UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	. Case No. 07-11337(KG)
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	.
The SCO GROUP, INC., et al.	.
	. 824 Market Street
	. Wilmington, Delaware 19801
Debtor.	.
	. November 6, 2007
. . . . .	. 10:00 a.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE KEVIN GROSS
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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For the Debtor:	Pachulski, Stang, Ziehl & Jones By: LAURA DAVIS JONES, ESQ. RACHEL L. WERKHEISER, ESQ. 919 North Market Street 17th Floor Wilmington, DE 19899-8705
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For Alan P. Petrofsky:	By: ALAN P. PETROFSKY Pro se

THE COURT: Thank you, everyone, you may be seated. Good morning.

ALL ATTORNEYS: Good morning, Your Honor.

THE COURT: Good morning, Ms. Jones.

MS. JONES: Good morning, Your Honor. How are you?

THE COURT: Very well, thank you.

MS. JONES: Your Honor, for the record, Laura Davis Jones with Pachulski, Stang, Ziehl & Jones on behalf of The SCO Group et al.

Your Honor, we have a number of matters scheduled on the agenda for you this morning and does Your Honor have a copy of the notice of agenda?

THE COURT: I do, yes.

MS. JONES: Your Honor, if I may walk through that. And a number of the matters have been continued and/or otherwise are still the subject of discussion.

It's indicated on the agenda, Your Honor, Matters 1-3 are continued. Matter 4, Your Honor, the application for the approval of Dorsey and Whitney, Your Honor, I understand that that has now been resolved. There were issues raised by the Trustee's office on that and there is a supplemental affidavit that has been filed. My understanding though is the parties are working through a form of order that they would submit under certification of counsel if that's okay with the Court.

THE COURT: That is perfectly fine. Thank you.

MS. JONES: Your Honor, Matter 5, our motion for approval of employment of a CFO Solutions to furnish a chief financial officer to the debtors, Your Honor, the Trustee's office has given us comments with respect to that and, indeed, provided a revised form of order this morning. Unfortunately, Your Honor, we're not there yet, on agreement on that order. So as we reflected on the agenda, if we haven't reached resolution, this matter would be continued over to the November 16 day and, Your Honor, we seek to have that continued.

THE COURT: That's fine. We'll do that.

MS. JONES: Your Honor, the motion of SUSE with respect to filing exhibits under seal, my understanding is a certificate of no objection has been filed in connection with that.

THE COURT: Yes, and I don't know if anyone has a form of order at this point, but if not, I will be approving that. And that is fine. That order will be entered if it hasn't been already in chambers.

MS. JONES: Thank you, Your Honor. Your Honor, just to give Your Honor a preview of a couple other matters, we will be going forward and I'm going to yield to Mr. Spector momentarily with respect to Matter 7.

On Matter 8, Your Honor, the application for the employment of Mesirow Financial, Your Honor, that matter there had been issues raised by the U.S. Trustee. Those have been

resolved, Your Honor. There's the supplemental affidavit that has been filed. And I do have a proposed form of order that reflects comments from the Trustee's office, if I may approach.

THE COURT: You certainly may. Thank you, Ms. Jones. Mr. McMahon looks comfortable seated, so I'm not going to disturb him. And obviously he has approved the form of order and I am prepared to enter it.

MS. JONES: Thank you, Your Honor.

THE COURT: It's been entered. Thank you.

MS. JONES: Your Honor, we would be going forward on Matters 9 and 10. Let me jump ahead just for a second, though. On Matter 11, Your Honor, our application to seek the approval of the Boies Schiller firm. Your Honor, the Trustee's office had some issues with respect to that application. We have talked quite a bit about that. Mr. McMahon made another proposal to us right before the hearing. I'd like to have some time to digest that on our side of the table, Your Honor. So we're -- we may go forward with that today. We have to work through that.

THE COURT: That's fine. We can put that to the end.

MS. JONES: Thank you, Your Honor.

THE COURT: Or after a recess.

MS. JONES: And, Your Honor, also on the motion for the employment of the ordinary course professional, Your Honor, there were issues raised by the Trustee's office as well as an

individual who may be on the phone, Your Honor.

