURT: Yes.

15 MR. STEELE: We anticipate having five exhibits for  
16 the Court.

17 THE COURT: All right.

18 MR. STEELE: And we've already prenumbered them. We  
19 have copies for Ms. Fatell, for the Court. And one of those  
20 documents submitted is going to be an original certified copy.  
21 And what I would like to do would be at the end of the hearing  
22 recover from the Court that original certified copy. And  
23 substitute a copy of that document.

24 THE COURT: I understand. That makes sense to me.  
25 And in an abundance of caution, Mr. Steele, because when I

1 practice my nickname was the squirrel, because people would  
2 give things to me and they would just kind of disappear.  
3 Perhaps, if you just give me the copy I would be satisfied with  
4 that, sir.

5 MR. STEELE: Okay.

6 THE COURT: I have a preliminary question for you  
7 about this, because it's an unusual application and it's  
8 intriguing. And my question is this. Is Mr. Gray a creditor  
9 or a party-in-interest relative to the debtors' estate?

10 MR. STEELE: Or to put it another way, how do we have  
11 standing --

12 THE COURT: Standing, that's -- yes.

13 MR. STEELE: -- to even be here in Wilmington today?

14 THE COURT: Yes.

15 MR. STEELE: First of all, the schedules in this  
16 reflect that Mr. Gray's litigation in Tampa names SCO as a  
17 defendant, so we believe that he has standing based upon that  
18 alone. In addition, he has what we are here -- and I don't  
19 mean to intrude, Your Honor, but has Your Honor had the  
20 opportunity to read some of the papers that we've submitted.

21 THE COURT: Yes, I did.

22 MR. STEELE: Well, you'll understand then that we are  
23 here at what I perceive to be the very clear signal. Judge  
24 Birch of the Eleventh Circuit when he entered the stay order  
25 staying the entire appeal under Section 362(a) of the Federal

1 Bankruptcy Code, I viewed that as a very clear signal for us if  
2 we wanted the appeal to go forward to come over here and file  
3 the kind of motion that we did.

4 THE COURT: Yes.

5 MR. STEELE: I don't pretend to be a mind reader or  
6 anything of that sort. But that's my sense of what Judge Birch  
7 was either expecting or opposing counsel was expecting. So  
8 while that may not have any legal significance, and I can see  
9 the following doesn't, I think that is probably the real  
10 practical reason why we are here.

11 THE COURT: All right.

12 MR. STEELE: Thirdly, we believe that -- and we'll  
13 demonstrate today, Your Honor, that the UNIX marks, and there  
14 are two of them, that are in issue in Mr. Gray's lawsuit and in  
15 the Eleventh Circuit appeal, we will demonstrate to the Court  
16 this afternoon that as of August 3, 2005 the debtors, SCO, was  
17 on a record with the United States Government as being the  
18 owner of the two marks. And we are aware of no transfers  
19 subsequent to that, either before bankruptcy or after  
20 bankruptcy. So we will demonstrate to this Court that SCO is,  
21 in fact, the owner of those two marks.

22 Given that it's Mr. Gray's belief and I share that  
23 believe that SCO's rights, vis-a-vis those two marks should not  
24 be litigated either behind this Court's back or behind SCO's  
25 back in the Eleventh Circuit, SCO should be given a full

1 opportunity to defend those rights, both for itself and for its  
2 creditors.

3 Fourthly, we believe that if SCO were to stand by and  
4 not take action in the Eleventh Circuit that it's ownership of  
5 those marks very well could be jeopardized. And that's where  
6 this Court's jurisdiction comes in in that this Court has the  
7 jurisdiction, the authority and even the duty to make certain  
8 that assets in the debtors' estate are preserved if not  
9 enhanced.

10 THE COURT: Well, that's where I think we go to the  
11 standing issue. I can understand, for example, why -- clearly  
12 under the code, in fact, but as a more practical reason why a  
13 creditor has standing to challenge the debtors' decision on the  
14 litigation front. Whether to proceed to protect its trademarks  
15 or not. But I'm not certain why a non-creditor, a non-party-  
16 in-interest under the Bankruptcy Code has the right to question  
17 that judgment by the debtor. And I think that's the Court's  
18 concern here at the very outset, is as sort of a threshold  
19 issue.

20 MR. STEELE: I think one response to that, Your Honor,  
21 of which we will be prepared to present in detail today, is  
22 that we believe that SCO's clear ownership of the two marks as  
23 of August 3, 2005 in it's own words, in its own writing  
24 submitted to the United States government, coupled with the  
25 fact that it did not list those marks on its schedules filed

1 with this Court, strongly suggest that this Court at this point  
2 has an obligation to -- and I always hesitate to suggest to the  
3 judge that he or she has an obligation.

4 THE COURT: I understand what you mean.

5 MR. STEELE: But to require the trustee to take steps  
6 further than what have been taken here to inquire into the  
7 situation of possible bankruptcy fraud, that it's been brought  
8 to the Court's attention.

9 THE COURT: Well, I don't know whether the debtor or  
10 the trustee, forgive me, but the trustee was prepared to  
11 discuss that legal issue at the outset. But, you know, I did  
12 do just a little bit of research and there's a Johns Mansville  
13 case which I thought made it pretty clear in my mind that, you  
14 know, as not a creditor or debtor that Section 362 of the code  
15 did not provide standing to a third-party to question what is,  
16 in effect, an economic issue for the debtor.

17 Now, you've come a long way and I am prepared to hear  
18 your case, I think. You know, I'm not trying to foreclose you  
19 from presenting evidence, but it may well be that as an  
20 initial, and I suppose determinative, legal ruling that I just  
21 don't know that Mr. Gray is a proper party to be raising the --  
22 or challenging the judgment by the debtor as to how to proceed  
23 in protecting or not protecting its assets. There are business  
24 decisions that come into play and that sort of thing.

25 Ms. Fatell -- if I may just interrupt you just for a

1 moment, Mr. Steele, as you proceed, perhaps this is something  
2 that you're prepared to address.

3 MS. FATELL: Your Honor, we did not specifically  
4 direct the Court to the standing issue but certainly addressed  
5 our questions as to how a third-party --

6 THE COURT: Yes.

7 MS. FATELL: -- not a party to any of the agreements  
8 that they are challenging in connection with the debtor would  
9 have the right to come into this Court and ask the Court to  
10 direct the trustee to investigate certain assets -- alleged  
11 assets and to take certain actions at the expense of the estate  
12 without anything further. I understand if they're saying they  
13 had a cause of action against the debtor and they wanted to  
14 proceed and they wanted to come in and get stay relief to  
15 proceed, or to proceed in that action and carve out the debtor.  
16 That's not what they're asking here. They're asking that the  
17 Court direct the debtor to investigate. And I couldn't find  
18 anything that indicated that they were a creditor or  
19 shareholder. I did inquire that of counsel for Mr. Gray, I  
20 didn't get a response. So I have no idea what their issue is  
21 to ask this Court to compel the trustee to do something in this  
22 regard.

