IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
The SCO GROUP, INC., et al.,[1]	)	Case No. 07-11337 (KG)
	)	(Jointly Administered)
Debtors.	)	**Related Docket Nos. 69 and 141**

DEBTORS' MEMORANDUM OF LAW IN REPLY TO SUSE'S SPECIAL OPPOSITION TO SCO GROUP, INC.'S MOTION TO "ENFORCE THE AUTOMATIC STAY"

I. PRELIMINARY STATEMENT

SUSE Linux GmbH ("SUSE"), a 100% subsidiary of Novell and a 25% owner of the Delaware LLC that purportedly "assigned" SUSE the rights that form the basis of its arbitral claims against SCO Group, Inc. ("Debtor" or "SCO Group"),[2] seeks to torpedo SCO's reorganization by proceeding with a three-week, $100,000,000 arbitration trial in December in Zurich, Switzerland. SUSE's conduct (caused by Novell) grossly violates the automatic stay and should be punished.

In its "special opposition,"[3] SUSE objects to Debtor the SCO Group, Inc.'s Motion to Enforce the Automatic Stay (the "Motion to Enforce") on three grounds: lack of proper service, lack of personal jurisdiction, and lack of any proceeding "against" SCO. All of these objections are baseless.

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[1] The Debtors and the last four digits of each of the Debtors' federal tax identification numbers are as follows: (a) The SCO Group, Inc., a Delaware corporation, Fed. Tax Id. #2823; and (b) SCO Operations, Inc., a Delaware corporation, Fed. Tax ID. #7393.

[2] SCO Group and SCO Operations, Inc. shall collectively be referred to herein as the "Debtors" or "SCO".

[3] In response to SCO's motion, SUSE filed SUSE's Special Opposition to SCO Group, Inc.'s Motion to "Enforce the Automatic Stay" (Docket No. 141) (the "SUSE Opposition").

The Debtor validly served SUSE via Novell and its U.S. counsel, in accordance with Fed.R.Bankr.P. 7004(b)(3). In any event, this Court is authorized to permit any appropriate method of service. Service via the Hague Convention is unnecessary because SUSE has agents in the USA, and moreover this form of service takes months and could not be effected prior to the scheduled December 3 start of the Zurich trial.

SUSE is also plainly subject to personal jurisdiction in this Court. It has more than ample "minimum contacts" with the United States. In fact, SUSE has had a "continuous and substantial" presence in the United States. It had a permanent office here, and its CEO and other senior management had offices in this country. Its products are sold here and a U.S. company is its "exclusive licensee" and 100% owner. SUSE is a 25% owner of the very Delaware LLC that was created as the vehicle for the UnitedLinux venture that gave rise to SUSE's arbitral claims, the same LLC that made the purported "assignment" on which all of SUSE's claims in Switzerland are purportedly based.

On the merits, SUSE's arbitral suit in which SUSE affirmatively seeks an injunction, declaratory relief, and a *$100,000,000 damages award* against SCO, is plainly an "action against the debtor" within the meaning of 11 U.S.C. § 362(a) and binding Third Circuit precedent. SUSE's contention that the arbitration is "defensive" in nature is frivolous. *All actions* "against the debtor" are subject to the automatic stay, including arbitrations and claims for just injunctive and declaratory relief.

II. JURISDICTIONAL FACTS

The Debtor is aware of the following facts on the basis of SUSE's admissions and on publicly available information from the Internet. These facts alone are more than ample for

the Court to reject SUSE's defenses. If SUSE disputes any of these facts, or if the Court requires a further showing, the Debtor requests time for discovery and an evidentiary hearing before the issue is finally decided, as SCO believes that SUSE's U.S. contacts are even more extensive than as described below. *See Kelly v. Syria Shell Petroleum Development B.V.* , 213 F.3d 841, 854 (5th Cir. 2000) (prima facie showing of jurisdiction sufficient); *In re Williams*, 264 B.R. 234, 239 (Bankr. D. Conn. 2001) ("Prior to discovery, a plaintiff may defeat a motion to dismiss based on legally sufficient allegations of jurisdiction"); *In re EAL (Delaware) Corp.*, 1994 WL 828320, *17 (D. Del. 1994) ("when a motion to dismiss for lack of jurisdiction is decided on the basis of affidavits and other written materials, ... all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party").

A. SUSE and the UnitedLinux Agreements

At the time SUSE and SCO entered into the 2002 UnitedLinux agreements on which SUSE's arbitration claims are based, SUSE was an independent, privately held company with worldwide operations. SUSE had a U.S. office in Oakland, California with 45 employees, and a California-based Professional Services Division.[4] In 2001, SUSE had a "48% market share of the Linux retail market in the USA."[5]

SUSE has admitted that the UnitedLinux agreements were negotiated in large part during face-to-face meetings of the parties in Atlanta, Salt Lake City, and New York. *See* SUSE

[4] *See* http://www.hoise.com/ primeur/00/articles/monthly/AE-PR-08-00-34.html; http://www.news.com/2100-1001-252298.html.

