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.	)	(Jointly Administered)
		Re: Docket No. 69

SUSE'S SPECIAL OPPOSITION TO SCO GROUP, INC'S MOTION TO "ENFORCE THE AUTOMATIC STAY"

SUSE Linux GmbH ("SUSE") appears specially to respond to SCO's request that this Court "enforce the automatic stay" against SUSE. By filing this Opposition, SUSE does not consent to the jurisdiction of this Court, which SUSE expressly contests.

PRELIMINARY STATEMENT

1. SUSE is a German company with no United States offices. SUSE is pursuing a foreign arbitration arising out of contracts with SCO that explicitly choose Switzerland as the forum for resolving any disputes concerning those contracts. Given that state of affairs, SUSE is not subject to this Court's personal jurisdiction and is therefore not within the ambit of the bankruptcy stay. Moreover, SUSE was not properly served with this motion. Unless and until SCO properly serves SUSE, this Court cannot grant SCO any relief on this motion.

2. Even were SUSE subject to jurisdiction here and properly served, SUSE initiated the arbitration to defend against SCO's claims that SUSE's products infringe SCO's copyrights. Such "defensive" actions are not subject to the automatic bankruptcy stay.

BACKGROUND

3. SUSE is the developer of a popular version of the Linux operating system, SUSE Linux.

4. SUSE is a German company with no United States offices. No SUSE employee is based in the United States. (Decl. of Felix Imendoerffer, filed herewith ("Imendoerffer Decl."), ¶¶ 10-11.)

5. SUSE is a wholly owned subsidiary of Novell. SUSE nevertheless has its own separate corporate identity. For example:

(a) SUSE has its own directors. There is no overlap between the Novell and SUSE directors.

(b) SUSE keeps its own corporate records and its own independent accounts.

(c) SUSE is sufficiently capitalized for its ongoing operations.

(d) There are multiple levels of corporations between Novell and SUSE. Novell owns NSIL Cayman. NSIL Cayman in turn owns NISL Ireland. NISL Ireland owns Novell Holding Deutschland GmbH. Novell Holding Deutschland GmbH owns SUSE Linux GmbH, which, as discussed above, owns SUSE Linux Products.

(*Id.* ¶¶ 14-15.)

6. In May 2002, SUSE and SCO entered into a Master Transaction Agreement ("MTA") and a UnitedLinux Joint Development Contract ("JDC," together "UnitedLinux Contracts"). As explained in the preamble to the UnitedLinux Contracts, the UnitedLinux project arose from the agreement of SCO (then Caldera International, Inc.), SUSE and two other Linux vendors (Turbolinux and Conectiva) to jointly develop a standard form of the Linux operating system, referred to as "UnitedLinux." By combining their respective expertise and

intellectual property to develop and promote a uniform Linux platform under the "UnitedLinux" brand, the four UnitedLinux members sought to encourage widespread adoption of UnitedLinux "as a standard for the information technology industry." (*Id.* ¶ 4 & Exs. A (MTA) & B (JDC).)

7. Consistent with this goal, the UnitedLinux members agreed in the UnitedLinux Contracts that each member would have a broad license to use the technology included in the UnitedLinux software, including any related intellectual property rights of the other members. (*Id.* ¶ 5 & Exs. A § 3.2, B § 8.)

8. In early 2003, SCO initiated its "SCOsource" campaign. As part of this campaign, SCO claimed that the Linux operating system infringed UNIX copyrights purportedly owned by SCO. SCO's aim was to extract "licensing" revenue from Linux users, under threat of infringement lawsuit.

9. In response to SCO's attack on Linux, SUSE stated that SUSE and its customers were protected by the broad licenses in the UnitedLinux Contracts. SCO's Senior Vice President, Chris Sontag, replied in May 2003 that SUSE and its customers were *not* protected by the UnitedLinux Contracts:

> Regarding contracts we have with SUSE and UnitedLinux, I would unequivocally state that there is nothing in those contracts that provides them with any protection or shelter in the way they are characterizing this in the press. If I were them, I would not be making those kinds of statements.

