# EXHIBIT B

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

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| In re: | ) | |
| | ) | Chapter 11 |
| The SCO Group, Inc., et al., | ) | |
| | ) | Case No. 07-11337 (KG) |
| Debtors. | ) | (Jointly Administered) |
| | ) | |
| | ) | **Hearing Date: December 22, 2009 at 2:00 p.m. (ET)** |
| | ) | **Objection Deadline: November 30, 2009 at 4:00 p.m. (ET)** |

## SUSE'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY TO COMPLETE INTERNATIONAL ARBITRATION

SUSE Linux GmbH ("SUSE") moves the Court to grant relief from the automatic stay so that it can complete the international arbitration (the "Arbitration") that SUSE filed against The SCO Group, Inc. ("SCO") in April 2006, and which has now been stayed for over two years.

Stay relief should be granted because the outcome of the Arbitration will have a major impact on the value of what SCO's trustee, Edward Cahn (the "Trustee") considers to be SCO's principal asset: its alleged copyright infringement and related claims against SUSE, Novell, Inc. ("Novell"), International Business Machines ("IBM") and others. SUSE seeks a ruling in the Arbitration that SCO is barred from asserting copyright infringement claims against SUSE, Novell (SUSE's parent and distributor), and their customers by the terms of joint development contracts signed by SCO and SUSE. If SUSE prevails in the Arbitration, SCO's alleged claims against both SUSE *and Novell* will be materially impaired on the merits and in potential value. Moreover, the result of the arbitration may nullify or greatly reduce the value of SCO's alleged claims against IBM and other vendors and users of the Linux operating system. It is these claims that the Trustee now says he intends to pursue vigorously. But the District Court has stayed SCO's copyright infringement claim against Novell pursuant to the Federal Arbitration Act

pending a decision in the Arbitration. Thus, lifting the stay of the Arbitration is essential to enable the value of SCO's claims to be determined.

Completing the Arbitration will impose only a modest incremental burden on SCO, because the Arbitration was on the eve of a merits hearing on liability when it was suspended two years ago. In contrast, continuing the stay of the Arbitration would prejudice SUSE as the uncertainty created by SCO's threats would remain. Moreover, the Arbitral Tribunal recently expressed concern about the long delay, stating that unless there are new developments soon, the members of the Tribunal may be forced to consider their position and the future conduct of the proceedings. It is not clear what steps might be taken by the Tribunal, but it is clear that the stay should be lifted so that the Arbitration can proceed.

In sum, both judicial economy and fairness dictate that the stay of the Arbitration be lifted to enable a prompt resolution of the merits of SUSE's claims, which are critical to the value of the primary asset in SCO's bankruptcy estate.

## I. BACKGROUND

### A. The SCO/Novell Litigation in Utah District Court

Before filing these chapter 11 cases in September 2007, SCO was involved in litigation against various parties, including both Novell and SUSE, concerning SCO's claims that the distribution and use of the Linux operating system infringed copyrights in the UNIX operating system that were allegedly owned by SCO (the "UNIX Copyrights"). (*See* Dkt. No. 232, Memorandum Opinion, filed herein on November 27, 2007 ("11/27/2007 Opinion"), at 1-2.)

A key dispute was the Utah Litigation.[1] SCO initially claimed that Novell had "slandered" SCO's alleged title in the UNIX Copyrights by stating that Novell owned the Copyrights. In February 2006, SCO added a claim that Novell's distribution of "SUSE Linux"[2]

[1] *The SCO Group, Inc. v. Novell, Inc.*, United States District Court, District of Utah, Case No. 04-00139.

[2] "SUSE" was previously written as "SuSE," which is an acronym where "u" refers to "und," the German word for "and." This was changed to "SUSE" (all capital letters) several years ago, so "SUSE" is used herein.

— a version of the Linux operating system developed by SUSE — infringed SCO's UNIX Copyrights. (SCO's Second Amended Complaint, filed February 3, 2006, at ¶¶ 46, 116-18 (submitted herewith as Exhibit A to Declaration of Grant L. Kim In Support of SUSE's Motion for Relief from the Automatic Stay ("Kim Decl.").)