[5] http://www.hoise.com/primeur/01/articles/weekly/AE-PR-05-01-13.html.

Statement of Claim, attached as Ex. 1,[6] ¶¶ 33, 34, 37, 45. In addition, SUSE sent numerous emails and faxes and made many phone calls to SCO's team in the U.S.A. during the course of the negotiations. *Id.* at ¶¶ 29, 30, 31, 33, 34, 35, 37, 44, 48, 51, 53, 57.

Aware that U.S. law in general, and U.S. bankruptcy law in particular, could impact the transaction, SUSE retained U.S. counsel to review and edit the agreements. *Id.* ¶ 66. SUSE's U.S. attorneys inserted a "special clause ... referring to the U.S. bankruptcy code." *Id.*

After extensive negotiations, the parties closed the UnitedLinux deal by signing three agreements: a Master Transaction Agreement ("MTA") (SUSE Opposition, Imendoerffer Aff., Ex. A),[7] a Joint Development Agreement ("JDC") (*Id.*, Ex. B), and an agreement to form a Delaware LLC, to be 25% owned by each of the four parties ("LLC Agreement") (Motion to Enforce, Ex. D). Although in its objection SUSE attempts to gloss over the LLC Agreement and its membership in the LLC (which still exists to this day), SUSE admits that the use of a separate LLC was an essential element in the deal. *See* SUSE Statement of Claim at ¶¶ 32-37. SUSE mentions the LLC *seventy-four times* in its arbitral Statement of Claim.

In fact, SUSE's primary claim in the Swiss arbitration is *entirely predicated* on the allegation (denied by the Debtor) that SCO assigned the disputed intellectual property to the LLC, and that the *Delaware LLC assigned this property to SUSE for use in the USA and worldwide.* JDC 8.2; MTA 3.2.2; SUSE Statement of Claim at ¶¶ 99-103. In other words, the Swiss arbitration was filed on the theory that SUSE contracted with a Delaware LLC, in which it

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[6] Exhibits 1 and 9 referenced herein are being filed under seal, in an abundance of caution, as both exhibits refer to documents that are the subject of a Motion to File Under Seal (Docket No. 143) that SUSE filed on October 18, 2007.

[7] SUSE filed the Affidavit of Felix Imendoerffer in support of the SUSE Opposition (Docket No. 142), attached to which were various agreements filed under seal.

has a 25% ownership interest, and that the contract gave SUSE the right to market, and SUSE did in fact market, the subject intellectual property in the United States in substantial quantities. Yet SUSE claims that it does not have "minimum contacts" with the United States.

B. SUSE after the Novell Acquisition

SUSE remained independent until January 2004, when Novell became its 100% owner and turned it into a "product business unit within Novell."[8] Novell closed SUSE's Oakland office and began distributing SUSE's products (mainly Linux software) itself. Novell became SUSE's "exclusive licensee," with virtually unlimited power to "make, sell, offer to sell, use, import into the United States, sublicense, market, distribute, reproduce, modify, translate, localize, develop, display, perform, make derivative works from, and otherwise make use of, the SUSE IP in any manner and in any media." Motion to Enforce, Ex. F, art. 3. Through Novell, SUSE's products, now called "SUSE Linux from Novell," are widely sold in the U.S.A. and throughout the world. Motion to Enforce, Ex. G.

Shortly after acquiring 100% ownership of SUSE, Novell officers took over the management of SUSE. From 2004 until July 2006, SUSE's CEO ("Geschäftsführer") was Novell's CFO and Senior Vice-President, James Tibbetts, Jr. Mr. Tibbetts managed SUSE from Novell's headquarters in Waltham, Massachusetts.[9]

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[8] *See* http://www.novell.com/news/press/archive/2004/01/pr04003.html.

[9] *See* http://www.novell.com/news/press/novell_appoints_joseph_s__tibbetts_jr__as_chief_financial_officer and Ex. 2 (excerpt from official German online company register at http://www.handelsregister.de/). As indicated in the highlighted portion of the excerpt, Mr. Tibbetts was SUSE's registered *Geschäftsführer*, with an unlimited power of attorney to act for the company, from 12/15/04 to 7/12/06. A full translation of the cited excerpts will be provided at the Court's request.

Novell's Vice President for Engineering, Eric Anderson, who lives in Utah and works at Novell's Provo office, was assigned to "run the SUSE organization." Although he often commuted to Germany in the early stages of his assignment, by 2006 he largely managed SUSE remotely from Novell's Utah office.[10]

Mr. Tibbetts was replaced in July 2006 by Volker Smid, the president of Novell's EMEA Division (Europe, Middle East, and Africa), who remains SUSE's CEO as of today.[11] Mr. Anderson, who was the CEO of SUSE's wholly owned subsidiary, SUSE Linux Products GmbH, remained in office until June 2007.[12] His predecessor as CEO of this company was David E. Patrick, Novell's Utah-based General Manager of Linux Open Source Platforms.[13]

C. SUSE and the Swiss Arbitration

During Mr. Tibbett's term as SUSE's CEO, in April 2006, SUSE filed its Request for Arbitration ("RFA"). Mr. Tibbetts, in Massachusetts, must have approved the decision to file it. Although he had to give formal approval, Novell drove the process. Novell and SCO had been in litigation in Utah since 2004, and its attorneys sought to gain a strategic advantage by opening a second front in Switzerland. The same law firm, Morrison & Foerster ("MoFo"), represents Novell in the Utah litigation and in this bankruptcy case, and SUSE in the arbitration

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[10] Ex. 3 (transcript of audio interview of Mr. Anderson at http://www.novell.com/feeds/openaudio/?p=62).