23 In addition, this is the first time I have heard any  
24 allegation that there is possibly some fraudulent filing of  
25 schedules in this case. And I certainly am not prepared to

1 address that. We weren't even around at that time. So I  
2 think, you know, to raise that issues at this point in time is  
3 inappropriate.

4 THE COURT: Well, it just seems to me that it should  
5 be within the province of the debtor to determine what actions  
6 it's going to take with regard to its assets and its business.  
7 And I don't know that a non -- a party that does not have an  
8 economic interest has the right to raise that issue.

9 MS. FATELL: Your Honor, we certainly agree with the  
10 Court. And before Mr. Steele goes through I haven't seen his  
11 exhibits.

12 THE COURT: Okay.

13 MS. FATELL: I don't know what evidence he plans to  
14 put on. But I actually was going to suggest that perhaps we  
15 should just have oral argument on the relief requested before  
16 we even get into the merits. The merits of the underlying  
17 cause of action don't really seem to be the primary issue  
18 before the Court. The question is does the movant have the  
19 basis for the Court to grant the stay relief requested.

20 MR. STEELE: I guess my response to that, Judge, would  
21 be, I think --

22 THE COURT: Yes.

23 MR. STEELE: -- that before we conveniently discuss  
24 relief we need to talk about the pertinent facts here.

25 THE COURT: I would say this, because as I've

1 indicated, counsel has come a long way, and your client as  
2 well, and let me hear -- how long do you think your case will  
3 take to put in? And I'm not asking that to rush you, I just  
4 want a sense in determining how we proceed.

5 MR. STEELE: Assuming no breaks, I should be finished  
6 in fifteen minutes maximum.

7 THE COURT: Oh, okay. Then let's do this. Let me  
8 hear you on, in effect, the factual merits of your case and  
9 then we'll proceed to oral argument.

10 MR. STEELE: If I could briefly respond to one of the  
11 things that Ms. Fatell said. I believe that Mr. Gray having an  
12 existing cause of action as alleged in the Florida District  
13 Court case, is, in fact, qualified as a creditor. Plus, what  
14 we are simply doing, reduced, I think, to its essence, is  
15 pointing out to the Court what we believe is a situation where  
16 there's a high degree that the debtor is wasting or is  
17 preparing to waste certain valuable assets.

18 THE COURT: See, that's where I think it's pretty  
19 clear you don't have standing. But let me hear from you on the  
20 merits. Proceed.

21 MR. STEELE: I appreciate it, Judge.

22 If I could, Your Honor --

23 THE COURT: Yes.

24 MR. STEELE: -- I guess I can skip over the part about  
25 my name being Thomas Steele, and may it please the Court.

1 THE COURT: It does, certainly, Mr. Steele.

2 MR. STEELE: Mr. Gray and I are here today, and able  
3 counsel, BJ as opposed to Mr. Duhig, we seek an order from this  
4 Court lifting the automatic stay to enable SCO to defend its  
5 undisputed ownership rights in the valuable UNIX marks in the  
6 Eleventh Circuit. And what other forum may be appropriate.

7 The pertinent documents in our view demonstrate beyond  
8 question that the debtor, SCO, owns these trademarks. And that  
9 these trademarks are extremely valuable trademarks, whose value  
10 dwarfs the value of the other assets of the estate.

11 Mr. Gray consistently has taken the position  
12 throughout this case that the marks, in fact, belong to the SCO  
13 Group, now the debtor, SCO, both in the Florida District Court  
14 action, the Eleventh Circuit and before this Court.

15 May I approach, Your Honor?

16 THE COURT: You may, yes, certainly, Mr. Steele.

17 MR. STEELE: What I'm handing the Court, then, the  
18 Court's suggestion is Movant's Exhibit Number 1.

19 THE COURT: Yes.

20 MR. STEELE: This is a response to office action. And  
21 you'll note at the end of it that it is dated August 3, 2005.

22 THE COURT: And this is the document I assume where  
23 you do have an original certified copy, that's what you.

24 MR. STEELE: We do. We do.

25 THE COURT: Okay, very well, sir. Thank you.

1 MR. STEELE: I would direct the Court's attention to  
2 page 4. Because the entire theory of Mr. Gray's case is that  
3 in 1995 there was a transaction whereby Novell sold the UNIX  
4 business, including the licenses, the trademarks, the whole  
5 shooting match, if you will, to a company called Santa Cruz.  
6 And then Santa Cruz thereafter never transferred anything back  
7 to Novell. Novell then in 1998 executed a deed of assignment  
8 to a company called X Open, and we're challenging that date of  
9 assignment.

10 As a peripheral issue, though, in this case, we see  
11 that our theory of this entire case in terms of the relevant  
12 transactions is set forth in detail on page 4 of Movant's 1.  
13 And here in the SCO's own words, through SCO's own attorney,  
14 while SCO is in the process of responding to an objection by  
15 the United States Patent and Trademark Office, SCO's lawyer  
16 says that the assets were sold to Santa Cruz, as part of the  
17 transaction Novell assigned the UNIX and UNIX were trademarks  
18 to Santa Cruz. Santa Cruz subsequently assigned those to  
19 Coldera. Coldera changed its name. And here we are with the  
20 debtor, SCO.

21 THE COURT: Yes, I'm very familiar with that corporate  
22 history.

23 MR. STEELE: To the very best of our knowledge there's  
24 never been a transaction whereby Santa Cruz, Coldera, or the  
25 SCO Group ever transferred either the business, the good will

1 associated with the business, or the UNIX trademarks back to  
2 Novell. So the net result of this Movant's Exhibit Number 1 is  
3 in our view to establish beyond peradventure that SCO, in fact,  
4 owns these marks today. Unless sometime during -- from August  
5 3, 2005 to the present they sold them and we're not aware of  
6 any document reflecting any such transaction.

7 What's important about this and to summarize this, is  
8 SCO applied to register this UNIX systems laboratories, or  
9 system laboratories mark. The trademark examiner said wo,  
10 that's going to be --

11 MS. FATELL: Objection, Your Honor. We're going way  
12 beyond admitting a doc -- moving a document into evidence.

13 THE COURT: Yes.

14 MS. FATELL: And I'm going to object to all of this as  
15 hearsay.

16 THE COURT: Hearsay, I'll sustain that objection.

17 MR. STEELE: All right. The importance of this  
18 document, Your Honor, is that it was submitted to the USPTO in  
19 response to clarifying the concerns of the PTO as expressed and  
20 summarized in this document that there was going to be a  
21 likelihood of confusion. The net result was that the lawyer  
22 for SCO said there's not going --

23 MS. FATELL: Objection, Your Honor, the document  
24 speaks for itself. Again, that's hearsay.

25 THE COURT: Yes.

1 MR. STEELE: No, I agree.

2 THE COURT: Sustained.

3 MR. STEELE: The result was for SCO to state very  
4 clearly that since as it states on page 4 there can't be a  
5 likelihood of confusion because the mark has been assigned to  
6 one of our units.

