

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

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

Appearances:

For the Chapter 11 Trustee: Bonnie Glantz Fatell, Esq.
Blank, Rome LLP

For Alan P. Petrofsky (Pro Se): Alan P. Petrofsky

For the SUSE/Novell: Alan Lewis, Esq.
Morrison & Foerster

For an Interested Party: Ted Normand, Esq.
Boies, Schiller & Flexner, LLP

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1 THE CLERK: Please rise.

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

4 MR. LEWIS: Good morning, Your Honor.

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

6 MR. LEWIS: Thank you.

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

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

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

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

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

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

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

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

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

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

6 MS. FATELL: Okay, that's perfect.

7 THE COURT: So, that helps.

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

12 THE COURT: Yes.

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

16 THE COURT: Yes.

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

19 THE COURT: Yes.

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

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

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

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

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

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

1 same date that the Trustee's objection stated that he would
2 be meeting, and the order also says that that date is the
3 deadline for the November and December reports, which are
4 presumably being held up by the same fiscal year end
5 accounting issue, and then going forward, the order would set
6 deadlines at 20 days after the end of each month and those
7 deadlines would be extendable for cause. As I described in
8 the briefs, the lack of any MOR deadlines set by the Court
9 has been a problem throughout these cases causing unnecessary
10 confusion for all the parties and the Trustee's objection did
11 not identify any harm though it comes from setting some
12 deadlines. And then lastly on the semi-annual subsidiaries
13 reports for Rule 2015.3. This rule was adopted on December
14 1, 2008, and the Supreme Court ordered that it shall govern
15 insofar as just and practicable all cases filed before that
16 date, and I describe in my brief why it would be just and
17 practicable in these cases. Now, the mere accident of birth
18 that these cases happen to be commenced before the December
19 2008 date of the rule change does not justify continuing to
20 operate the businesses indefinitely with no reports. We're
21 more than a year past the change. We're into our third semi-
22 annual period of business operations that are being conducted
23 after the rule change, and the Supreme Court explicitly chose
24 not to put in a grandfather clause and have all cases keep
25 running under the old rules indefinitely. Instead, cases are

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

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

21 MR. PETROFSKY (TELEPHONIC): Yes.

22 THE COURT: You are a shareholder of the debtors.

23 MR. PETROFSKY (TELEPHONIC): That is correct.

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

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

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

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

7 THE COURT: Okay. Thank you.

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

9 THE COURT: Ms. Fatell?

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

12 THE COURT: No, go on.

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

18 THE COURT: Yes.

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

1 THE COURT: Alright. Thank you.

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

3 THE COURT: Now, Ms. Fatell.

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

6 THE COURT: Yes.

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

9 THE COURT: To show cause.

10 MS. FATELL: - seek to modify that.

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

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

15 THE COURT: Yes.

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

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

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

25 THE COURT: Alright.

1 MS. FATELL: Thank you, Your Honor.

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

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

21 MS. FATELL: Thank you, Your Honor.

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

24 THE COURT: Thank you, Mr. Petrofsky.

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

1 submit an order?

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

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

9 THE COURT: Yes.

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

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

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

20 THE COURT: Thank you.

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

23 THE COURT: Okay.

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

1 THE COURT: Okay.

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

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

13 THE COURT: Yes.

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

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

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

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

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

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

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

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

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

12 MR. LEWIS: Yes, Your Honor.

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

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

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

5 THE COURT: Right.

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

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

5 THE COURT: Thank you, Mr. Lewis.

6 MR. LEWIS: Thank you, Your Honor.

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

21 MS. FATELL: Thank you, Your Honor.

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

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

25 THE COURT: Of course.

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

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

8 THE COURT: Yes.

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

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

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

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

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

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

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

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

19 MR. LEWIS: Two things -

20 THE COURT: Yes.

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

25 THE COURT: Any discovery?

1 MR. LEWIS: No, it's done.

2 THE COURT: All done.

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

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

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

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

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

2 MR. LEWIS: Thank you.

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

8 THE COURT: Yes.

9 MS. FATELL: The question, Your Honor, is, where
10 should that be decided; okay? That issue is squarely before
11 the Utah District Court. There is a jury trial set for March
12 8th for three weeks. The parties are fully engaged right now
13 in trial preparation. We have to remember, Your Honor, that
14 the SUSE arbitration is an action initiated by SUSE, not SCO,
15 so the comment that SCO would have to start it all over
16 again, I don't quite understand, but it is to stop SCO from
17 suing SUSE for copyright infringement. Now SCO has not yet
18 sued SUSE at this point in time, and we submit that it's
19 illogical to even schedule this arbitration on the SUSE claim
20 to stop litigation that hasn't yet occurred before the
21 District Court first determines if in fact SCO owns this
22 copyright. Why we would have these two issues going on
23 almost simultaneously makes - it's just illogical. If SCO is
24 wrong, as was just discussed and conceded, the SUSE
25 arbitration issues are moot. So, it's important to remember,

