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)
	)	
Debtors.	)	**Re Dkt No. 951**

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

SUSE Linux GmbH ("SUSE") has moved (the "Motion") pursuant to 11 U.S.C. § 362(a) for relief from the automatic stay to complete the international arbitration (the "Arbitration") before the arbitrators (the "Tribunal") that SUSE filed against the Debtor, The SCO Group, Inc. ("SCO"), in April 2006. SUSE seeks the relief on the grounds that minimal work remains to complete the Arbitration and it remains prejudiced because SCO in the past threatened to and could at any time bring suit against SUSE and its customers of the Linux operating system.

The Arbitration arises from SCO's litigation against various parties, including both Novell, Inc. and SUSE, concerning SCO's claims that the distribution and use of the Linux operating system infringed copyrights in the UNIX operating system that SCO allegedly owned (the "UNIX Copyrights").

Background

In *SCO Group, Inc. v. Novell, Inc.*, United States District Court, District of Utah, Case No. 04-00139 (the "Utah Litigation"), SCO initially claimed that Novell had "slandered" SCO's alleged title in the UNIX Copyrights by stating that Novell owned the UNIX

Copyrights. In February 2006, SCO added a claim that Novell's distribution of "SUSE Linux" infringed SCO's UNIX Copyrights.

Novell responded that it owned the UNIX Copyrights and thus could not be liable for slander of title or for copyright infringement. In the alternative, Novell contended that even if SCO had acquired ownership of the UNIX Copyrights, Novell was protected from SCO's claims by contracts that SUSE and SCO had signed in 2002 (the "UnitedLinux contracts"), under which they agreed to jointly develop and promote a new version of Linux called "UnitedLinux." Novell asserted that the UnitedLinux contracts provided a complete defense to SCO's copyright infringement claim.

The Motion relates to an arbitration proceeding which SUSE commenced against SCO in April 2006, in Switzerland pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce. SUSE requested a ruling that the UnitedLinux contracts barred SCO's copyright infringement claims against SUSE and its licensees, including Novell. At the same time, Novell moved to stay SCO's claims in the Utah Litigation on the ground that they implicated the assignment and license provisions of the UnitedLinux contracts, whose scope was at issue in the SUSE Arbitration. Novell relied on the Federal Arbitration Act, which requires a court to stay litigation involving any issue referable to arbitration under a written agreement as was the case with the UnitedLinux contracts.

In August 2006, the Utah District Court granted a stay as to SCO's claims against SUSE, including SCO's claim that Novell's distribution of SUSE Linux infringed SCO's UNIX Copyrights. The District Court held that the Federal Arbitration Act applied and therefore SCO's claims regarding SUSE, and Novell's defenses to those claims under the UnitedLinux contracts belonged in arbitration. The District Court refused to stay the Utah Litigation with respect to other claims and counterclaims, including the issues regarding the UNIX Copyrights.

In August 2007, the District Court granted Novell's motion for summary judgment that Novell owns the UNIX Copyrights and thus cannot be liable for slandering SCO's title to these copyrights. SCO then filed this bankruptcy proceeding on the eve of the scheduled trial of Novell's counterclaims against SCO.

In November 2007, this Court granted Novell relief from the automatic stay to complete the Utah Litigation. This Court emphasized that determining the value of Novell's claims in the Utah Litigation was essential to the administration of the bankruptcy case. This Court also noted that the District Court had detailed knowledge of Novell's claims, and that both SCO and Novell had already prepared in full.

The District Court trial took place in the Spring of 2008, and final judgment for Novell was entered in November 2008. On August 24, 2009, the Tenth Circuit reversed the District Court's grant of summary judgment to Novell on copyright ownership, and remanded for trial the copyright ownership and related claims. The Tenth Circuit also affirmed the

District Court's ruling requiring SCO to pay more than $2.5 million in damages on Novell's counterclaim. The *SCO Group, Inc. v. Novell, Inc.*, 578 F.3d 1201 (10th Cir. 2009). In October 2009, the Tenth Circuit denied Novell's petition for rehearing and rehearing en banc. The Utah Litigation is scheduled for a three week jury trial beginning March 8, 2010.

The Arbitration

On September 28, 2007, SCO moved this Court to find that the automatic stay applied to the Arbitration. (Dkt. No. 69.) The Court granted that motion on November 14, 2007. (Dkt No. 204.) At the time of this ruling, the Arbitration had already been pending for 19 months, and both the parties and the Arbitration tribunal had devoted substantial efforts preparing for a merits hearing on liability that was originally scheduled for December 2007. The Arbitration has thus been suspended for the past two years.