(*Id.* ¶ 7 & Ex. C.) SCO later made good on these threats by bringing claims against Novell asserting that Novell's distribution of SUSE Linux infringed SCO's copyrights

10. In order to lift the cloud created by SCO's anti-Linux campaign and to assure its customers that SUSE's products do not infringe any unlicensed SCO intellectual property right, SUSE initiated arbitration in Switzerland with SCO ("Swiss Arbitration"). (*Id.* ¶ 8.)

11. The nature of the Swiss Arbitration is made clear in the "Terms of Reference," a document prepared by the Tribunal with input from SUSE and SCO. (*Id.* ¶ 9 & Ex. D.)

12. In addition, the Tribunal has determined that the Swiss Arbitration will proceed in phases. Phase I resolved the parties' jurisdictional arguments. Phase II will resolve the declaratory relief sought by the parties and whether SUSE bears any liability under SCO's counterclaims. If necessary, in Phases III and IV the Tribunal will resolve any remaining technical issues and assess all issues relating to damages. (*Id.* ¶ 9.)

13. The Swiss Arbitration is in Phase II now. In Phase II, SUSE seeks a declaration interpreting the UnitedLinux Contracts to preclude SCO from claiming that SUSE products infringe SCO's copyrights along with an order barring SCO from making such claims. (*Id.*)

14. Notwithstanding this bankruptcy, the Phase II relief SUSE seeks remains vital. SCO continues to press its claim of copyright infringement and thus persists in clouding SUSE Linux. It therefore remains important to SUSE that the arbitration proceed in order to provide a definitive defense to SCO's claims of copyright infringement against SUSE's customers.

OPPOSITION

I. SUSE WAS NOT PROPERLY SERVED WITH NOTICE OF THIS MOTION.

15. SUSE is a German corporation with a principal address in Nuremberg. SCO purported to serve SUSE by sending copies of the Motion to SUSE's business address in Germany, as well as to Morrison & Foerster LLP and to SUSE's Swiss counsel in the Swiss Arbitration.[1] Morrison & Foerster represents SUSE as co-counsel with Swiss counsel solely

[1] Specifically, SCO's Certificate of Service for the Motion reflects that SCO attempted service on SUSE at three addresses: (1) By Overnight Delivery to SUSE Linux GmbH, Attn: Felix Imendoerffer, Maxfeldstrasse 5, 90409, Nurnberg, Germany; (2) Overnight Delivery, (counsel to SUSE), Georg Rauber, Esquire, Felix Dasser, Esquire, David Rosenthal, Esquire, Homburger Rechtsanwalte, Weinbergstrasse, 56/58, Postfach 338,

(Footnote continues on next page.)

with respect to the Swiss Arbitration and does not represent SUSE generally with respect to SCO's Chapter 11 cases, nor does SUSE authorize Morrison & Foerster to act as its agent for general service of process. As discussed below, SUSE has not been properly served with the Motion in accordance with the applicable Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

A. SCO's Service on the Foreign Addresses Was Improper.

16. SCO's attempt to serve SUSE at the foreign addresses was improper because SCO did not follow The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Convention") in serving SUSE, as expressly required by Bankruptcy Rule 7004. The Hague Convention requires that a German corporation such as SUSE be served only through Germany's designated central authority. The central authority then confirms that the Hague Convention rules have been followed and effectuates service on the party-in-interest. Under the Hague Convention, both Germany and Switzerland have expressly rejected service directly on a party via mail — a valid and enforceable election under the Hague Convention.[2] Therefore, SCO's mail service on the foreign addresses is improper.

(Footnote continued from previous page.)

8006 Zurich, Switzerland; and (3) Overnight Delivery, (counsel for SUSE), Michael A. Jacobs, Esquire, Grant L. Kim, Esquire, Kenneth W. Brakebill, Esquire, Morrison & Foerster LLP, 425 Market Street, San Francisco, CA 94105-2482.