Novell responded that it owned the UNIX Copyrights and thus could not be liable for slander of title or for copyright infringement. In the alternative, Novell contended even if SCO had acquired ownership of the UNIX Copyrights, Novell was protected from SCO's claims by contracts that SUSE and SCO had signed in 2002 (the "UnitedLinux contracts"), under which they agreed to jointly develop and promote a new version of Linux called "UnitedLinux." Novell asserted that the UnitedLinux contracts provided a complete defense to SCO's copyright infringement claim because (1) the contracts transferred ownership of any SCO copyrights needed to use UnitedLinux to a joint venture company; (2) the contracts granted SUSE a broad royalty-free license to use any such copyrights, including the right to sublicense such copyrights to Novell and its customers; and (3) the contracts obligated SCO to make the UnitedLinux "kernel" freely available to the public, under the terms of the "General Public License." (Kim Decl., Ex. B (Memorandum In Support of Novell's Motion to Stay Claims Raising Issues Subject to Arbitration, filed April 10, 2006 ["Novell's Motion to Stay"]), at 12-13.)

The UnitedLinux contracts required any disputes between SCO and SUSE to be resolved by arbitration in Switzerland pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce ("ICC"). In April 2006, SUSE filed an arbitration against SCO, requesting a ruling that the UnitedLinux contracts barred SCO's copyright infringement claims against SUSE and its licensees, including Novell. (Kim Decl., Ex. C (SUSE's Request for Arbitration ("RFA"), dated April 10, 2006), at ¶¶ 82, 89.)[3] At the same time, Novell moved

[3] Some portions of the Request for Arbitration and of Novell's Motion to Stay refer to portions of the UnitedLinux contracts that are subject to the confidentiality clause in those contracts. SUSE has redacted these confidential portions from the public versions attached as Exhibits B and C to the Kim Declaration, and is submitting non-redacted versions under seal for the Court's

to stay SCO's claims in the Utah Litigation on the ground that they implicated the assignment and license provisions of the UnitedLinux contracts, whose scope was required to be decided in the SUSE Arbitration. (Kim Decl. Ex. B, Novell's Motion to Stay.) Novell relied on the Federal Arbitration Act, which requires the court to stay litigation involving "any issue referable to arbitration under an agreement in writing for such arbitration." (*Id.* at 8 (quoting 9 U.S.C. § 3).)

In August 2006, the District Court granted a stay as to SCO's claims related to SUSE, including SCO's claim that Novell's distribution of SUSE Linux infringed SCO's copyrights. (Kim Decl., Ex. D (District Court Order of August 21, 2006), at 9, 2.) The District Court held that the Federal Arbitration Act applied because "SCO's claims regarding SuSE, and Novell's defenses to those claims under the UnitedLinux contracts clearly raise issues referable to arbitration." (*Id.* at 7.) At the same time, the District Court decided to continue the litigation with respect to other claims and counterclaims —such as the dispute concerning ownership of the UNIX Copyrights — with the condition that if the litigation were ready for trial before the arbitration concludes, the court "will revisit the issue of whether to stay the trial on the APA and TLA claims pending the conclusion of the arbitration." (*Id.* at 8.)

In August 2007, the District Court granted Novell's motion for summary judgment that Novell owns the UNIX Copyrights and thus cannot be liable for slandering SCO's title to these copyrights. (11/27/2007 Opinion, at 3-4.) SCO then initiated this bankruptcy proceeding, just three days before the scheduled trial of Novell's counterclaims against SCO. (*Id.* at 1, 4.)

In November 2007, this Court granted Novell relief from the automatic stay of Bankruptcy Code section 362(a) to complete the Utah Litigation. This Court emphasized that determining the value of Novell's claims in the Utah Litigation was essential to the administration of the bankruptcy case, because SCO "simply cannot file a confirmable plan of reorganization until they know what liability they have to Novell." (11/27/2007 Opinion at 11, 1.) This Court also noted that the District Court already had detailed knowledge of Novell's

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review. SUSE is serving SCO with the non-redacted versions since SCO already has these documents and is a signatory to the UnitedLinux contracts.

claims, and that "because this bankruptcy case was filed on the eve of trial, both parties have already spent all of the necessary time and resources in preparation." (*Id.* at 7, 9.)