The parties received a letter from the Arbitration tribunal, dated October 5, 2009, which stated, in part:

> Following each party's update of 4 August 2009, a further two months have now elapsed, and as far as the Arbitration Tribunal is aware, there is still no indication as to whether this arbitration might be permitted to proceed.
>
> As the parties will appreciate, if this situation is to continue indefinitely, it will begin to cause difficulties for the members of the Arbitral Tribunal.

> To this end, I attach herewith Procedural Order No 10, which sets a further reporting date of 4 December 2009, by which time the arbitration will have been in abeyance for approximately two years. If there have been no developments by that date, the members of the Arbitral Tribunal may then need to consider their position, as well as the future conduct of these proceedings.

The Lift Stay Motion

The Court directed the appointment of a chapter 11 trustee on July 27, 2009. The Trustee was appointed shortly thereafter. (Dkt. Nos. 898-900.)

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

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

SUSE argues that "cause" exists, for the following reasons:

1. The Arbitration is nearly complete.

2. Federal policy favors arbitration.

3. Continuing the stay will lead to incomplete litigation, i.e., the Utah Litigation.

4. SCO is using the stay of the Arbitration as a litigation tactic.

5. SUSE satisfies each of the *Rexene*[1] factors.

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[1] *In re Rexene Prods. Co.*, 141 BR. 574, 575 (Bankr. D. Del. 1992).

RULING

The Court agrees with the Chapter 11 Trustee that the Motion at this time is ill-founded. Accordingly, the Court will deny the Motion. The Court previously addressed this very issue and ruled that the automatic stay applicable to the Arbitration should remain in place. The reason to continue the stay is now stronger than at the time of SUSE's prior attempt. In November 2007, this Court enforced the automatic stay and ruled that the "Swiss arbitration is subject to the automatic stay and SUSE is enjoined from proceeding in that arbitration during the pendency of the bankruptcy case." 11/6/07 Hrg. Tr., at 71. The decision resulted in the suspension of the Arbitration for over two years.

The District Court in the Utah Litigation has scheduled a three-week jury trial to begin on March 8, 2010 – less than two months from now – at which the dispute between SCO and Novell over, among other things, the ownership of the UNIX Copyrights, will be decided. It is the ownership of the Unix Copyrights which is the very issue that the District Court in 2006 determined would be an underlying finding to both the SUSE Arbitration and the Utah Litigation. SUSE can only speculate that if the Court grants stay relief, it expects the merits hearing will take place in three to six months. It is therefore more than likely that the Utah Litigation will be completed before the Tribunal begins its proceedings.

The Court will deny the Motion based upon its findings that SCO would suffer considerable harm were it to permit the Arbitration to proceed.

The Trustee has very limited resources with which to maintain SCO's business and perform other duties. The Trustee will also have to devote substantial time and resources over the coming weeks to prepare for the trial phase of the Utah Litigation. The Arbitration would require fees, costly travel expenses and payment to the Tribunal. In contrast, there is no compelling need for the SUSE Arbitration to go forward at this point. SUSE does not satisfy the first *Rexene* factor.

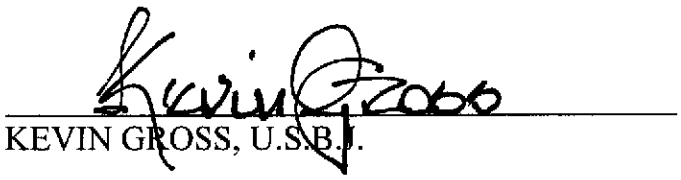
In balancing the hardships, the Court is also aware that in addition to the Utah Litigation moving forward on a tight timetable, the Trustee is continuing his efforts to restructure SCO's business, or sell its assets, or a combination of both.

The preliminary issue is who owns the UNIX Copyrights. SUSE seeks a ruling in the Arbitration that SCO is barred from asserting copyright infringement claims against SUSE. The ownership issue is soon to be tried before the District Court. The issue in the Arbitration is what, if anything, SCO did with the UNIX Copyrights it allegedly had acquired. It is a matter of judicial and estate economy that a factfinder first determine whether SCO acquired the UNIX Copyrights. If the jury in the Utah Litigation determines that SCO did not acquire the UNIX Copyrights, the Arbitration would be unnecessary as moot. SUSE does not satisfy the second *Rexene* factor.

Applying the third *Rexene* factor, probability of success on the merits, the Court is not in a position to determine who would prevail and the probability. The Court therefore can not find that SUSE would likely prevail in the Arbitration.

Accordingly, SUSE's motion to lift the automatic stay to proceed with the Arbitration is denied.

Dated: January 15, 2010



KEVIN GROSS, U.S.B.J.