2 *See* Hague Convention, notes 7 (listing countries objecting to mail service, including Germany and Switzerland) & 8 ("service by a Central Authority is the *exclusive* method for service of process in the Federal Republic of Germany" (emphasis added)), available at *http://travel.state.gov/law/info/judicial/judicial_686.html.*

17. The Bankruptcy Rules require that service on SUSE and its foreign counsel at foreign addresses comply with the Hague Convention.[3] Bankruptcy Rule 9014 governs contested matters and provides, in relevant part, that motions must be served "in the manner provided for service of a summons and complaint by Rule 7004." Fed. R. Bank. P. 9014(b). Bankruptcy Rule 7004 then incorporates the portions of Federal Rule of Civil Procedure 4 that govern service on foreign corporations. Federal Rule of Civil Procedure 4 provides that service on SUSE may be effectuated in a place not within any judicial district of the United States: "by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention . . . [or] by other means not prohibited by international agreement as may be directed by the court." Fed. R. Civ. P. 4(f), (h).

18. As the United States, Germany, and Switzerland are all signatories to the Hague Convention and this Court has not directed any other means of service, service in accordance with the Hague Convention is the only proper means of service on SUSE or its counsel at a foreign address. *See, e.g., Harris v. Browning-Ferris Indus. Chem. Serv., Inc.*, 100 F.R.D. 775 (M.D. La. 1984). In *Harris*, the court held:

> Germany has specifically rejected service by direct mail. If the provisions of state law conflict with the provisions of an international treaty, by virtue of the supremacy clause the provisions of the treaty must prevail. State law cannot authorize service of process in a manner inconsistent with a federal treaty. Nor can the provisions of Rule 4 authorize service in this manner. . . . Because the Hague Convention is specific as to how service is to be made in a foreign country . . . the Court finds that the provisions of the Hague Convention must control the manner of service in this action.

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[3] In addition, as discussed below, SCO's foreign counsel has no authority to accept service of process concerning SCO's Chapter 11 cases.

Id. at 777-78 (citations omitted). Accordingly, the *Harris* court held that Volkswagen was not properly served in Germany because the plaintiff, as here, failed to follow the Hague Convention by serving through the central authority. *Id.* at 778.

B. SCO's Service on U.S. Counsel Was Improper.

19. Likewise, SCO's service of notice of the Motion on Morrison & Foerster was improper. Bankruptcy Rule 7004(b)(3) provides for service within the United States on "an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process." SCO bears the burden to show Morrison & Foerster is an "agent" authorized to receive service under Bankruptcy Rule 7004. *In re Harnischfeger Indus., Inc.*, 288 B.R. 79, 82 (Bankr. D. Del. 2003).

20. SUSE has not designated Morrison & Foerster as its agent for the receipt of service of process, either generally or in connection with this bankruptcy. (Imendoerffer Decl. ¶¶ 16-17.) There can therefore be no claim that Morrison & Foerster has SUSE's express authority to receive service of SCO's motion.

21. In "rare...extraordinary circumstances," bankruptcy courts have sometimes deemed counsel in one action an *implied* agent for the service of process in other actions. *In re The Muralo Co.*, 295 B.R. 512, 518 (Bankr. D. N.J. 2003). As *Muralo* suggests, the general rule — in bankruptcy and otherwise — is that an attorney's representation of a client in one matter does not create any implication of authority to receive service as to other matters. "Even where an attorney exercises broad powers to represent a client in litigation, these powers of representation alone do not create a specific authority to receive service. Instead, the record must show that the attorney exercised authority beyond the attorney-client relationship, including the power to accept service." *United States v. Ziegler Bolt & Parts Co.*, 111 F.3d 878, 881 (Fed. Cir. 1997); *see also In re Villar*, 317 B.R. 88, 93 (B.A.P. 9th Cir. 2004) ("We cannot presume from Paris'

handling the litigation that resulted in the judicial lien that he is also authorized to accept service for a motion to avoid the judicial lien."); *In re York*, 291 B.R. 806, 811 (Bankr. E.D. Tenn. 2003) ("The debtors also mailed service to the lawyers who handled the foreclosure and who are representing the bank in this proceeding. The lawyers' prior representation of the bank did not necessarily make them the bank's agent for service of process in this proceeding. ... Thus, service on the lawyers was not proper service."). Because there is no evidence that SUSE has ever empowered Morrison & Foerster to exercise "authority beyond the attorney-client relationship," Morrison & Foerster does not have SUSE's implied authority to accept service of contested matters in these bankruptcy proceedings under Bankruptcy Rule 7004. (Imendoerffer Decl. ¶¶ 16-17.) As SCO has not carried its burden to show that SUSE was properly served with this motion, SCO is not entitled to any of the relief it seeks.