Although SCO had opposed Novell's motion to allow the Utah Litigation to proceed, SCO later agreed that prompt resolution of the Utah Litigation was essential to the bankruptcy case. SCO repeatedly moved to extend the period of exclusivity, arguing that it could not formulate a reorganization plan until after Novell's claims were tried and final judgment was entered in the Utah Litigation. (*See* Dkt. No. 289 (SCO's Motion for Extension of Exclusivity, filed January 2, 2008), at ¶¶ 14-15; Dkt. No. 525 (SCO's Third Motion for Extension of Exclusivity, filed August 11, 2008), at 5-6, 9-10, 13.)

The District Court trial took place in the Spring of 2008, and final judgment for Novell was entered in November 2008. On August 24, 2009, the Tenth Circuit reversed the District Court's grant of summary judgment to Novell on copyright ownership, and remanded for trial on copyright ownership and related claims. The Tenth Circuit also affirmed the District Court's ruling requiring SCO to pay more than $2.5 million in damages on Novell's counterclaim. *The SCO Group, Inc. v. Novell, Inc.*, 578 F.3d 1201 (10th Cir. 2009). In October 2009, the Tenth Circuit denied Novell's petition for rehearing and rehearing en banc. Accordingly, the Utah litigation has returned to the District Court.

### B. The SUSE Arbitration

As noted above, SUSE filed the Arbitration against SCO in April 2006 with the ICC, a highly-respected international arbitral institution. The Arbitration is taking place in Zurich, Switzerland, under Swiss substantive law, before three experienced international arbitrators: Mr. Yves Derains, the former Secretary-General of the ICC, nominated by SCO; Mr. Roberto Dallafior, a Swiss arbitration specialist nominated by SUSE; and Mr. Toby Landau, an English barrister and arbitration expert, who was jointly nominated by Messrs. Derains and Dallafior. (Kim Decl., ¶ 11.)

In the Arbitration, SUSE seeks a ruling that the UnitedLinux contracts preclude SCO from asserting copyright infringement claims against SUSE, Novell, and their customers for the same reasons that Novell noted in its motion to stay the Utah Litigation. (Kim Decl., Ex. C, RFA at ¶¶ 82, 89.) As noted above, the District Court stayed SCO's claim that Novell's distribution of SUSE Linux infringed SCO's UNIX Copyrights in August 2006, because of the overlap with SUSE's claims in the Arbitration and the Federal Arbitration Act's strong federal policy favoring arbitration

On September 28, 2007, SCO moved this Court to find that the automatic stay applied to the Arbitration. (Dkt. No. 69.) The Court granted that motion on November 14, 2007. (Dkt. No. 204.) At the time of this ruling, the Arbitration had already been pending for 19 months, and both the parties and the Arbitral Tribunal had devoted substantial efforts preparing for a merits hearing on liability that was originally scheduled for December 2007. (Kim Decl., ¶¶ 10-14). For example, the Tribunal conducted a full-day hearing in Zurich in January 2007 to address SCO's challenge to arbitral jurisdiction over SUSE's claims, and then issued a lengthy ruling rejecting SCO's arguments. (*Id.*, ¶ 13.) Following this hearing, both SUSE and SCO made multiple written submissions regarding the merits of their claims and defenses, including detailed witness statements, numerous documentary exhibits, supporting legal authorities, and lengthy argumentative briefs. (*Id.*, ¶ 14.)

When this Court ruled that the stay applied to the Arbitration in November 2007, the only remaining submission before the December 2007 merits hearing was SCO's final rejoinder in support of its counterclaims. (*Id.*, ¶ 15.) Thus, the parties were ready to complete the previously scheduled liability hearing with only modest additional effort.

Due to this Court's stay ruling, the Arbitration has been suspended for the past two years. The Tribunal initially postponed the December 2007 liability hearing until April 2008, but then cancelled the hearing when the parties advised that the stay remained in effect. (*Id.*, ¶ 16.) The parties have since provided periodic updates to the Tribunal regarding the bankruptcy, and the Tribunal has responded by noting that the Arbitration continues to be suspended. (*Id.*, ¶ 17.)