7 So with that there's --

8 MS. FATELL: Objection again, Your Honor. I'm sorry,  
9 but that's not what this document says.

10 MR. STEELE: We conceded the document speaks for  
11 itself.

12 MS. FATELL: Whatever the document says it says.

13 THE COURT: Yes.

14 MR. STEELE: And the document states very clearly on  
15 page 4 that Novell assigned the units, skip, skip, trademarks  
16 to Santa Cruz.

17 So in our view, based upon this document, Judge, there  
18 is at least a strong inference, it's not a conclusive one, that  
19 SCO owns the UNIX marks today.

20 Now, we move onto Movant's Exhibit Number 2. Your  
21 Honor, we would move Exhibit Number 1 into evidence at this  
22 time?

23 THE COURT: Any objection?

24 (Pause)

25 MS. FATELL: I'm sorry, Your Honor.

1 THE COURT: No, take your time.

2 MS. FATELL: Your Honor, I've never seen this document  
3 before. I have no idea who Kelly Carlton is. And I'm not sure  
4 what it's being submitted for or what relevance it is, so I  
5 think I have to object. I don't know anything about this  
6 document.

7 THE COURT: All right. Well, why don't we do this --

8 MS. FATELL: And there's also -- I'm sorry.

9 THE COURT: No, please.

10 MS. FATELL: There's also no witness here to identify  
11 this document.

12 THE COURT: Right. Well, let me do this, I understand  
13 the objection. I'm going to reserve a ruling on the objection  
14 until the end, until I've seen the other evidence.

15 MR. STEELE: That's fair enough. I have put before  
16 you, Your Honor, Movant's Exhibit Number 2.

17 THE COURT: Yes.

18 MR. STEELE: And this is a direct -- a copy of the  
19 declaration filed in the Utah litigation between the SCO Group  
20 and Novell. And I direct the Court's attention to page 2 of  
21 the minutes that are attached. And they read, "Novell will  
22 retain all of its patents, trademarks, copyrights and  
23 trademarks (except for the trademarks UNIX and UNIX where) a  
24 royalty for your perpetual worldwide license back to UNIX and  
25 UNIX where for internal use and resale in bundled products,

1 tuxedo and other miscellaneous unrelated technology."

2 This was a document produced by SCO in connection with  
3 the litigation. It's also a document that is referred to and  
4 is part of the record in the litigation that was in the Tenth  
5 Circuit, it's now back in the District of Utah.

6 THE COURT: Yes.

7 MR. STEELE: As such, we believe that this Court can  
8 take judicial notice of a filing in another Court by someone  
9 who has signed on behalf of a party to that litigation.

10 And the purpose of this document is simply to  
11 demonstrate that the entire -- so far as Novell is concerned,  
12 the trademarks transfer, the UNIX trademarks transfer.

13 MS. FATELL: Objection, Your Honor. I think that that  
14 states way beyond whatever this document says. The document  
15 speaks for itself.

16 THE COURT: I think that's correct.

17 MS. FATELL: It's also a document taken out of context  
18 and presented to the Court in a total vacuum. So I would  
19 object on that one, too.

20 THE COURT: I'll sustain the objection certainly on  
21 anything beyond what the document, itself, states. I have seen  
22 this document before in connection with the underlying  
23 bankruptcy issues. And I think probably both sides submitted  
24 this at one point, but I will admit it into evidence, again,  
25 just simply for the purpose of what the document states.

1 MR. STEELE: Thank you, Your Honor. Let me now  
2 present the Court Movant's Exhibit 3.

3 THE COURT: Yes, sir. Thank you. And this was a  
4 document filed by SCO in the same Utah litigation.

5 And in this document, if I could direct the Court's  
6 attention to page 7, SCO through the declaration as quoted  
7 here, but SCO takes the position with the Court that the asset  
8 purchase agreement as well as the technology licensing  
9 agreement on compete provisions were intended to protect the  
10 value of SCO's newly acquired worldwide UNIX business and good  
11 will. That same memorandum goes on on page 11 on paragraph 26,  
12 SCO states that -- and I won't read the entire amount, but that  
13 the sale includes good will, trade names and other intangibles.  
14 And that it's a broad transfer of all rights and ownership of  
15 UNIX and UNIX wear, including the good will Novell had  
16 developed. And it quotes from a Peter Marwick report.

17 Then on page 39 of that same document it makes the  
18 point that in connection with the transfer of the UNIX business  
19 everything transferred except for the excluded assets and that  
20 the -- and without limitation. So that's the business without  
21 limitation, the license agreement without limitation. And the  
22 UNIX and UNIX were trademarks. And the point was made that  
23 they did not have to identify good will as an excluded asset  
24 because it was an included assets. So, clearly, the mark by  
25 here SCO is quite clearly stating its analysis of the document

1 and how the document works. And if I could have -- first of  
2 all, I'd like to move --

3 MS. FATELL: Objection. Your Honor, I'm just going to  
4 have a continuing objection. There's a lot of hearsay here,  
5 there's a lot of assumptions, there's a lot of conclusions, and  
6 I would object to all of those statements.

7 THE COURT: You know it is difficult. First of all,  
8 this memorandum was challenged, so I'm certainly not going to  
9 admit it for the truth asserted in the document. I think --  
10 generally speaking, memoranda of law or not exhibits other than  
11 for the purpose of showing an argument that was made by a  
12 party. And I am prepared to admit it into evidence for that  
13 very limited purpose.

14 MR. STEELE: That's --

15 THE COURT: Mainly, that SCO did make the arguments  
16 contained within this memorandum of law. But I make no finding  
17 as to the truth or accuracy of the statements.

18 MR. STEELE: No. We agree with Your Honor  
19 wholeheartedly that the whole purpose of admitting this  
20 document was to show not only the arguments that they made but  
21 the approach that they took to the interpretation of the asset  
22 purchase agreement.

23 And then Movant's Exhibit 4.

24 THE COURT: Thank you, Mr. Steele.

25 MR. STEELE: Movant's Exhibit 4 is a document that was

1 filed in that same litigation by Novell and it is being  
2 admitted for precisely the same purposes, that here Novell is  
3 conceding that the trademarks cancelled. That is it's official  
4 position in connection with that litigation.