THE COURT: I believe he is, according to my roster. Yes. Mr. Petrofsky.

MS. JONES: Yes, sir. And, Your Honor, I believe we have resolved our issues with the Trustee's office. We sent a proposed form of order. I left a voice mail for Mr. McMahon to see if it was satisfactory and I know he's been busy this morning.

THE COURT: Good morning, Mr. McMahon.

MR. MCMAHON: Your Honor, good morning. Good to see you.

THE COURT: Good to see you. Thank you.

MR. MCMAHON: Joseph McMahon for the U.S. Trustee's Office. Your Honor, I would just like to have a few minutes to review the post form of order just to ensure that its consistent with my discussion with debtor's counsel. I just have not had the chance to do that prior to the hearing. But that's the request that I would make of the Court at this time.

THE COURT: That's fine. We can also, I think -- I know we do have Mr. Petrofsky on the phone and perhaps it would be well to hear from him before we proceed with what may be a lengthy hearing. Mr. Petrofsky.

MR. PETROFSKY: Yes, Your Honor.

THE COURT: Good morning.

MR. PETROFSKY: Good morning.

THE COURT: We do have your objection.

MR. PETROFSKY: Yes.

THE COURT: And if you would just like to be heard, this is your opportunity to do so.

(Appearing by telephone - difficult to discern)

MR. PETROFSKY: Thank you, Your Honor. Well, just quickly then, to recount what's in the written objection, there's two points. One is that the order (indiscernible) schedule of non-professionals. And all the parties have had a chance to view that list and file their objections, but through the back door in Paragraph 7 whereby, you know, 100 more professionals have been added to the list. And, no (indiscernible) voters would have any opportunity to object. And I don't see any reason for the noticed parties be summarily (indiscernible) and I don't think there will be any substantial burden in withstanding the noticed parties that have objected.

And then the second point is on the German litigation. This is not mentioned in the schedules and they claim that this is, you know, in ordinary course of business and that the business would somehow be fairly hindered if they could not (indiscernible). I just don’t see any facts to support that. That's it, thank you.

THE COURT: You're most welcome. Ms. Jones, would you like to respond?

MS. JONES: A couple things, Your Honor. With

respect to providing notice of any supplement -- supplements to the OCP list, Your Honor, I don't know if the individual has added his appearance under Rule 2002, but that might be the simplest way to make sure that he has notice of any supplements that are submitted.

THE COURT: And I assume, Mr. Petrofsky, have you entered your appearance in this case?

MR. PETROFSKY: I have, Your Honor. The problem is is that the noticed parties are not just -- the order doesn't just say that those are the only people who get noticed. The order also says those are the only people who have the opportunity to object.

MS. JONES: Your Honor, we can made a point of making sure that if we have any supplements, that we'll add this individual. Your Honor, the order is very specific that if there are any supplements, there is an opportunity to review the affidavit.

THE COURT: Yes.

MS. JONES: And also to object, so I'm not sure I understand the individual's point. But, Your Honor, we can make sure that he does receive a copy of any supplements. And as I said, there is a period of objection in there.

THE COURT: Mr. Petrofsky, does that address your concern that there will be notice and, of course, it would be subject to the Court's review as well.

MR. PETROFSKY: Yes --

THE COURT: And specifically, notice would be given to you as a noticed party.

MR. PETROFSKY: Right. Okay.

THE COURT: All right. So that addresses that objection.

MR. PETROFSKY: Right.

THE COURT: And as far as the other litigation is concerned, Ms. Jones?

MS. JONES: Your Honor, I believe what I've heard is a concern about what is the German litigation about, Your Honor, not so much about the retention of the ordinary course professional. And Your Honor, I don't know if its something we want to do during the course of this hearing or if we can talk to this individual off-line and tell him what the German litigation is about. But, Your Honor, at this point, the debtor does believe in its business judgment that it does need the retention of the German firm. I don't think there's any dispute as the bona fides of that German firm. And we'd ask that they continue to be on th OCP list, Your Honor.