The most recent communication from the Arbitral Tribunal is a letter dated October 5, 2009, which stated:

> Following each party's update of 4 August 2009, a further two months have now elapsed, and as far as the Arbitral Tribunal is aware, there is still no indication as to whether this arbitration might be permitted to proceed.
>
> As the parties will appreciate, if this situation is to continue indefinitely, it will begin to cause difficulties for the members of the Arbitral Tribunal.
>
> To this end, I attach herewith **Procedural Order No 10**, which sets a further reporting date of 4 December 2009, by which time the arbitration will have been in abeyance for approximately two years. ***If there have been no developments by that date, the members of the Arbitral Tribunal may then need to consider their position, as well as the future conduct of these proceedings.***

(Kim Decl. Ex. G, October 5, 2009, Letter from Arbitral Tribunal (emphasis added).)

If the stay of the Arbitration is lifted, SUSE expects that the Tribunal will schedule the merits hearing to take place within about three to six months.

### C. Recent Events in and Current Status of the Bankruptcy Case

In the meantime, after two years of missteps and massive losses by SCO's management, Novell, IBM and the United States Trustee moved the Court to convert the case to a chapter 7 so that neutral party, a trustee, would be appointed to take charge of SCO's affairs and decision-making. (Dkt. Nos. 750, 751, 753.) Agreeing with many of the premises of the motions, the Court directed the appointment of a chapter 11 trustee. (Dkt. No. 890, Memorandum Opinion (filed August 5, 2009 (the "Trustee Opinion"); Dkt. No. 891, Order.) The Trustee was appointed shortly thereafter. (Dkt. Nos. 898-900.)

The Court found "cause" to convert the case beyond question, but found that the need to evaluate the litigation as the estate's key asset constituted "unusual circumstances" that permitted the Court to appoint a chapter 11 trustee rather than convert the case. (Trustee Opinion 12-13.) The Court wrote, further:

> The Court fully respects the OUST's authority and ability to select an appropriate [chapter 11] trustee. The Court's "two cents," however, is to suggest that the OUST consider appointing a retired judge or litigator since the analysis of the litigation will serve as the trustee's principal responsibility.

(Trustee Opinion 14.)

The Trustee concurs in that view and has said that he intends to pursue the litigation, including the Utah Litigation, vigorously. At a status report to the Court on October 23, 2009, he said:

> In my view, the Debtors' claims against Novell and IBM should be pursued aggressively. I acknowledge I have much more analysis to do, including another meeting with IBM's lawyers. And [at] this juncture, I remain confident that the Debtors' claims against IBM and Novell, especially in light of the 10th Circuit opinion, are meritorious.

(*See* Declaration of Adam A. Lewis in Support of SUSE's Motion for Relief From the Automatic Stay to Complete International Arbitration ("Lewis Decl."), Ex. C, Transcript of October 23, 2009 proceedings at 12.) Under his management, SCO also just filed a Form 8-K with the United States Securities and Exchange Commission that attaches a press release that states:

> The current management team . . . will continue to work closely with the Chapter 11 Trustee and his advisors to . . .move the intellectual property litigation forward with Boies, Schiller & Flexner, LLP and emerge from Chapter 11 bankruptcy.

(Lewis Decl., Ex. B.) Finally, in keeping with these comments, the Trustee has applied to modify the SCO's agreement with its intellectual property litigation counsel, the aforementioned Boies, Schiller & Flexner ("Boies Schiller"). (Motion of Chapter 11 Trustee for Entry of Order

Authorizing Retention Order for Boies, Schiller and Flexner LLP *Nunc Pro Tunc* to August 6, 2009 (filed October 30, 2009, Dkt. No.941).)

But, inconsistently, the Trustee has *refused* to stipulate to stay relief so that the Arbitration, which is so critical to the claims in the Utah Litigation but which may be terminated by the Tribunal if stay relief is not granted now, can resume. (*See* Lewis Decl., ¶ 5 and Ex. A.) Thus, SUSE now moves for stay relief so that the Arbitration can be resumed and completed expeditiously based upon the parties' efforts to date.