5 MS. FATELL: Objection, Your Honor, the document  
6 speaks for itself.

7 THE COURT: And I will admit it for that purpose. Or  
8 I should say with that limitation.

9 MR. STEELE: Correct. And the last document, Your  
10 Honor, Movant's Exhibit Number 5, is another Novell memorandum  
11 submitted in that precise litigation.

12 THE COURT: Yes.

13 MR. STEELE: Submitted for exactly the same purpose.  
14 Noting on page 56 that here Novell states, and I quote on page  
15 56 at line 8 down, "The APA did transfer UNIX and UNIX  
16 trademarks to Santa Cruz (to the extent owned by Novell)." And  
17 then it goes on to say, "But explicitly excluded all patents  
18 and all copyrights."

19 So what we have here in summary, Judge, is that we  
20 have a situation where throughout the SCO/Novell litigation in  
21 Utah, both SCO and Novell concede to that Court that the  
22 trademark was transferred.

23 MS. FATELL: Objection, Your Honor. Hear --  
24 objection, Your Honor.

25 MR. STEELE: Excuse me.

1 THE COURT: Well --

2 MR. STEELE: Let me finish my sentence before you  
3 object.

4 THE COURT: I understand the objection. Well, I am  
5 considering this at this point as argument.

6 MS. FATELL: Fine, that's fine, Your Honor.

7 THE COURT: We don't have a witness. Mr. Steele's  
8 integrity is not in question at all and he's an officer of the  
9 Court. But, nonetheless, it's certainly not testimony, it's  
10 argument.

11 MR. STEELE: I agree. If I had a witness to put on I  
12 would.

13 THE COURT: Yes.

14 MR. STEELE: So in sum, and to make it clear, this is  
15 my wrap-up argument and I'm doing my best to come within twenty  
16 percent or so of my original estimate.

17 Our view here is today as supported by these documents  
18 is that, number one, it's crystal clear that SCO owns these  
19 trademarks, in its own words. The Patent Trademark Office, no  
20 response to the certified document we gave you or offered to  
21 you and substituted, makes clear SCO owns these marks.

22 Secondly, we are very concerned that SCO disavows any  
23 interest in these trademarks, that it steadfastly resists our  
24 requests that it protect those marks in the Eleventh Circuit.  
25 We believe that -- and, again, as I said Judge Birch -- I'm not

1 a mind reader of Judge Birch, but I think that Judge Birch's  
2 order required us to do precisely what we have done here today,  
3 namely make these arguments to this Court.

4 Throughout this litigation I think one of the defenses  
5 that we have continually confronted is the effort to  
6 characterize Mr. Gray as some sort of pariah, if you will, some  
7 kind of litigation gadfly. In all litigation, Your Honor, we  
8 confront people who -- witnesses who have versions of the truth  
9 that they may or may not believe, but that they tell.

10 We suggest to the Court that the better approach to  
11 follow the truth here is to follow the documents. And the  
12 documents lead inexorably to the document Movant's Exhibit  
13 Number 1, where SCO's lawyers says to the government in an  
14 official document that SCO's got ownership rights in these  
15 marks. There's no question about that.

16 So we're confident that Judge Birch read the briefs  
17 and that led to entry of his order, and that led us here.  
18 Whether we have standing or not, and we believe that we do, we  
19 believe that this configuration of facts demonstrates that  
20 these are assets that are in grave danger of being wasted and  
21 that this Court should take action to remedy that.

22 So anticipating this Court's question, I anticipated  
23 the Court's question on standing, I anticipate that this Court  
24 at some point would say to me all right, let's say I find  
25 standing, what the heck do you want from me? Okay. I mean no

1       disrespect, Your Honor, I just sense that we are rapidly  
2       approaching the point where you would be interested in the  
3       concept of remedy.

4               THE COURT:   Yes.

5               MR. STEELE:   Well, first of all, you know, Mr. Gray  
6       seeks entry of an order lifting the automatic stay to permit  
7       SCO to take whatever steps it deems necessary to protect its  
8       undisputed rights in the UNIX trademarks, in the Eleventh  
9       Circuit and elsewhere.

10              I was thoroughly taken to task by Ms. Fatell for not  
11      discussing certain documents in her opposition.   Well, with all  
12      due respect and most gently, Ms. Fatell had full access to the  
13      PTO or to the opposition -- excuse me, the response, Movant's  
14      1, didn't address it.   And we consider that, and I know that  
15      this Court at times has used the phrase a Perry Mason moment,  
16      or a smoking gun, we consider that to be a smoking gun here.  
17      Because there's no other explanation around it.

18              So what we want and what we want this Court to order  
19      is the lifting of the stay.   What -- we also suggest, though,  
20      that this Court enter an order directing the U.S. Trustee, and  
21      not the special trustee, to represent the debtor, SCO, before  
22      the Eleventh Circuit.   We are very concerned that we ask the  
23      special trustee and his counsel to evaluate the situation,  
24      provided them with copies of briefs and with literally hundreds  
25      of documents, including this document, which we consider to be

1 a very important document that is referred to on the very first  
2 page, the filing that we made with this Court, utterly ignored.

3 So so far as we're concerned the U.S. Trustee should  
4 investigate this.

5 Secondly, we would ask this Court to enter an order  
6 referring this matter to the United States Attorney with a  
7 request that she investigate the possible bankruptcy fraud  
8 arising out of what we believe to be a willful concealment of  
9 the ownership of the UNIX trademarks. We believe that there's  
10 a continuing concealment of this ownership.

11 So in light of the statements submitted by Novell and  
12 by SCO that we have put before the Court, true or not I agree  
13 with the Court, it makes no difference. But these are  
14 representations that they made in Utah to Judge Kimball in that  
15 Court. That the trademarks passed, that they went to Santa  
16 Cruz, there's no evidence that those trademarks ever went back  
17 from Santa Cruz to Novell. Rather, they went up the line and  
18 they now reside in the sole ownership of SCO.

19 Lastly, Your Honor, I would suggest --

20 THE COURT: And the reason this is significant just so  
21 I'm clear, Mr. Steele, the reason this is of importance to your  
22 client is that Novell assigned its trademark to another party?

23 MR. STEELE: Purportedly.

24 THE COURT: Purportedly assigned a trademark that you  
25 would argue it did not own to another party. And that that is

1 harming Mr. Gray's interest?

2 MR. STEELE: That that is harming, both SCO's interest  
3 and Mr. Gray's interest.

4 THE COURT: And how is it harming Mr. Gray's interest?

5 MR. STEELE: Well, with respect to Mr. Gray that, what  
6 we consider to be fraudulent deed of assignment in 1998, Novell  
7 purported to transfer exactly the same marks that are referred  
8 to in Movant's Exhibit Number 1, exactly the same marks to a  
9 company -- X Open Company Ltd.