II. SUSE IS NOT SUBJECT TO THIS COURT'S PERSONAL JURISDICTION.

22. SCO acknowledges that SUSE is potentially subject to the automatic stay *only* if SUSE is subject to the *in personam* jurisdiction of this Court. (Motion ¶ 15.) Where a party is not subject to such jurisdiction, the automatic stay does not apply and the party is free to proceed with, for example, foreign arbitrations.

23. Such was the case in *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512 (2d Cir. 1975). There, Copal, a Japanese corporation, initiated an arbitration against Fotochrome, a New York corporation, before the Commercial Arbitration Association in Japan. During the pendency of the arbitration, Fotochrome declared bankruptcy. *In re Fotochrome, Inc.*, 377 F. Supp. 26, 28 (E.D.N.Y. 1974). The arbitration nevertheless proceeded and Copal obtained a favorable judgment. When Copal sought to enforce the judgment as a debt against the estate, the bankruptcy court held that the judgment was obtained in violation of the bankruptcy stay and

was therefore invalid. *Id.* The district court overturned that ruling and the Second Circuit affirmed the district court. *Id.* at 34; *Fotochrome, Inc.*, 517 F.2d at 520. The district court noted:

> It is not surprising that the Japan Commercial Arbitration Association made its award despite the bankruptcy court order. Our courts were bereft of any basis to exercise *in personam* jurisdiction over Copal — much less the Arbitration Association — in this case until after proceedings in Japan had terminated and Copal filed its claim here.

In re Fotochrome, Inc., 377 F. Supp. at 28.

24. Establishing jurisdiction is SCO's burden. *In re Astropower Liquidating Trust*, No. 04-10322, 2006 Bankr. LEXIS 2443, *5 (Bankr. D. Del. Oct. 2, 2006) ("The overwhelming authority in the Third Circuit establishes that the Plaintiff has a burden of proving, by concrete evidence and not merely the allegations in its complaint, that the [defendants] have the minimum contacts necessary to establish personal jurisdiction.").

25. Personal jurisdiction comes in two types: general and specific. *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 317 (3d Cir. 2007).[4] SCO does not identify what sort of jurisdiction it claims exists over SUSE. Neither type subjects SUSE to jurisdiction here.

A. SUSE is Not Subject to General Jurisdiction in the United States.

26. General jurisdiction exists when a defendant has maintained systematic and continuous contacts with the forum. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-15 (1984).

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[4] *O'Connor*, and other cases cited in this opposition, concern the scope of a defendant's due process rights under the Fourteenth Amendment. As a technical matter, the limits on the Court's jurisdiction here are circumscribed by the Fifth, rather than the Fourteenth Amendment. *In re Plassein Intl' Corp.*, 352 B.R. 36, 38 (Bankr. D. Del. 2006). Courts nevertheless rely without distinction on Fifth and Fourteenth Due Process cases when determining the scope of a bankruptcy court's personal jurisdiction over a party. *In re Paques*, 277 B.R. 615, 628 (Bankr. E.D. Pa. 2000).

27. There are no such systematic and continuous contacts here. SUSE is a German company with no United States offices. No SUSE employee is based in the United States.

28. Linux software developed by SUSE is sold in the United States, but these sales are made by Novell, not SUSE. (Imendoerffer Decl. ¶¶ 12-13.) Where the proper corporate form is observed, the fact that one company imports and distributes a product developed by a foreign affiliate does not subject that affiliate to general jurisdiction in the United States. *See, e.g., Cambridge Literary Props., Ltd. v. W. Goebel Porzellanfabrik G.m.b.H & Co. Kg.*, 295 F.3d 59, 63 n.3 (1st Cir. 2002) ("[S]ales by an independent distributor ... or separately incorporated subsidiary normally do not count as 'contacts' of the manufacturer or parent corporation."); *Kuenzle v. HTM Sport-Und Freizeitgerte AG*, 102 F.3d 453, 459 (10th Cir. 1996) ("[I]n the absence of an agency relationship, the acts of a distributor are not ordinarily attributable to a foreign manufacturer for purposes of establishing general jurisdiction.").