## II. ARGUMENT

### A. Relief From the Automatic Stay is Warranted

SUSE seeks relief from the automatic stay to proceed with the Arbitration to a judgment by the Tribunal. Section 362(d)(1) of the Bankruptcy Code provides that:

> (d) On request of a party in interest after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -
>
> (1) *for cause*, including the lack of adequate protection of an interest in property of such party in interest....

11 U.S.C. § 362(d) (emphasis added). Relief from the automatic stay for SUSE is warranted for "cause."

#### 1. The Standard for Granting Stay Relief to Allow Litigation or Arbitration to Proceed

Courts have often permitted "litigation to be concluded in another forum, particularly if the nonbankruptcy suit involves multiple parties or is ready for trial." Lawrence P. King, COLLIER ON BANKRUPTCY § 362.07[3][a] (15th ed. 2006); *In re Rexene Prods. Co.*, 141 B.R. 574, 575 (Bankr. D. Del. 1992) ("...the fact that [the non-bankruptcy judge] has already heard and decided two issues support[s] the granting of relief on the grounds of judicial economy.") (hereinafter, "*Rexene*"); *Sonnax Indus., Inc. v. Tri Component Prods. Corp. (In re Sonnax)*, 907 F.2d 1280 (2d Cir. 1990) (hereinafter, "*Sonnax*"); *In re Castlerock Props.*, 781 F.2d 159 (9th Cir. 1986); *In re Curtis*, 40 B.R. 795 (Bankr. D. Utah 1984). In fact, the legislative history of section

362(d)(1) emphasizes that a single factor, such as allowing a proceeding to advance before another tribunal, can constitute the requisite "cause." "It will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from any duties that may be handled elsewhere." H.R. Rep. No. 595, 95th Cong., at 341 (1977) (cited in *Rexene* at 576).

Moreover, the Federal Arbitration Act (9 U.S.C. §§1-307) embodies the federal policy in favor of enforcing arbitration agreements. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220-226-27 (1987); *Mintze v. Am. Fin Servs. Inc. (In re Mintze)*, 434 F.3d 222, 229 (3rd Cir. 2006). This policy is so important that federal courts must resolve doubts about whether to enforce an arbitration agreement in favor of arbitration. *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719 (9th Cir. 1999). The federal policy favoring arbitration applies in bankruptcy cases. *E.g., Mintze*, 434 F.3d at 229-32; *In re Gurga*, 176 B.R. 196, 198-200 (B.A.P. 9th Cir. 1994); *McDonald v Cash 'N Advance (In re Lucas)*, 312 B.R. 407, 409-10 (Bankr. D. Nev. 2004) (citing "emerging" trend adopted by Ninth Circuit Bankruptcy Appellate Panel); *In re Snake River Dairyman's Ass'n, Inc.*, No. 03-41124, 2004 Bankr. LEXIS 2481, at *11-13 (Bankr. D. Idaho March 31, 2004). In fact, in this Circuit, absent a competing, bankruptcy-created right that overrides the federal policy favoring arbitration, the Court must order arbitration regardless of whether the matter is "core" or "noncore" within the meaning of 28 U.S.C. sections 157(b) and (c). *Mintze*, 434 F.3d at 230-31. No such rights are involved in the Arbitration, of course. Finally, international arbitration is especially respected, even in bankruptcy proceedings. *Societé Nationale Algerienne Pour La Recherche v. Distrigas Corp.*, 80 B.R. 606, 611 (D. Mass. 1987).

In the context of litigation, courts in the Third Circuit have approached the issue of stay relief by applying a balancing test between the interests of the estate and the moving party. For example, in deciding to grant stay relief, the Delaware Bankruptcy Court in *Rexene* considered three factors in its analysis. Those factors are:

(a) whether any great prejudice to either the bankrupt estate or the debtor will result from continuation of the civil suit;

(b) whether the hardship to the non-bankrupt party by maintenance of the stay considerably outweighs the hardship to the debtor; and

(c) the creditor has a probability of prevailing on the merits.