10 THE COURT: Yes.

11 MR. STEELE: Along with the business and the goodwill  
12 associated with those marks. But the business and the goodwill  
13 associated with those marks had gone in 1995 via the APA and  
14 the bill of sale to Santa Cruz. And there's not a shred of  
15 evidence reflecting that Santa Cruz ever transferred the marks,  
16 the good will and the business back to Novell so that it could  
17 then go on and make an appropriate transfer. Because as this  
18 Court knows, I can't just give you a trademark unassociated  
19 with good will or unassociated with the business connected to  
20 it. It's a package, it's a box, it has three things in it. It  
21 has a business, it has the good will of the business, and has  
22 the trademarks.

23 THE COURT: And is Mr. Gray's business in competition  
24 with the purported transferee from Novell?

25 MR. STEELE: Could be.

1 THE COURT: Could be?

2 MR. STEELE: We're dealing with a potential  
3 competition issue here.

4 THE COURT: Okay.

5 MR. STEELE: But what is -- what I will wrap up with,  
6 the final killer on, we believe, on that issue is that when  
7 Novell sold the UNIX business, the UNIX licenses, the UNIX  
8 marks, the entire UNIX business to Santa Cruz Novell signed  
9 restrictive covenants saying we're out of this business, we  
10 promise not to get back into it. So, therefore, as those marks  
11 and the business win their way up the chain -- the chain of  
12 title to SCO, what business did Novell have when it signed the  
13 deed of assignment saying we transfer these marks to the other  
14 with the business and the goodwill associated with them to X  
15 Open and didn't have the business, and it didn't have the good  
16 will and we say it didn't even have the marks.

17 That takes us a little far afield from where we are  
18 today in the purpose of our trip up here. And, mainly, that  
19 our view is that if the Eleventh Circuit goes ahead and  
20 considers the appeal without the presence of SCO and SCO  
21 asserting its position within the context of that appeal, that  
22 SCO is at risk in two very clear ways.

23 One, SCO's rights, if you will, would be being  
24 litigated not before this Court, they would be being litigated  
25 somewhere else where it wasn't participating.

1 THE COURT: Is it fair for me to conclude that the  
2 reason you or Mr. Gray needs SCO's involvement in that appeal  
3 is because there is a serious question as to Mr. Gray's  
4 standing to assert that appeal?

5 MR. STEELE: No. No. I think if I have led this  
6 Court astray I apologize. There is no need on Mr. Gray's part  
7 for SCO to participate in that appeal.

8 THE COURT: Okay.

9 MR. STEELE: You know, we can line up three judges  
10 from the Eleventh Circuit and I'll argue it right now. We  
11 don't need anything from SCO; factual, legal or otherwise.

12 We believe to the contrary, though, that number one,  
13 what it's really doing is that it's adjudicating SCO's rights  
14 to these marks. SCO's not there. SCO is litigating through --  
15 if you will, the proxy of Mr. Gray.

16 Secondly, to the extent that SCO does not participate  
17 in that appeal -- I guess not secondly, but of a related  
18 matter, SCO runs the risk that the Court -- the Eleventh  
19 Circuit may well declare abandonment, because X Open has taken  
20 the position in its brief that it may well have only common law  
21 rights here. And that, therefore, puts at risk SCO's rights to  
22 the two registered marks, the two registered UNIX marks.

23 So if you will, and what I think Judge Birch probably  
24 perceived, was that X Open's rights in these marks are being  
25 litigated behind its back, behind this Court's back and behind

1 the backs of the creditors here. So unless SCO is given an  
2 opportunity to participate in that appeal, in full and fair  
3 fashion, then the litigation of its rights without it being  
4 present may well have a direct and immediate impact on the  
5 assets available in this bankruptcy proceeding.

6 THE COURT: Well, you know, there are a lot of reasons  
7 that SCO may not be proceeding at this time. It's in  
8 bankruptcy, it has some significant matters that it's attending  
9 to, a trustee has just been recently appointed who is working  
10 very hard to make a determination as to what -- which of  
11 various litigations are worth pursuing and any number of  
12 business issues.

13 One of the benefits of the automatic stay for a debtor  
14 is to provide the debtor, here in this case represented by the  
15 trustee -- the Chapter 11 trustee, with an opportunity to  
16 perform various functions and to determine what litigations to  
17 pursue or not to pursue.

18 And I'll hear from Ms. Fatell in just a moment, but it  
19 seems to me that parties such as Mr. Gray is not in a position  
20 to make a determination of SCO's interests and what to pursue  
21 when, and how to prioritize its affairs and matters of that  
22 kind. But why don't I hear from Ms. Fatell, at least briefly,  
23 on the issues, because, for example, you mentioned that Mr.  
24 Gray is, in effect, SCO's proxy. Clearly, he can't be SCO's  
25 proxy. And I think that that may as much as anything be of

1 concern to the judge in the Eleventh Circuit, but I'll hear  
2 from Ms. Fatell, if I may.

3 MR. STEELE: Your Honor, thank you very much for  
4 entertaining us this afternoon -- a Friday afternoon. I'll  
5 just leave you with this one thought.

6 THE COURT: Yes, sir.

7 MR. STEELE: And that would be this. I went to school  
8 in Louisiana, and as the Court's probably aware that's a civil-  
9 coded state.

10 THE COURT: It is.

11 MR. STEELE: And I had this funny little green book  
12 from 1972 that has the entire Louisiana civil code in it, which  
13 has always fascinated me.

14 But one of the civil code provisions says, in effect,  
15 for every right -- or rather, for every wrong there is a  
16 correction.

17 THE COURT: Yes.

18 MR. STEELE: It's not the pure common law correlative  
19 rights duties kind of analysis that common law students learn.

20 Our view of it was this, stated very succinctly and  
21 very simply. Putting all legal issues aside, we believe -- Mr.  
22 Gray believed, that when we called to Ms. Fatell's attention  
23 these facts, provided to her the copies of all of the briefs  
24 that were filed, pretty detailed response, that if we had  
25 gotten a response back saying gee, that sounds pretty

1 interesting, you've given me kind of a tight time limit here,  
2 can I have until the December 30th meeting to really take a  
3 look at and investigate this, that would have been one thing.  
4 But we got back what can only be characterized charitably as a  
5 very cursory non-factual response. And that response led us to  
6 conclude that it's not Mr. Gray's decision as to what to do,  
7 it's ultimately this Court's decision. And that's why we came  
8 to this Court. If we don't have standing before this Court so  
9 be it, I'll report that to the Eleventh Circuit whenever this  
10 Court rules. But I think we have fulfilled the obligations as  
11 I see it that Judge Birch imposed upon us.