[11] *See* http://www.novell.com/company/bios/vsmid.html and Ex. 2. As indicated in the highlighted portion of the excerpt, Mr. Smid became SUSE's registered *Geschäftsführer*, with an unlimited power of attorney to act for the company, on 6/13/06.

[12] *See* Ex. 4 (excerpt from official German online company register at http://www.handelsregister.de/). As indicated in the highlighted portion of the excerpt, Mr. Anderson was SUSE Linux Products's registered *Geschäftsführer*, with an unlimited power of attorney to act for the company, from 7/4/06 to 6/20/07.

[13] *See* http://www.linuxworldexpo.com/live/12/events/12SFO05A/keynotes/keynotebio//CMONYA00BC8K. Mr. Patrick was SUSE Linux Product's registered *Geschäftsführer*, with an unlimited power of attorney to act on behalf of the company, from 9/2/04 to 7/4/06, when he was replaced by Mr. Anderson. *See* Ex. 4.

and in this Court. MoFo filed the RFA in Europe at the same time it filed a motion with the Utah court to stay the Utah litigation pending the Swiss arbitration.

In the arbitration, SUSE claims that, under the UnitedLinux agreements, SCO assigned certain proprietary UNIX intellectual property to the Delaware LLC, and that the LLC then assigned these rights to SUSE. JDC 8.2; MTA 3.2.2; SUSE Statement of Claim at ¶¶ 99-103. As relief for SCO's purported breach of the agreements, SUSE seeks a $100,000,000 damages award, plus injunctive and declaratory relief. Terms of Reference ("ToR"), SUSE Opposition, Ex. D, ¶ 48.

SUSE has filed into the arbitral record a written Power of Attorney that gives MoFo "full power to perform all legal acts falling within the scope of authority of a general attorney-in-fact," including the right to represent SUSE before the arbitration tribunal and "*in any related proceedings before any court*, agency, or tribunal" and to take "*all other actions* needed to represent [SUSE] in connection with the ICC arbitration *and any related proceedings.*" SUSE Power of Attorney (emphasis added), a copy of which is attached hereto as Ex. 5. In the arbitral Terms of Reference, the parties agreed that all notifications or communications between the parties "arising in the course of this arbitration" would be sent via email and fax or overnight courier to the parties' attorneys. ToR ¶¶ 6-7. From its California offices, MoFo has prepared SUSE's arbitral pleadings and other documents and has participated in telephonic hearings with the arbitral tribunal and opposing counsel.

D. SUSE's Post-Petition Prosecution of the Swiss Arbitration

Notwithstanding SCO's September 14 filing of its Chapter 11 petition, SUSE has continued prosecuting the arbitration and is attempting to persuade the arbitral tribunal to

proceed with the three-week Zurich arbitration hearing, scheduled to begin on December 3, where issues of liability on SUSE's claims would be determined. Motion to Enforce, Ex. A. SUSE has made this decision knowingly, in disregard of SCO's warnings that SUSE's actions violated the automatic stay. Indeed, in its response, SUSE continues to take the position that the automatic stay does not apply to the arbitration at all.

SUSE would have the arbitration go forward even though SCO has been *without arbitration counsel* since the Chapter 11 petition was filed. SCO's motion to retain Boies Schiller & Flexner as arbitration counsel is set for hearing before this Court on November 6. However, after negotiation, SCO's Swiss counsel Lenz & Staehelin, has opted to withdraw, as it cannot accept the requirement of court approval of its fee invoices. *See* October 19, 2007 Letter by Paolo Patoochi of Lenz & Staechelin, attached hereto as Ex. 6.

SUSE first informed SCO of its intentions in a September 21st telephone call. Later that same day, SUSE wrote to the tribunal that "the bankruptcy filing does not stay the arbitration, and that the proceedings should continue." Motion to Enforce, Ex. A. On September 24, the tribunal requested both parties to provide a "detailed explanation" of their views on whether SCO's bankruptcy affects the arbitration. *Id.*, Exs. B & C. On September 28, SCO filed the present motion to enjoin SUSE from proceeding with the arbitration.

SUSE responded to the tribunal in an October 9 letter, which again asserted that the automatic stay had no effect and the December hearing should proceed. *See* SUSE's October 9, 2007 Letter (without exhibits) attached hereto as Ex. 7. The letter made two of the three arguments that SUSE makes here: that this Court lacks personal jurisdiction over SUSE, and that the stay does not apply to SUSE's purportedly "defensive" proceeding.