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

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

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

5 MS. FATELL: It has, Your Honor.

6 THE COURT: It's gotten larger over time.

7 MS. FATELL: Over two years later, SUSE in April of
8 2006 initiated the arbitration with the International
9 Tribunal in Switzerland. In April of 2006 also, Novell
10 sought to stay the District Court action to permit that Swiss
11 arbitration to proceed, and the District Court ruled that the
12 SCO's action against Novell would proceed, and it would only
13 stay those infringement claims that related to the Swiss
14 arbitration, as I understand it, Your Honor. I'm not an IP
15 expert and I was not involved in the details of this, so I
16 may have stated it a little broadly, but that's my
17 understanding of it. So, the litigation in Utah went
18 forward, and as we all know, Novell prevailed on the summary
19 judgment motions and SUSE was nowhere to be found to
20 interfere and prevent that from going forward. In August of
21 2007, the District Court ruled in favor of Novell. It
22 reversed for trial the amount of the royalties due to Novell
23 from SCO and consequently in September of '07, SCO filed for
24 Chapter 11. The arbitration was stayed, but the debtor did
25 come in and asked the Bankruptcy Court to enforce the stay as

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

11 THE COURT: Yes.

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

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

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

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

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

8 THE COURT: Right.

9 MS. FATELL: - and see if in fact there is a basis
10 for stay relief here. The first is the prejudice to the
11 debtor. Your Honor, just looking at the submissions that
12 were filed under seal, SCO, as well as SUSE, are likely to
13 have several witnesses. SCO will have to pay 50 percent of
14 the costs of the three arbitrators, who we understand bill at
15 \$800 an hour. There will be lawyers from the United States,
16 and it is true that the Boies, Schiller attorneys have agreed
17 to bill at 50 percent of their normal fees in this case, but
18 nevertheless, they still have to be involved. There will be
19 costs. I suppose in-house counsel will have to attend. We
20 will need to hire new Swiss counsel because Your Honor our
21 Swiss counsel, I'm advised, has resigned from the case quite
22 some time ago. So we would have to get new counsel, bring
23 that person up to speed, and get them involved in the
24 proceeding. We will have to bring in experts and I can go on
25 and on. Your Honor, all of this is required for the Swiss

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

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

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

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

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

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

24 THE COURT: Because you haven't sued yet.

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

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

1 Honor.

2 THE COURT: Alright.

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

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

6 MS. FATELL: Thank you, Your Honor.

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

8 MR. LEWIS: Thank you, Your Honor.

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

12 MR. LEWIS: No, Your Honor.

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

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

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

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

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

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

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

12 THE COURT: I know.

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

19 THE COURT: Alright.

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

1 THE COURT: Yes.

2 MR. LEWIS: The Court will remember.

3 THE COURT: Yes.

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

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

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

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

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

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

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

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

1 use that favorable result.

2 MR. LEWIS: Yeah. They might use it against us too,
3 and we have, Your Honor, we do have customers to whom we sub-
4 license besides Novell. All of that's up in the air while
5 this sit around. That is a harm to us in addition to
6 everything else. We'd like to know where we stand and after
7 2 1/2 years, we ought to know where we stand. That's a long
8 time, Your Honor, for this to have been on the back burner,
9 and while it's true that the Trustee has not been around for
10 the 2 1/2 years, the Trustee's been in this case for four
11 months now. He's already announced to this Court that he
12 believes that - he's reviewed the litigation in general and
13 decided that the claims that the debtor has against Novell
14 are meritorious and they're worth pursuing vigorously.
15 There's no more need for a breathing space if there was one
16 when the Court agreed that the stay applied and enforced the
17 stay at the beginning of these cases 2 1/2 years ago. It's
18 just not so anymore. It's time to get these cases wrapped
19 up, Your Honor, and it's time to get them wrapped up in a
20 manner that is expeditious and fair, not to have them drag
21 out another two years while we decide the SUSE arbitration.
22 So, I submit, Your Honor, that whatever it takes to get that
23 SUSE arbitration decided and if there is a scheduling issue,
24 the parties will deal with it, precisely as they would have
25 dealt with it had there been no bankruptcy. No one wants to

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

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

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

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

4 MR. LEWIS: Your Honor -

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

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

13 THE COURT: The witnesses and the -

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

19 THE COURT: Right.

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

23 THE COURT: Yes.

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

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

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

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

14 THE COURT: Right.

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

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

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

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

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

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

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

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

20 THE COURT: Okay.

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

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

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

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

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

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

15 THE COURT: Please, please, yes.

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

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

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

13 THE COURT: Yes.

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

20 THE COURT: Yes.

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

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

6 THE COURT: Okay.

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

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

17 THE COURT: Right.

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

21 THE COURT: Thank you, Ms. Fatell.

22 MS. FATELL: Thank you.

23 MR. LEWIS: Your Honor, may I -

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

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

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

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

6 THE COURT: I do too.

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

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

21 THE COURT: Right.

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

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

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

8 THE COURT: Right.

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

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

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

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

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

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

13 THE COURT: Thank you.

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

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

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

19

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

/s/ Elaine M. Ryan January 7, 2010
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