29. Here, as discussed above, it is clear that proper corporate forms have been observed, and SUSE is not the "alter ego" of Novell. (Imendoerffer Decl. ¶¶ 14-15.) SCO has not offered any facts suggesting otherwise. Because SUSE is a genuinely separate entity with its own corporate existence, Novell's sale of SUSE products does not subject SUSE to general jurisdiction in the United States.

B. SUSE is Not Subject to Specific Jurisdiction in this Matter.

30. Nor is SUSE subject to the specific jurisdiction of this Court. Determination of specific jurisdiction is a three part inquiry:

> First, the defendant must have "purposefully directed [its] activities" at the forum. Second, *the litigation must "arise out of or relate to" at least one of those activities*. And third, if the prior two requirements are met, a court may consider whether the exercise of jurisdiction otherwise "comport[s] with 'fair play and substantial justice.'"

O'Connor, 496 F.3d at 317 (internal citation omitted, emphasis added).

31. For these purposes "the litigation" is the Swiss Arbitration, the only proceeding in which SCO and SUSE are parties to a controversy. *See, e.g., Helicopteros*, 466 U.S. at 416 (requirement for *in personam* jurisdiction is "controversy" arising out of or relating to defendant's contacts with the forum). SUSE's claims in the Swiss Arbitration do not arise out of any SUSE activity "purposefully directed" at the United States. Rather, SUSE's claims arise from *SCO's* assertion of infringement claims against SUSE Linux that are inconsistent with SCO's obligations under the UnitedLinux Contracts. (Imendoerffer Decl. Ex. D ¶¶ 18-25.) Though part of the negotiations that led to the UnitedLinux Contracts took place in the United States, that is not enough to subject SUSE to jurisdiction here. *Sunbelt Corp. v. Noble, Denton & Assoc., Inc.*, 5 F.3d 28, 32 (3d Cir. 1993). This is especially so given that these contracts are each explicitly subject to Swiss law and choose Switzerland as the forum in which any disputes shall be resolved. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) (holding that forum selection clause are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances").

32. In support of its position, SCO cites the existence of another UnitedLinux agreement, forming a Delaware LLC. (Motion ¶ 16, Ex. D.) No SUSE claim in the Swiss Arbitration arises out of the LLC agreement — indeed, neither SUSE nor SCO seeks to enforce any right or obligation derived from the terms of the LLC agreement. Accordingly, the Terms of Reference, the basic joint document that sets out SCO and SUSE's claims and defenses in the Swiss Arbitration, makes no mention of the LLC agreement. (Imendoerffer Decl. Ex. D.) The LLC agreement therefore cannot ground specific jurisdiction over SUSE.

33. SCO also cites a license agreement with Novell, a website for UnitedLinux, and a printout of a Google search. (Motion ¶ 16, Exs. E-G.) As none of these bear any connection to SUSE's claims in the Swiss Arbitration, they, too, cannot ground specific jurisdiction.

34. SCO's evidence of "minimum contacts" here stands in stark contrast to the contacts evident in the cases SCO's motion cites. For example, in *In re McLean Indus.*, 68 B.R. 690, 693 (Bankr. S.D.N.Y. 1986), the creditor had a New Jersey office, through which it negotiated the disputed fuel oil contract, and at which the documentary record of those negotiations remained. *In re Lykes Bros. Steamship Co.*, 207 B.R. 282 (Bankr. M.D. Fla. 1997), and *In re Chiles Power Supply Co.*, 264 B.R. 533,543 (Bankr. W.D. Mo. 2001), involved attempts by a creditor to seize specific property of the bankruptcy estate (a ship in *Lykes* and a settlement fund in *Chiles*).

C. To The Extent SCO Proposes a More Relaxed Jurisdictional Test Than Described Above, It Runs Afoul of SUSE's Fifth Amendment Rights.