In its October 18 objection filed with this Court, SUSE repeated these two contentions and added a new one: that the Motion to Enforce was not properly served. Even though it indisputably received full and fair notice of SCO's motion, SUSE asserted that it could *only* be served under the Hague Convention. SUSE did not inform the Court that Hague Convention service is slow and expensive, and that SUSE could not possibly be served by this method prior to the scheduled December 3 start of the Zurich hearing.

Hague Convention service, however, is required only if the defendant can only be served at a location outside the United States. It has no application if the party in question has a U.S. agent or may otherwise be served here. According to a leading international process serving firm, Hague Convention service in Germany would take two to three months, with no expedited procedure available (thus service could not have been perfected prior to December 3, even if SCO had started the process on the same day it filed its Chapter 11 petition). *See* Brochure of Crowe Foreign Services, attached hereto as Ex. 8. The Motion to Enforce and all of its exhibits, totaling over 100 pages, would have to be translated into German, at $65 per page, including even documents drafted by SUSE itself in English, with the possibility that the German authorities will refuse to serve the papers if any translation errors are detected. *Id.*[14] However, SUSE is amenable to service within the United States, so SUSE may not hide behind the Hague Convention.

Remarkably, SUSE committed a further violation of the automatic stay on October 30, 2007 when it filed with the tribunal a so-called rejoinder memorial. A copy of

[14] *See also* http://www.germany.info/relaunch/info/missions/consulates/ chicago/docuserv.html (German consulate website).

SUSE's October 30 Rejoinder, without exhibits, is attached hereto as Ex. 9 (filed under seal). The document commences by reminding the tribunal that SUSE requests as "Prayers for Relief" six delineated items, including an order for "SCO to pay damages"; and an order for "SCO to bear all costs;" in addition to injunctive relief against SCO and a declaration that SUSE now has rights to SCO's UNIX intellectual property – perhaps the most valuable asset of the Debtor's estate. *Id.* at p. 2. Although SUSE continues to argue before this Court that the current phase of the arbitration pertains only to SCO's counterclaim and that SUSE is acting only in defense of the counterclaim, its recently submitted rejoinder shows that either SUSE is misrepresenting the facts to this Court or that it cannot itself differentiate where SUSE's own claims end and where SCO's counterclaim begins.

Indeed, SUSE makes clear in its Preliminary Remarks that the purpose of its rejoinder is not with respect to SCO's counterclaims, but rather, to "address Respondent's Opposition to *SUSE's Claims* . . . ." SUSE Rejoinder, p. 6 (emphasis added). SUSE then proceeds for 17 pages to attack SCO's defenses to SUSE's Statement of Claim and argue why SUSE should prevail on its affirmative claims against SCO. Finally, SUSE reiterates in its rejoinder's concluding sentence that SUSE requests the tribunal "to uphold SUSE's Prayers for Relief", which, as noted included six separate bold-faced bullet points on *SUSE's claims*, including money damages, and declaratory and injunctive relief *against SCO. See id.* at p. 49. Thus, notwithstanding SCO's filing of the Motion to Enforce, SUSE continues to snub its nose at this Court's jurisdiction and authority.

III. SUSE HAS BEEN VALIDLY SERVED

As noted above, "Hague Convention applies only when the service has to be made abroad, and very often service abroad proves unnecessary because the foreign defendant has a local presence or a local agent for service." Rule 4, Fed.R.Civ.P., Supplementary Practice Commentaries ¶ C4-24. "Where service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends and the Convention has no further implications." *Volkswagenwerk A.G. v. Schlunk*, 486 U.S. 694, 707 (1988). SUSE was properly served in the United States by service on its expressly or impliedly authorized agents, Novell and MoFo.

A. For Service Purposes, Novell is SUSE's Agent

Not mentioned at all in SUSE's Objection is the fact SCO served a copy of the motion papers on Novell. *See* Certificate of Service to Motion to Enforce. Novell undisputedly is SUSE's 100% parent, Novell's own people run SUSE, and SUSE admittedly conducts *all* of its U.S. business through Novell. Imendoerffer Aff. ¶¶ 13-14. Novell, as SUSE's "exclusive licensee," has the power to "make, sell, offer to sell, use, import into the United States, sublicense, market, distribute, reproduce, modify, translate, localize, develop, display, perform, make derivative works from, and otherwise make use of, the SUSE IP in any manner and in any media." Motion to Enforce, Ex. F, art. 3.

Under these circumstances, Novell is SUSE's "managing or general agent," and SUSE was, therefore properly served under Rule 7004(b)(3), which allows service on a "foreign corporation" such as SUSE by "mailing a copy of the summons and complaint to the attention of

an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process...."