*Rexene Prods. Co.*, 141 B.R. at 576. The United States District Court of Delaware applied this same test in affirming stay relief for the movant in *In re Continental Airlines, Inc.*, 152 B.R. 420 (D. Del. 1993). This Court also applied this test in granting Novell's prior motion to lift the stay to allow the Utah litigation to proceed, noting that as to the third factor that "[e]ven a slight probability of success on the merits may be sufficient to support lifting the automatic stay in an appropriate case [citations omitted]." *In re The SCO Group, Inc.*, 395 B.R. 852, 857, 859 (Bankr. D. Del. 2007).

**2. Stay Relief Is Warranted in this Case**

The reasons for stay relief are manifest here. There will be no prejudice to the estate; indeed, the estate can only benefit by knowing the value of its claims against Novell (and others, such as IBM). That question, in turn, depends materially on the outcome of the Arbitration, as the District Court recognized. Continuing the stay of the Arbitration will only lead to incomplete litigation elsewhere and wasted resources and efforts previously devoted to the Arbitration and its specialized Tribunal. Finally, SUSE's chances of prevailing in the Arbitration are more than minimal.

The Arbitration is before an experienced international Tribunal employing recognized procedures. The issues are defined, and briefing is all but complete. SCO's final brief was due just before SCO sought this Court's ruling on the applicability of the stay, meaning that SCO should already have conducted substantial work on its final submission. Thus, the primary remaining task was for the parties to prepare their witnesses for cross examination and appear with them at the merits hearing.

Not only were the parties prepared, but so were the members of the Tribunal, who were already familiar with the case as a result of the preliminary proceedings, hearing on jurisdiction, and submission of massive amounts of written evidence and argument. These are precisely the kind of circumstances under which lifting the automatic stay for "cause" to conclude litigation is appropriate. Indeed, this Court previously granted relief from the stay to allow the trial of the Utah Litigation to proceed under similar circumstances.

By contrast, the alternatives of further delay or determination by a different judicial authority are inconsistent with the dictates of judicial economy and fairness to the parties, who by joint voluntary agreement selected the Tribunal as the forum for litigation and whose witnesses and preparations will grow increasingly stale through further delay. Prompt resolution of the Arbitration is essential to the progress of these long-stalled chapter 11 cases, because the outcome of the Arbitration will have a substantial impact on the merits and value of SCO's copyright infringement claims against SUSE, Novell, IBM, and others. The strong federal policy in favor of arbitration is a further reason to grant stay relief, which also reflects federal support of arbitration as promoting judicial economy. Nor are the claims between SUSE and SCO bankruptcy-created rights. *See Mintze, supra.*

Given the key role of the Arbitration in addressing issues that are critical to the value of SCO's assets, what possible reason could there be for the Trustee to oppose stay relief except to gain a tactical advantage over Novell? But such a strategy, if that is the Trustee's purpose, is inconsistent with the purpose of the stay. The stay is intended to (1) give the debtor a breathing spell; (2) protect creditors against dismemberment of the estate and unequal payment; and (3) allow a debtor time to formulate a reorganization plan. *In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90, 100 (3rd Cir. 2008). Gaining a strategic litigation advantage is not among these purposes. *Cf. In re Star Broadcasting, Inc.*, 336 B.R. 825 (Bankr. N.D. Fla. 2006) (because debtor filed bankruptcy case in bad faith to stall litigation going against in order in hope of capitalizing on other bankruptcy procedures for an advantage, bankruptcy court grants stay relief to complete litigation (but not dismissal of bankruptcy case). And here, of course, the estate has

had its breathing spell (for over two years); there is no risk of dismemberment of the estate or unequal payment involved in allowing SUSE to complete the Arbitration to judgment; and all agree that the resolution of the Utah Litigation, which is so dependent on the Arbitration, is essential to any reorganization of SCO.[4]

Moreover, the Arbitral Tribunal has recently expressed concern about the continuing delay in the Arbitration, noting that it may be forced to take action if the stay is not lifted soon. It is not clear what action might be taken, but any steps that would make it harder for SUSE to obtain a prompt adjudication of its claims would be highly prejudicial. Both SUSE and SCO have already invested substantial resources in submitting evidence and arguments on the merits of the claims in the arbitration and in educating the three prominent arbitrators. Those resources should be put to use by completing the Arbitration, rather than being wasted.