35. SCO does not discuss the boundaries the U.S. Constitution places on the personal jurisdiction of this Court — for example, SCO does not mention the terms "general" or "specific" jurisdiction. Instead, citing three cases from other jurisdictions, SCO claims personal jurisdiction is appropriate over any creditor that "(i) transacts business in the United States; (ii) does an act in the United States; or (iii) has an effect in the United States." (Motion ¶ 15, citing *In re Lykes Bros. Steamship Co.*, 207 B.R. 282 (Bankr. M.D. Fla. 1997); *In re Chiles Power Supply Co.*, 264 B.R. 533,543 (Bankr. W.D. Mo. 2001); *In re McLean Indus., Inc.*, 68 B.R. 690 (Bankr. S.D.N.Y. 1986).)

36. It is unclear whether SCO contends that test allows for more expansive jurisdiction than the traditional formulations of general and specific jurisdiction described above. If SCO means that this Court has jurisdiction over any creditor who transacts *any* business, does *any* act,

or causes *any* effect in the United States, no matter how attenuated, SCO is simply wrong. The Constitution requires "*minimum* contacts," not "*any* contact."

37. In particular, SCO appears to claim that the mere fact that the Swiss Arbitration "has an effect in the United States" (*i.e.*, on SCO) is enough to ground personal jurisdiction over SUSE. (Motion ¶ 16.) That is flatly inconsistent with constitutional boundaries on this Court's jurisdiction. Were that the case, bankruptcy courts would automatically have jurisdiction over any participant in any foreign proceeding that had anything to do with the debtor, and cases such as *Fotochrome* would not exist. (*See* ¶ 23, *supra*.)

38. Instead, consistent with the constitutional limits on its jurisdiction, this Court has circumscribed the scope of "effects" jurisdiction, holding that application of the "effects test" is only appropriate where there is, *inter alia*, an intentional tort against a resident of the forum — facts that are not present here. *In re Astropower Liquidating Trust*, No. 04-10322, 2006 Bankr. LEXIS 2443, *12 (Bankr. D. Del. Oct. 2, 2006); *see also Marten v. Godwin*, No. 05-5520, 2007 U.S. App. LEXIS 19921, *11-*15 (3d Cir. Aug 22, 2007); *IMO Indus. v. Kiekert AG*, 155 F.3d 254, 265-66 (3d Cir. 1998)).

III. THE STAY DOES NOT APPLY TO SCO'S CLAIMS IN THE SWISS ARBITRATION.

39. SCO acknowledges, as it must, that under existing law, the automatic stay applies only to claims "*against* the debtor." (Motion ¶ 20, citing 11 U.S.C. § 362(a) (emphasis added).) Courts have uniformly held that the automatic stay does not apply to claims brought *by* the debtor. *First Wis. Nat'l Bank v. Grandlich Dev. Corp.*, 565 F.2d 879, 880 (5th Cir. 1978) (automatic stay did not bar district court's dismissal of debtor's counterclaim in action originally brought against debtors, "because the counterclaim was not a proceeding against the debtors"); *Trans Caribbean Lines v. Tracor Marine, Inc.*, 49 B.R. 360, 362 (S.D. Fla. 1985) (since

prosecution of counterclaims and crossclaims by debtor is not stayed by § 362, court's dismissal of debtor's counterclaims or cross claims is not barred by § 362); *In re Regal Construction Co.*, 28 B.R. 413, 416 (Bankr. D. Md. 1983) (automatic stay did not preclude debtor from proceeding on its counterclaim).

40. Ignoring that it has asserted counterclaims against SUSE in the Swiss Arbitration, SCO seeks a blanket declaration that "the automatic stay prohibits the continuation of the SUSE arbitration," presumably meaning this to stay its own claims as well. (Motion ¶ 17.)[5] Though SCO seeks *sanctions* against SUSE for supposedly "continuing to prosecute its claim against the debtor," SCO neglects to inform this Court that the only substantive post-petition action SUSE has undertaken in the Swiss Arbitration — other than to oppose SCO's request that the Tribunal grind its proceedings to a halt — was to file an opposition to SCO's counterclaims. Even were SUSE subject to this Court's jurisdiction, SUSE cannot be sanctioned for defending itself against SCO's unstayed counterclaims. *In re United States Abatement Corp.*, 157 B.R. 278 (E.D. La. 1993) (nondebtor's motion to reinstate debtor's counterclaim and its own motion for summary judgment thereon did not violate stay), *aff'd* 39 F.3d 563 (5th Cir. 1994).