12 And, again, thank you, Your Honor, for entertaining us  
13 on --

14 THE COURT: Thank you, Mr. Steele, for an interesting  
15 argument.

16 MR. STEELE: And all I did was prove I'm a typical  
17 lawyer that can't estimate time.

18 THE COURT: I happen to like lawyers very much, and I  
19 don't mind.

20 Ms. Fatell.

21 MS. FATELL: If it please the Court. Your Honor, I  
22 think what I'd like to do is actually go through my argument,  
23 if I may --

24 THE COURT: Please.

25 MS. FATELL: -- and then come back and address some of

1 the points.

2 THE COURT: Yes.

3 MS. FATELL: I do want to go a little bit out of order  
4 and at least just respond to the standing question. Attached  
5 as an Exhibit to our objection was the opinion from the  
6 District Court -- bear with me for just one moment, for the  
7 Middle District of Florida, the Tampa Division, in connection  
8 with the action that Mr. Gray has taken an appeal to the  
9 Eleventh Circuit on. And that was the action by Gray against  
10 Novell, the SCO Group and X Open Ltd. -- X Open Company Ltd. in  
11 which the District Court basically found in favor of all of the  
12 defendants and dismissed the action completely, which is now  
13 what's on appeal.

14 In footnote number 9, which is continued -- starts on  
15 page 30 and is continued on page 31, and I'll quote from the  
16 Court, "Gray's arguments are even less persuasive in light of  
17 the fact that he was not a party or an intended beneficiary to  
18 these contracts, and, therefore, has no standing to challenge  
19 defense's assertions as to their intent into entering the  
20 subject contracts." And I think that really goes to the heart  
21 of this, Your Honor.

22 This litigation has been going on for quite some time.  
23 And Mr. Steele referred the Court to a number of pleadings that  
24 were filed in a separate action, which is pending in the -- in  
25 courts in Utah, in the federal courts in Utah. And Gray is not

1 a party to that action, Gray was not involved in any of the  
2 discovery in that action. Gray was not -- I think he  
3 petitioned the Court to be able to file an amicus brief, the  
4 docket doesn't reflect that that was filed, so I'm assuming --  
5 and it was opposed by SCO and others. So I can only assume  
6 that the court denied that request, I didn't see that on the  
7 docket.

8 So to put those documents into "evidence" in this  
9 Court to justify why this Court should grant stay relief to, in  
10 essence, and I have to say this, force the trustee to  
11 investigate and take an action with respect to this matter in  
12 the Eleventh Circuit is really -- it's irrelevant and it's,  
13 quite frankly, it's pretty baffling to the trustee.

14 Let me start basically with what we're here for, which  
15 is Gray's motion for stay relief.

16 THE COURT: Yes.

17 MS. FATELL: And he has the burden to show that there  
18 will be no prejudice to this estate. That in balancing the  
19 hardships there will be less hardship on the debtor than there  
20 will be by Mr. Gray by granting the relief, and the probable  
21 success on the merits. The only thing we've heard, Your Honor,  
22 is Mr. Gray's assertion that he will succeed on the merits into  
23 the underlying action.

24 I need to point out to the Court that when that  
25 underlying action was first filed there was a complaint filed

1 that had, I believe, something like 180-some paragraphs. It  
2 was filed against SCO, against Novell and against X Open by Mr.  
3 Gray. And in that complaint accused those three parties of a  
4 conspiracy, of counts of fraud under RICO, and I can go on and  
5 on and on.

6 And that was filed in October of 2006. And I think  
7 this timeline is important, Your Honor.

8 THE COURT: All right.

9 MS. FATELL: SCO filed a motion to dismiss that in  
10 January of 2007. Subsequently, on September 14, 2007, SCO  
11 Filed its Chapter 11 petition. And in September, also, on the  
12 18th, the Florida District Court entered a stay order as to  
13 SCO.

14 Nevertheless, Mr. Gray and the other defendants  
15 proceeded in that action even though SCO was not participating.  
16 And on June 26, 2008 X Open filed a motion for summary  
17 judgment, Novell joined in, at some point Mr. Gray filed a  
18 motion for summary judgment. On January 30, 2009, so this was  
19 approximately a seventh-month period, briefing was completed.  
20 Again, SCO was not involved in that at all. Mr. Gray was quite  
21 happy to go forward with that action. And On February 20,  
22 2009, the District Court ruled to dismiss the complaint as to  
23 all defendants. And, now, on the appeal to the Eleventh  
24 Circuit Mr. Gray is concerned that SCO is not participating.  
25 SCO, being the party that Mr. Gray sued for conspiracy and RICO

1 fraud, he's now concerned that SCO has some valuable assets  
2 that are not being protected.

3 So, Your Honor, when he talks about the probability of  
4 success and why he needs stay relief and the lack of prejudice  
5 to the debtor, I think he fails to recognize that the debtor is  
6 not a party to the transaction that he is disputing. Mr. Gray,  
7 as far as I understand it, sought to use a particular  
8 trademark. X Open challenged his right to use that trademark.  
9 And, suddenly, Mr. Gray became the investigator, the decider of  
10 facts, evidence and the law, and concluded on his own that lo  
11 and behold SCO was the owner of that trademark. And it was not  
12 properly transferred to X Open and, therefore, SCO should play  
13 a particular role in this litigation.

14 Your Honor, the trustee has reviewed as many of the  
15 pleadings as he can in this litigation, carefully considered  
16 the District Court's order, and I will point to some provisions  
17 in the order I'd like the Court to consider, spoken with  
18 counsel for SCO who handled the response initially to this  
19 action when it was in the Court in Florida, and looked at  
20 various documents including what's referenced in Mr. Gray's  
21 pleadings as this confirmation agreement which specifically,  
22 it's redacted, but I think the Court can tell from what's  
23 available in the unredacted portion, and if the Court would  
24 like I have the unredacted portion that the Court can review if  
25 we're going that far into the merits. But, essentially, it is

1 the position of SCO, Novell and X Open that pursuant to this  
2 confirmation agreement that the trademarks were transferred and  
3 registered with X Open and that SCO does not claim an ownership  
4 right to those trademarks. That's history.

5 And the trustee does not believe that there is any  
6 reason to go back and try and undue that history at great cost  
7 to the estate.

8 The Court is being asked to lift the stay and to  
9 direct the trustee.

10 THE COURT: Yes.

11 MS. FATELL: To spend money to investigate and then  
12 possibly conduct discovery. In fact, in Mr. Steele's comments  
13 he said that he wants this Court to lift the stay so that it  
14 can proceed with SCO and SCO can assert its rights. Well, what  
15 happens if the Court lifts the stay and SCO doesn't assert any  
16 rights, are we going to have Mr. Gray back in this Court  
17 asserting that we should be reported to the U.S. Attorney and  
18 that we're acting in violation of our duties as a Chapter 11  
19 trustee because we did not assert rights that he believes SCO  
20 may have, even though SCO, who was a party to all of the  
21 agreements, and Mr. Gray was not, SCO concludes that it does  
22 not have an interest in the issue that's in dispute with Mr.  
23 Gray and X Open.