Although a parent-subsidiary relationship, without more, may be insufficient to make the parent an agent of the subsidiary, the parent *is* deemed an agent if it performs services for its affiliate that go "beyond mere solicitation," services that "are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services." *In re McLean Indus., Inc.*, 68 B.R. 690, 700 (Bankr. S.D.N.Y. 1986) (quoting *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116, 121 (2d Cir. 1967). *Accord*, 4A Wright & Miller, Federal Practice & Procedure § 1104 (subsidiary may be served via a parent if the parent is "acting as an agent" for the subsidiary's separate business within the jurisdiction). *See also Lamb v. Volkswagenwerk Aktiengesellschaft*, 104 F.R.D. 95, 101 (S.D. Fla. 1985) (subsidiary validly served via parent where parent had absolute authority, determined on a daily basis how the subsidiary would operate, and the subsidiary was "very close to nothing more than a department" of the parent); *Titu-Serban Ionescu v. E. F. Hutton & Co.*, 434 F. Supp. 80, 82-83 (S.D.N.Y. 1977) (service on the parent bound E.F. Hutton's French subsidiary because the subsidiary was "merely an incorporated division and instrumentality of Hutton" and the commonly-owned enterprise "relie[d] on the joint endeavors of each constituent part and each corporation function[ed] as an integral part of a united endeavor").

These same factors are all present here. As set forth above, SUSE's "own officials would undertake to perform substantially similar services" in the United States, just as they did from SUSE's Oakland office prior to the Novell acquisition, if Novell did not perform

them. *McLean Industries*, *supra*. Novell has absolute authority over SUSE, Novell's own employees manage SUSE and determine its day-to-day operations, and SUSE is merely a "product business unit within Novell,"[15] very close to "nothing more than a department." *Lamb*, *supra*.

Novell and SUSE plainly function as an "integral part of a united endeavor," *E. F. Hutton*, *supra*. Novell should be regarded as SUSE's agent, and SUSE's service objection should be rejected.

B. SUSE Authorized Its U.S. Law Firm, MoFo, to Accept Service

As noted above, SUSE has granted MoFo, its U.S. law firm, a broad power of attorney "with full power to perform all legal acts falling within the scope of authority of a general attorney-in-fact," including the right to represent SUSE before the arbitration tribunal and "*in any related proceedings before any court*, agency, or tribunal" and to take "*all other actions* needed to represent [SUSE] in connection with the ICC arbitration *and any related proceedings*." SUSE Power of Attorney (emphasis added). This power of attorney twice states expressly that MoFo's "full power" to act as SUSE's "general attorney-in-fact" extends not just to the Swiss arbitration but also to "related proceedings before any court," such as the present Chapter 11 case. Thus, service on MoFo was valid service on SUSE.

Furthermore, in the arbitral Terms of Reference, the parties agreed that all notifications or communications between the parties "arising in the course of this arbitration" would be sent via email and fax or overnight courier to the parties' attorneys. ToR 6-7. This

[15] *See* http://www.novell.com/news/press/archive/2004/01/pr04003.html (Novell press release).

"arising in the course" language includes more than arbitration filings, and it is broad enough to include service of the present motion.

In addition to this express authority, MoFo at least had implied authority to accept service. MoFo has implied authority by virtue of its extensive involvement in all of the related litigation between SCO and Novell/SUSE and by the close relationship of this motion to the Swiss arbitration. *See In re Focus Media Inc.*, 387 F.3d 1077, 1083 (9th Cir. 2004) (implied authority may be found based on the "level of the attorney's involvement in [a] related proceeding and the extent to which the two proceedings are intertwined); *In re Muralo Co.*, Inc., 295 B.R. 512, 518 (Bankr. D.N.J. 2003) (finding implied authority where attorney was representing the defendant in a related bankruptcy proceeding). Thus, in *U.S. v. Bosurgi*, 343 F. Supp. 815, 818 (S.D.N.Y. 1972), an attorney retained to bring a state court action was deemed to have implied authority to receive service in a related federal action, where successful defense of the federal action was a "necessary incident" of success in the state action. Similarly, SUSE can succeed in the Swiss arbitration only if it successfully defends this motion.

Accordingly, SUSE was validly served through MoFo.

C. If Deemed Necessary, This Court Should Authorize Service on Novell and/or MoFo

Even if SUSE is deemed not to have been validly served as a matter of law via Novell and MoFo, this Court can and should authorize substitute service on SUSE through Novell and/or MoFo under Rule 4(f)(3), Fed.R.Civ.P., and Rule 4(f)(1)(VI), Del.Sup.Ct.RCP. The federal rule allows service on a foreign defendant "by other means not prohibited by international agreement as may be directed by the court" and the Delaware rule, which this Court

may employ pursuant to Fed.R.Civ.P. 4(e)(1) and 4(h)(1) and Fed.R.Bank.P. 7004(a)(1), which permits service in any manner provided by an "order of court." In light of the fact that SUSE may not be served via the Hague Convention prior to the December 3 arbitral hearing, fairness and equity suggest that authorization be granted if needed.