IV. SUSE'S CLAIMS IN THE SWISS ARBITRATION ARE DEFENSIVE IN NATURE AND THEREFORE NOT SUBJECT TO THE AUTOMATIC STAY.

41. As discussed above, SUSE initiated the Swiss Arbitration in response to specific claims by SCO that SUSE's products infringe SCO's copyrights. (Imendoerffer Decl. ¶ 8.)

42. Because SUSE's Phase II claims are defensive in nature, the bankruptcy stay does not apply even if this Court has personal jurisdiction over SUSE:

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[5] SCO's Proposed Order is ambiguous in this regard. It prohibits *SUSE* from "commencing or continuing" the "SUSE Arbitration," a term whose meaning the Proposed Order indicates is found in SCO's Motion. The Motion appears to define that term as the entire Swiss Arbitration. (Motion ¶¶ 6-7.)

> Since section 362 mandates a stay only of litigation "against the debtor" designed to seize or exercise control over the property of the debtor ... it does not prevent entities against whom the debtor proceeds in an offensive posture ... from "protecting their legal rights."

In re Financial News Network Inc., 158 B.R. 570, 573 (S.D.N.Y. 1993). Here, SUSE is merely trying to protect its own property and rights against interference and claims by SCO. (Imendoerffer Decl. ¶ 8.)

43. The posture of the Utah litigation drives this point home. There, SCO brought counterclaims claiming that Novell infringed SCO's copyrights by distributing SUSE products. As affirmative claims, those claims are not subject to the bankruptcy stay. (*See* Section III, *supra*.) Instead, Novell sought and obtained a stay of certain of SCO's counterclaims pending resolution of the Swiss Arbitration, because the issues to be decided in the Swiss Arbitration could provide Novell with a defense against those counterclaims in the Utah litigation. *SCO Group, Inc. v. Novell, Inc.*, 2006 U.S. Dist. LEXIS 59295, *11 (Aug. 21, 2006 D. Utah). So not only are SUSE's claims in the Swiss Arbitration defensive against the general accusations made by SCO against SUSE, they are also affirmative defenses against the specific claims SCO has brought against distributors of SUSE products such as Novell.

44. Similarly "defensive" claims were at issue in *In re Transp. Sys. Int'l*, 110 B.R. 888 (D. Minn. 1990). There, the bankrupt entity (TSI) had demanded certain freight payments from Honeywell, but had not instituted formal proceedings against Honeywell. Honeywell responded by filing an ICC claim seeking a declaration that the freight billing was improper. TSI argued that the ICC proceeding violated the bankruptcy stay. The bankruptcy court agreed with TSI and awarded sanctions against Honeywell. On appeal, however, the court overturned that ruling, finding that because the ICC proceeding was defensive in nature it was not "against the debtor"

within the meaning of the bankruptcy stay statute and therefore not subject to the automatic stay. *Id.* at 893.

45. Because the Swiss Arbitration is primarily defensive in nature, it is unlike the disputes at issue in many of the cases cited by SCO. Damages, if any, will not be decided until Phase IV of the Swiss Arbitration, which is not scheduled to begin until 2008. SCO may well have exited bankruptcy by that point; it is SUSE's understanding that SCO has given every indication that it intends to complete this process quickly. Nevertheless, SUSE would not oppose denial of this motion without prejudice to SCO renewing it if and when Phase IV nears.[6]

CONCLUSION

46. For the reasons stated above, SUSE has not been properly served with SCO's motion and is not subject to personal jurisdiction before this Court. Even were that otherwise, SUSE's claims are defensive in nature and therefore not subject to any stay of claims against SCO. SUSE therefore requests that the Court deny SCO's motion.

Dated: October 18, 2007
Wilmington, Delaware

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6 Similarly, if the Court holds that SUSE is subject to the automatic stay, SUSE will move to lift the stay, on substantially the same grounds as Novell's motion to lift the stay as to the Utah litigation.

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