24 Your Honor, in turning to the District Court's order  
25 and I want to just, if I may, read a couple of provisions from

1 the order, because I think they're -- the Court's findings are  
2 very important. The Court considered the summary judgment  
3 motions of all parties. And at page 23 I will quote, "The  
4 Court finds that the documentary evidence in this case supports  
5 Novell and X Open's contentions that Novell granted X Open and  
6 exclusive license for the UNIX mark in May 1994 and that it  
7 intended to transfer ownership of the marks to X Open at some  
8 time thereafter. That SCO documented its agreement to that  
9 transfer in the 1996 confirmation agreement. And that the  
10 marks were lawfully transferred to X Open by operation of the  
11 1998 deed of transfer."

12 The court later states paragraph -- excuse me, at page  
13 27, consequently, based on the clear and unambiguous language  
14 of the 1996 confirmation agreement, the Court concludes that  
15 the subsequent 1998 deed of assignment validly passed ownership  
16 of the UNIX trademark to X Open as of November 13, 1998." The  
17 Court goes on on the following page, page 28, and says, "Gray  
18 offers absolutely no evidence to support his allegation that  
19 defendants fraudulently created these documents after the fact  
20 and backdated them in an effort to validate the 1998 recording  
21 of the assignment with the patent and trademark office."

22 The Court further states at the end of page 30,  
23 carrying on to page 31, "Importantly, there is no evidence of  
24 any dispute between SCO and Novell after execution of the 1995  
25 APA regarding interpretation of the 'to the extent held by

1 seller' language. SCO never challenged Novell's 1998  
2 assignment of the UNIX marks to X Open or X Open's subsequent  
3 recording of that assignment with the PTA," that's the Patent  
4 and Trademark Office.

5 THE COURT: Yes.

6 MS. FATELL: "In fact, the evidence shows that SCO  
7 publicly acknowledged X Open's ownership of the UNIX mark after  
8 that time."

9 Your Honor, the District Court had considerably more  
10 time than this Court has had to examine the documents, review  
11 the evidence before it, look at the arguments made in the  
12 summary judgment motion, examine the confirmation agreement  
13 which, in our view, is the critical document and reached the  
14 conclusion that there was no claim that Mr. Gray had against  
15 any of those defendants. And, certainly, based on the things  
16 that I've just stated recognized that SCO had no claim to the  
17 ownership of the trademark that lies with X Open presently.

18 Based on that, Your Honor, as well as everything else  
19 that I've described the trustee has done, the trustee can find  
20 no reason why it should be spending money from this estate to  
21 investigate something that somebody else thinks might be  
22 helpful to them, but not to this estate. There's been no  
23 evidence that there's either an ownership interest or a right  
24 to the interest. There's been no evidence as to the value of  
25 that mark. In fact, Your Honor, if Mr. Gray is correct and the

1 mark belongs to SCO, first of all, SCO will have to incur  
2 tremendous expense to litigate that.

3 THE COURT: Yes.

4 MS. FATELL: But then, secondly, SCO is going to be  
5 adversely to Mr. Gray on the same grounds, I would presume, that  
6 X Open is adverse to Mr. Gray. So, again, the trustee  
7 questions what are we doing here and what is this all about.

8 If SCO truly thought that this mark was one of its  
9 assets, and invaluable asset, first of all, it would have  
10 disclosed it on its statement of assets and schedules of  
11 financial affairs. I don't know for what reason it would have  
12 sought to defraud anybody by leaving such a valuable asset off  
13 of its schedules. It would have participated in this  
14 litigation years ago. It has one of the best law firms in the  
15 country, the Boies Schiller law firm as its litigation counsel,  
16 who's clearly looked into this issue. In fact, I believe Mr.  
17 Coe is on the phone from the Boies Schiller firm in the event  
18 the Court has any questions from him. And, again, we've  
19 concluded that there is no basis to participate, and we can't  
20 really understand to what end the trustee would really get  
21 involved in this.

22 So when we now go back to the basis for stay relief,  
23 again, the prejudice to the debtor is and the burden on the  
24 debtor is tremendous, it will be very costly. The debtor  
25 cannot afford to deploy valuable employee time to document

1 production, document review, interviews, depositions, briefs,  
2 et cetera, to pursue this action. And it will detract from the  
3 focus of the trustee and the debtors on the IBM and Novell  
4 litigation which the trustee previously reported to this Court  
5 should be pursued aggressively.

6 On balance, in terms of the hardships to the debtor  
7 versus the hardship to Mr. Gray, Mr. Gray's pursuing this  
8 litigation. He pursued it previously without SCO. He's now  
9 taking it to the Eleventh Circuit. If the Eleventh Circuit  
10 won't proceed without SCO being bifurcated, perhaps he should  
11 have sought a motion to bifurcate SCO from that proceeding.  
12 And I think that's something he certainly could do and SCO  
13 would not object to being bifurcated from that proceeding.

14 And when we talk about the success on the merits, I  
15 think we've covered that, Your Honor. We questioned whether  
16 there would be any success on the merits, and certainly whether  
17 there would be any benefit to the debtors' estate.

18 And, finally, Your Honor, I do have to say that the  
19 trustee is surprised and offended by Mr. Gray's assertions that  
20 he's not pursuing a valuable asset. Mr. Gray frivolously  
21 asserts that the debtors' failure to protect its alleged rights  
22 in the trademark would be disruptive, will deprive creditors of  
23 substantial assets and amounts of money. He asserts that the  
24 trustee and his counsel appear content not to pursue valuable  
25 assets. And that the trustee is eager to convince the Court to

1 reject Mr. Gray's motion. All of that is in his pleadings.

2 We now hear in Court that this should be referred to  
3 the U.S. Attorney's Office to investigate bankruptcy fraud.  
4 The willful concealment of ownership of trademarks and the  
5 continuing concealment. Your Honor, these are outrageous  
6 statements and allegations. They are not supported by any  
7 facts, by any documents, they are unwarranted, and in our view  
8 demonstrate the desperation of Mr. Gray to get some court to  
9 give him his day in court and put the puzzle together the way  
10 he wants it put together. Your Honor, we don't think that the  
11 Court should support that, we don't think it's in the best  
12 interest of this estate. We have heard that Mr. Gray is not a  
13 creditor, he's not a shareholder, and we think that basically  
14 there's no reason why this estate should be compelled to do  
15 anything other than what's it's been compelled to do so far,  
16 which is spend a lot of money, reviewing, responding, preparing  
17 for and litigating this issue before this Court. And we  
18 respectfully request that their relief be denied. Thank you.