Finally, it is clear that SUSE's claims against SCO are well-founded and that SUSE has more than a "slight probability" of success. The Arbitral Tribunal has already rejected SCO's argument that the Tribunal lacked jurisdiction over SUSE's claims in a lengthy ruling issued in July 2007. (Kim Decl., ¶ 13.) SUSE's claims are solidly based on the language and purpose of the UnitedLinux contracts, which were signed in 2002 by SCO, SUSE, and two other Linux vendors.[5] As noted in the Request for Arbitration, the purpose of the UnitedLinux contracts was to jointly develop and promote a standardized version of Linux called "UnitedLinux," with a view to encouraging the widespread adoption of UnitedLinux. (Kim Decl., Ex. C, Request for Arbitration, ¶¶ 1, 40-42.) To implement this purpose, SCO, SUSE, and the other UnitedLinux

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[4] More recently, the Delaware Bankruptcy Court has considered the three *Rexene* factors along with the general "policies underlying the automatic stay," which include the twelve factors followed by the United States Court of Appeals for the Second Circuit in *Sonnax*. *In re W.R. Grace & Co., et al.*, No. 01-01139, 2007 Bankr. LEXIS 1214, at *12 (Bankr. D. Del. 2007); *see also The SCO Group, Inc.*, 395 B.R. at 857; *In re Curtis*, 40 B.R. 795 (Bankr. D. Utah 1984). Analysis of those of the twelve factors that are relevant here (1, 2, 4, 6, 7, and 10-12) produces the same result. None weighs against stay relief.

[5] The key provisions are Article 3.2.2 of the Master Transaction Agreement and Article 8.2 of the Joint Development Agreement, which were previously submitted under seal as Exhibits A and B to the Declaration of Felix Imendoerffer (Dkt. No. 142).

members agreed that each member would have an irrevocable license to use any intellectual property of the other members included in the UnitedLinux Software, which would be transferred to a joint venture company for this purpose. (*Id.*, ¶¶ 45-48.)

SCO (then called "Caldera") initially supported UnitedLinux, stating that "UnitedLinux will be critical to [SCO's] success" and that SCO sought to make "UnitedLinux a standard in our industry." (*Id.*, ¶ 59.) But shortly after the release of UnitedLinux in November 2002, SCO suddenly changed its position, asserting that any use of Linux infringed SCO's alleged proprietary rights in the UNIX operating system — even though SCO never mentioned any such rights when it negotiated the UnitedLinux contracts, and had taken no steps to exclude them from the broad royalty-free license conferred by those contracts. (*Id.*, ¶¶ 60, 63-69.) SCO even made threats against SUSE, its joint venture partner, and claimed that Novell's distribution of SUSE Linux infringed SCO's rights. (*Id.*, ¶¶ 72-78.)

SUSE's basic claim is that it is improper for SCO first to agree to jointly develop and promote UnitedLinux with SUSE, subject to a broad assignment and license of any related intellectual property rights, and then to turn around and assert that SUSE and its licensees (such as Novell) are infringing SCO's rights by distributing Linux products based on UnitedLinux. SUSE fully expects to prevail on this claim based on the language of the contracts, the governing Swiss law, and the other evidence and arguments that it has already submitted in the Arbitration.

## III. CONCLUSION

There are no good reasons to postpone resumption of the Arbitration any longer. Indeed, every indicator decisively favors stay relief so that the parties may complete the Arbitration as soon as feasible. SUSE asks the Court to grant that relief.

Dated: November 10, 2009
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

*/s/ Sean T. Greecher*
James L. Patton (No. 2202)
Michael R. Nestor (No. 3526)
Sean T. Greecher (No. 4484)
The Brandywine Building
1000 West Street, 17th Floor
P.O. Box 391
Wilmington, Delaware 19899-0391
Telephone (302) 571-6600

-- and --

MORRISON & FOERSTER LLP
Adam A. Lewis
425 Market Street
San Francisco, California 94105-2482
Telephone (415) 268-7000

-- and --

MORRISON & FOERSTER LLP
Larren M. Nashelsky
1290 Avenue of the Americas
New York, New York 10104-0050
Telephone (212) 468-8000

Counsel for Novell, Inc. and SUSE Linux GmbH