SUSE admits that it may be served in the United States if this Court so directs. SUSE Objection at 6 (quoting from Rule 4(f)(3) and noting that "this Court has not directed any other means of service"). SUSE fails to state any reason why this Court should *not* direct such service and force SCO to resort to the slow, expensive, and needless Hague Convention procedure.

In fact, court-directed service under these rules is an independent, equally favored basis for service of process; it "is neither a "last resort' nor 'extraordinary relief'" and it is fully available even if other means have not been attempted. *Rio Properties, Inc. v. Rio Intern. Interlink*, 284 F.3d 1007, 1015 (9th Cir. 2002); *Ryan v. Brunswick Corp.*, 2002 WL 1628933, *2 (W.D.N.Y. 2002); 4B Wright & Miller, Federal Practice & Procedure § 1134.

Directly on point is *Forum Financial Group, LLC v. President, Fellows of Harvard College*, 199 F.R.D. 22 (D. Maine 2001), where the court allowed service on a foreign resident's U.S. attorney. The court held that service on a resident attorney may be authorized under Rule 4(f)(3) *even if* the attorney has not been authorized to accept process on behalf of his client. *Id.* at 24-25. Service through the attorney (or anyone else) under Rule 4(f)(3) is permissible as long as this method is "likely to fulfill the due process requirement of being reasonably calculated to give [the client] notice of the case and an opportunity to be heard." *Id.* at 25. Here, SUSE undisputedly did receive notice and it is being heard.

Delaware Rule 4(f)(1)(VI), the state's version of federal Rule 4(f)(3), was the basis for authorization of service on a Hungarian company through its U.S. indirect parent in *USH Ventures v. Global Telesystems Group, Inc.*, 1998 WL 281250 (Del. Super. 1998). The rule allows a court to "tailor a manner of service" to "fit the necessities of a particular case." *Id.* at *6-7. Similarly, in light of the necessities of this case, the Court should authorize service on Novell.

SCO submits that, for the reasons stated above in III.A and III.B, court authorization for service on Novell and/or MoFo is completely unnecessary. If otherwise, this Court should grant the appropriate authorization, and SCO respectfully moves for such an order. The Court may issue the order *nunc pro tunc* to September 28, 2007when SCO served Novell and MoFo. Or, if the Court prefers, SCO will re-serve immediately in any manner that the Court directs.

IV. THIS COURT HAS PERSONAL JURISDICTION OVER SUSE

As discussed in the Motion to Enforce, this Court has personal jurisdiction to enforce the automatic stay against anyone who has "minimum contacts with the United States at large." *In re Lykes Bros. S.S. Co., Inc.*, 207 B.R. 282, 286 (Bankr. M.D. Fla. 1997). The "minimum contacts" test is easily satisfied; even the sending of a single letter to the forum may suffice, as long as the exercise of jurisdiction accords with "traditional notions of fair play and substantial justice." *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-23 (1957). A foreign corporation may satisfy the minimum contacts requirement by:

(1) transacting business in the United States;

(2) doing an act in the United States; or

(3) having an effect in the United States by an act done elsewhere.

Lykes Bros., supra; In re Chiles Power Supply Co., Inc., 264 B.R. 533, 543 (Bankr. W.D. Mo. 2001).

As SUSE acknowledges, there are two types of personal jurisdiction: 1) general, which subjects the defendant to any type of suit, where the defendant has engaged in "systematic and continuous" activity in this country, and 2) specific, which subjects the defendant to any suit in the U.S. that "relates to" even a single purposeful act in this country. SUSE Objection at 9-12. SUSE's activities satisfy both of these tests.

With respect to general jurisdiction, at the time the subject UnitedLinux contracts were executed, SUSE was engaged in "systematic and continuous" activity in the United States. As shown above in part II, SUSE had a permanent office and full-time employees in California and a 48% share of the U.S. market. After SUSE was 100% acquired by Novell, a U.S. company, SUSE was run by Novell personnel, with SUSE's own CEO and other senior management often running the company remotely from Novell's U.S. offices. The existence of an office and employees (let alone the CEO) on U.S. soil are classic hallmarks of "systematic and continuous" activity, which subjects a foreign company to general jurisdiction. *See, e.g., Perkins v. Benguet Consol. Min. Co.*, 342 U.S. 437, 447-48 (1952) (general jurisdiction where CEO of foreign company had office in the forum for himself and two secretaries); *American Airlines, Inc. v. Rogerson ATS*, 952 F.Supp. 377, 382-83 (N.D. Tex. 1996) (general jurisdiction over foreign corporation based on one employee's home office in the forum and the sale of its

products in the forum); *Arena Football League, Inc. v. Roemer*, 947 F.Supp. 337, 340 (N.D. Ill. 1996) (general jurisdiction over foreign corporation whose general counsel had office in the forum).[16]

As for specific jurisdiction, SUSE had numerous U.S. contacts that were directly "related to" the matter at issue. The UnitedLinux agreements were admittedly negotiated in large part during four separate rounds of meetings between the parties in Salt Lake City, Atlanta, and New York. Between these face-to-face meetings, SUSE sent numerous emails, faxes and letters (any one of which would alone be a sufficient "minimum contact" for jurisdictional purposes) and made telephone calls to SCO in the USA. Knowing that U.S. bankruptcy law could impact the transaction, SUSE even retained U.S. counsel and inserted a "special clause ... referring to the U.S. bankruptcy code." *See* Part II.A *supra*.