19 THE COURT: Thank you, Ms. Fatell.

20 MR. STEELE: I have three points to make.

21 THE COURT: Three points if you would because I'm  
22 going over to another hearing, Mr. Steele.

23 MR. STEELE: I understand, I saw your calendar.

24 THE COURT: Yes.

25 MR. STEELE: So I'm sensitive to that, Your Honor.

1           First of all, I point out to the Court that Mr. Gray  
2 is, in fact, a creditor. That he has, in fact, filed a claim.  
3 The lawsuit in the Tampa Federal Court is listed in the  
4 schedules before this Court, so he is a creditor.

5           The second point I would make would be that I think it  
6 is most telling that Ms. Fatell stayed away from, did not even  
7 mention Movant's Exhibit Number 1.

8           Everybody in this case wants to treat Movant's Exhibit  
9 1 as the most radioactive document they've seen. And that  
10 document we think states and provides very clear basis for  
11 saying that SCO owns these marks today.

12           Third, with respect to the Tenth Circuit I just would  
13 like to clarify that we were, in fact, permitted to file an  
14 amicus brief out there, that it survived a motion to get rid of  
15 it, and that the court carried it with it throughout the entire  
16 case and then ultimately denied at the very end.

17           So with that, Judge, again, we thank you for your time  
18 this afternoon. We would be pleased to supply the Court, if  
19 the Court requests, with any other documents that the Court  
20 wants to analyze this situation. We think we have dealt with  
21 this professionally, carefully and thoroughly and we think that  
22 if the Court analyzes this situation it will come to the same  
23 conclusions as we. Thank you, Judge.

24           THE COURT: Thank you, Mr. Steele.

25           As I reviewed the papers earlier today and as I've

1 listened to argument, frankly, I don't think it's a close call.  
2 I just don't think that Mr. Gray has standing to assert these  
3 rights. And I think certainly does not meet the requirements  
4 of Rule 362 for lifting the automatic stay on the grounds  
5 argued by SCO's -- by the trustee's counsel, Ms. Fatell. There  
6 are strict requirements and tests for the propriety of lifting  
7 the automatic stay. I really do not believe they've been met  
8 here, but I am going to just retire at the conclusion of the  
9 day and review the documents again. And I will issue a brief  
10 opinion. But I really don't believe that Mr. Gray is going to  
11 prevail. I don't want people to leave the courtroom wondering  
12 about what my position is at the moment, but I give myself at  
13 least the opportunity to review and think more upon the issues.  
14 So I will be issuing a ruling in the very, very near future.

15 MR. STEELE: Thank you, Judge.

16 THE COURT: I appreciate counsel's argument. I will  
17 add that I certainly don't think that there is any basis for  
18 arguing bankruptcy fraud in this case. That surprises me that  
19 that allegation has been made. But, once again, I will clarify  
20 that in writing.

21 And I thank you, counsel. And you're excused or  
22 welcome to remain throughout the remainder of the hearing, but  
23 I see that we now have Mr. McMahon in Court for the earlier  
24 issue that we passed.

25 MS. FATELL: Your Honor, may I take just a moment to

1 confer with Mr. McMahon?

2 THE COURT: You certainly may.

3 MS. FATELL: Thank you.

4 THE COURT: Yes. I wish you a safe trip back, Mr.  
5 Steele and Mr. Gray.

6 MR. STEELE: Thank you, Judge. I have one daughter at  
7 Duke and another daughter who goes to Brown. The one who is at  
8 Duke is thoroughly exercised that it's been such a mild winter.

9 THE COURT: Wait, wait, wait, she has a long way to  
10 go, Mr. Steele.

11 MR. STEELE: Well, I told the one in Rhode Island that  
12 I'd visit her in September --

13 THE COURT: Yes.

14 MR. STEELE: -- and I'd see her in April, not in  
15 between unless she came to Florida.

16 THE COURT: You bet. Well, I've seen a few  
17 caterpillars and they look like they're getting ready for a  
18 tough winter.

19 MR. STEELE: Let us get out of here.

20 THE COURT: Good day. Good day to you.

21 Yes, Ms. Fatell.

22 MS. FATELL: Thank you, Your Honor. I believe that we  
23 have reached an agreement.

24 THE COURT: Oh.

25 MS. FATELL: I am unable to -- I'm willing to make a

1 phone call to Autozone's counsel and confirm that. So I'm not  
2 prepared to submit an order or put the agreement on the record  
3 until I can confirm that.

4 But if I may inquire of the Court, as I said there  
5 were no objections to the underlying settlement with respect to  
6 those who have asked to see it and have signed confidentiality  
7 agreements. The issue with respect to the seal --

8 THE COURT: Yes.

9 MS. FATELL: -- unless the Court had some question, if  
10 the Court is satisfied with the parties agreeing to the seal  
11 order and we submit the order I just ask if the Court has any  
12 questions.

13 THE COURT: Ms. Fatell, I don't. I am satisfied. I  
14 would certainly like and know that you're willing to consider  
15 any suggested language changes or term changes from the Office  
16 of the United States Trustee. I am satisfied not only on the  
17 basis of no objection but on the merits of the motion for the  
18 approval of the settlement that the settlement is certainly  
19 fair and reasonable and in the state's best interest. And I  
20 would be also prepared to approve the settlement. Am I waiting  
21 for anything further on that issue?

22 MS. FATELL: I don't think so.

23 THE COURT: Because if not, I will sign the order  
24 approving the settlement.

25 MS. FATELL: I think the Court can sign the order

1 approving the settlement, it's just a question of whether it  
2 will be under seal and if --

3 THE COURT: Exactly.

4 MS. FATELL: -- it's not under seal, then we have an  
5 agreement with Autozone that they'll withdraw the settlement  
6 and that's agreed. So we understand that.

7 THE COURT: Well, would it make anymore sense for me  
8 just to withhold executing the settlement agreement pending the  
9 finality of the seal?

10 MS. FATELL: Probably it does.

11 THE COURT: I think it probably would.

12 MS. FATELL: Let me put in the certification of  
13 counsel, both.

14 THE COURT: Yes.

15 MS. FATELL: I'll attach both orders.

16 THE COURT: Let's do that.

17 MS. FATELL: That would be easier.

18 THE COURT: I'll be here all next week.

19 MS. FATELL: Great, thank you.

20 THE COURT: All right. All right, counsel.

21 Thank you.

22 MS. FATELL: Thank you, Your Honor. Thank you for  
23 your time today.

24 THE COURT: Thank you. And we'll stand in recess.

25 And the next matter will be heard in just a few minutes.

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Thank you.

MS. FATELL: Thank you.

THE COURT: Good weekend to everyone.

(Proceedings concluded at 3:19 p.m.)

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

I, Esther Accardi, certify that the foregoing transcript is a true and accurate record of the proceedings.

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ESTHER ACCARDI (CET\*\*D-485)

AAERT Certified Electronic Transcriber

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Date: November 30, 2009