In a breach of contract action such as SUSE's, courts routinely hold that a foreign defendant is subject to personal jurisdiction if the contract has been negotiated in the forum, or if the defendant made telephone calls or sent letters to the local plaintiff. *See, e.g., Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A.*, 51 F.3d 1383, 1388 (8th Cir. 1995) (written and faxed communications to forum state.); *Grand Entm't Group v. Star Media Sales*, 988 F.2d 476, 482 (3d Cir. 1993) (mail and telephone); *International Administrators, Inc. v. Pettigrew,* 430 F.Supp.2d 890, 897 (S.D. Iowa 2006) (negotiations); *Lexington Ins. Co. v. Forrest*, 263 F.Supp.2d 986, 993 (E.D. Pa. 2003) (Third Circuit takes a "highly realistic" approach to minimum contacts, which may be satisfied by telephone calls and fax transmissions

[16] SUSE's cases, which suggest only that sales within the forum by an "independent distributor" do not normally count as jurisdictional "contacts," are plainly distinguishable in view of Novell's complete domination of SUSE, the close relationship between them, and SUSE's direct presence in the United States.

sent into forum by defendant); *Nat'l Cathode Corp. v. Mexus Co.*, 855 F.Supp. 644, 647 (S.D.N.Y. 1994) (defendant's agent "physically entered the forum, met with plaintiff, and discussed business" that led to the contract).

In addition, the UnitedLinux agreements called for the creation of, and the parties did in fact create, a Delaware LLC, 25% owned by SUSE, that managed the affairs of the joint venture. The LLC exists to this day. Despite SUSE's contrary protestations, the LLC plainly "relates to" SUSE's claims, and SUSE mentions the LLC 74 times in its arbitral claim. SUSE's involvement with this LLC are additional "minimum contacts" on which jurisdiction may be based. Indeed, the LLC is essential to SUSE's claim, which alleges (falsely) that SCO assigned the subject property to the LLC, and that the LLC then assigned it to SUSE. *See Papendick v. Bosch*, 410 A.2d 148, 152 (Del. 1979) (German corporation subject to personal jurisdiction where it created a Delaware company as an acquisition vehicle and the suit arose "from the very contract which the subsidiary was created to implement").

Even SUSE's very decision to file the arbitration was apparently made on U.S. soil. Its CEO at the time of the arbitral filing, Jack Tibbetts, Jr., worked from Novell's Massachusetts office. SUSE made the decision with advice from its U.S. counsel, MoFo, to whom SUSE gave a broad power of attorney. MoFo attorneys prepared arbitral filings and related documents and participated in telephonic arbitral hearings from their offices in California, and these acts too constitute "minimum contacts" on which SUSE is subject to this Court's jurisdiction.

In fact, even if SUSE did not have U.S. attorneys, jurisdiction could be based on the U.S. effects of the arbitration. For example, one court held that it had personal jurisdiction to

sanction foreign defendants, even though the defendants did nothing at all within the United States, because the defendants' prosecution of litigation in Canada "affect[ed] the very ability of the bankruptcy court to govern [the bankruptcy case] and ... tamper[ed] with the exclusive jurisdiction over all [estate] property." *Chiles Power Supply Co.*, 264 B.R. at 543. It follows *a fortiori* that this Court has jurisdiction where, as here, the foreign proceedings are controlled by U.S. attorneys and by SUSE's 100% U.S. parent Novell.

Thus, SUSE has had many U.S. contacts, many of which relate specifically to the present matter.[17] These contacts, individually and collectively, plainly subject SUSE to personal jurisdiction in this Court. SUSE's jurisdictional objection should be rejected.[18]

V. SUSE'S ARBITRAL CLAIM IS "AGAINST THE DEBTOR"

SUSE lastly contends that the Swiss arbitration is not stayed because the arbitration is not being brought "against the debtor" within the meaning of 11 U.S.C. § 362(a). SUSE claims that its arbitral case is "defensive" in nature. *See* SUSE Objection at p. 1, and 14-16. In fact, however, *SUSE* commenced the arbitration and seeks an arbitral award of over $100,000,000, plus a declaratory judgment that SCO does not own perhaps its most valuable asset (the UNIX intellectual property), and an injunction that would prevent SCO from claiming otherwise against anyone anywhere in the world.

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[17] And these are just the contacts of which the Debtor is presently aware. Discovery may reveal many others.

[18] SUSE incorrectly states (SUSE Objection at 8) that the automatic stay "does not apply" unless the Court has personal jurisdiction over it. In fact, however, "the automatic stay applies worldwide," and if "a creditor violates the stay anywhere in the world, that creditor is subject to sanctions in the bankruptcy court in the United States." Federal Judicial Center, International Insolvency II.C.2 (2001). The only issue is whether the bankruptcy court has personal jurisdiction to enforce the stay by assessing sanctions or enjoining a foreign entity that violates the stay outside the U.S. *Id.* Even if this Court did lack personal jurisdiction over SUSE, it could and should enforce the stay against Novell and MoFo, who undisputedly are subject to this Court's jurisdiction. Novell should be enjoined from allowing its 100% subsidiary to continue violating the stay.

All proceedings that may affect the Debtor's estate are subject to the stay, including arbitrations, and even proceedings seeking only declaratory or injunctive relief. *See Borman v. Raymark Industries, Inc.*, 946 F.2d 1031, 1035 (3d Cir. 1991)("[a]ll proceedings are stayed, including arbitration . . . proceedings")(citing House Report); *Advanced Computer Services of Michigan, Inc. v. MAI Systems Corp.*, 161 B.R. 771, 774 (E.D. Va.1993) ("no merit to the argument that a suit for injunctive and declaratory relief" is not stayed); *In re Johns-Manville Corp.*, 31 B.R. 965, 969-70 (S.D.N.Y. 1983) (would "disregard the plain wording of the statute" to say that declaratory judgment action is not stayed).

SUSE completely ignores the Third Circuit's decision in *Maritime Electric Co. v. United Jersey Bank*, 959 F.2d 1194 (3d Cir. 1991). In *Maritime Electric*, Maritime commenced an action in federal district court against the debtor. The debtor answered and asserted a counterclaim against Maritime and a third party claim. The district court granted partial summary judgment in favor of Maritime on its claims for compensatory damages, but not on its claim for punitive damages. Prior to the trial on Maritime's claim for punitive damages *and* the debtor's counterclaims, the debtor commenced a Chapter 13 case. Thereafter, the district court tried Maritime's claim for punitive damages (even though Maritime had not sought relief from the stay) and the debtor's counterclaims and third party claim. The district court rendered a judgment for the debtor on the counterclaim and third party claim, and against Maritime on its claim for punitive damages.

On appeal, the Third Circuit held that the judgment on Maritime's claim for punitive damages was void because it violated the automatic stay, but that the judgment in favor of the debtor on his counterclaim and third party claim was not. The court initially noted that

"[a]ll judicial actions against a debtor seeking recovery on a claim that were . . . brought before the commencement of the bankruptcy case, are automatically stayed." *Id.* at 1203. In determining whether the stay applies, "the dispositive question is whether a proceeding was '*originally brought* against the debtor.'" *Id.* at 1204 (emphasis in original) (citation omitted). That determination is made "by looking at the proceeding 'at its inception.'" *Id.* (citation omitted). The court reasoned that each claim in a lawsuit is treated individually so that "within one case, actions *against* a debtor will be suspended even though closely related claims asserted *by* the debtor may continue." *Id.* at 1205 (emphasis in original).

Here, SUSE admits that *it* commenced the arbitration *against* SCO. *See* SUSE Opposition at p. 14 ("SUSE initiated the Swiss Arbitration . . . ."). As the Third Circuit makes clear, the determination of whether the automatic stay applies to SUSE's claims is based upon the status of the Swiss arbitration at its inception. Because SUSE commenced the arbitration, regardless of the reason why SUSE did so, the automatic stay applies to prevent SUSE from going forward post-petition.[19]

Nor is there any merit to SUSE's alternative suggestion that the December arbitral trial on liability issues should be allowed to go forward, without prejudice to the Debtor's right to refile prior to the damages phase of the arbitration. The automatic stay totally freezes *all* actions against the Debtor. While the stay is in effect, there may be no discovery, no motions, no actions of any nature at all. *See* 11 U.S.C. § 362(a)(1)(the automatic stay operates as a stay of

[19] SUSE correctly states that SCO's arbitral counterclaim is not automatically stayed. However, SCO has offered to stay its counterclaim voluntarily, as it makes no sense for SUSE's claims and SCO's counterclaim to be tried separately. Also, SCO's Swiss counsel in the arbitration recently resigned, and no replacement counsel has been retained, let alone approved by this Court. Regardless, as *Maritime Marine* holds, even if SCO proceeded forward with its counterclaim, the automatic stay bars SUSE from going forward with its own claims.

"the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor. . . ."); *Constitution Bank v. Tubbs*, 68 F.3d 685, 691-92 (3d Cir. 1995) (stay applies to "any judicial action material to the claim against the debtor"); *In re Manowan*, 213 B.R. 411, 412 (Bankr. N.D. Ga. 1997) (discovery is subject to the automatic stay) Thus, there is no basis for SUSE's position that a full, three-week trial that will decide all liability issues may go forward simply because the quantum of damages will not be decided at this hearing.

[Remainder of page intentionally left blank.]

CONCLUSION

For the reasons stated above and in the Motion to Enforce, the Debtor's motion to enforce the stay should be granted. SUSE should be prohibited from litigating the Swiss arbitration while the automatic stay is in effect.

Dated: October 31, 2007

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