THE COURT: Mr. Petrofsky, what we'll do is I will have debtor's counsel speak with you about the German litigation. But I do think its appropriate to approve ordinary course counsel for that litigation. And to the extent you've objected on that ground, I'll overrule your objection. But

again, you will be advised by debtor's counsel of the nature of that litigation.

MR. PETROFSKY: Okay, thank you, Your Honor.

THE COURT: Certainly. Now, you are welcome to continue on the phone throughout what will be a lengthy hearing. Or you may excuse yourself at this point.

MR. PETROFSKY: Thank you. I'll stay on the line.

THE COURT: Okay.

MS. JONES: Your Honor --

THE COURT: So I, subject to Mr. McMahon's review and comment, I would be approving that order.

MS. JONES: That's fine, Your Honor, and we can submit that to the Court later in the hearing after -- once Mr. McMahon signs off on it.

THE COURT: That will be fine, thank you.

MS. JONES: Your Honor, at this point I would yield to Mr. Spector.

THE COURT: Okay. Thank you, Ms. Jones. Good morning, Mr. Spector.

MR. SPECTOR: Good morning, Your Honor. I rise primarily to introduce my partner, John Eaton --

THE COURT: Mr. Eaton.

MR. SPECTOR: -- who will addressing the next matter on the calendar.

THE COURT: Welcome.

MR. SPECTOR: I believe the next matter on the calendar is SCO's motion to enforce the automatic stay.

THE COURT: Yes.

MR. SPECTOR: With regard to the SUSE arbitration in Switzerland.

THE COURT: Thank you. Thank you, Mr. Spector. Mr. Eaton, good morning.

MR. EATON: Good morning, Your Honor. John Eaton on behalf of the debtor. Your Honor, the motion in question is one, quite frankly, that I'm surprised that the debtor was forced to file. It is simply a motion to enforce the automatic stay with respect to an arbitration proceeding that is pending in Switzerland that was instituted by SUSE Linux GMBH which I'm going to refer to simply as SUSE throughout this hearing.

The main issue, the primary issue is with respect to a fact that is not disputed. And that is who initiated the arbitration. And its undisputed that SUSE initiated the arbitration. And as Your Honor is well aware, under 362, the automatic stay applies to any and all proceedings, wherever located, that were brought against the debtor. And the Third Circuit in the Maritime Electric decision that we cited to in our motion and our reply specifically held that any and all actions against the debtor are stayed and cannot proceed forward. From our perspective, it's a very simple issue.

Unfortunately, Your Honor, the position that SUSE has

taken in the arbitration, and now before this Court, is that somehow the arbitration does not apply because the argument is made that their lawsuit, their arbitration claim, is defensive.

They also claim, not wanting to get to the merits, that the Court doesn't have jurisdiction over them because they don't have the requisite minimum contacts and they weren't properly served.

Your Honor, from our perspective, I don't believe any of those arguments have merit. And I think we've addressed each and every one of them in our reply. And I will take a few minutes to go through each of them if the Court wishes, but I think, quite frankly, that the primary issue and the only one really that is an issue for the Court to decide today is, does the automatic stay apply. And the reason its important is because the current arbitration, Your Honor, is scheduled to proceed on December 3rd, and go from December 3rd to December 14th.

THE COURT: Yes.

MR. EATON: The Swiss Arbitration Tribunal, as I understand it, have asked the parties to advise them as to what their respective positions are so as indicated that the automatic stay applies to the proceeding. And SUSE has indicated that it does not. And to a certain extent, as I understand it, they're looking -- "they" meaning the Tribunal

-- is looking for some guidance here so they know where it stands.

With that background, Your Honor, I think its important to understand what the nature is of the relief that SUSE is seeking in the Swiss arbitration. And there's several forms of relief that they're taking and its set forth in their statement of claim.

Specifically, Your Honor, they're seeking a declaratory judgment that SCO was precluded from asserting infringe -- copyright infringement claims, i.e. SCO cannot proceed with litigation that would be an asset of the estate.

They are seeking a declaration that two United Linux agreements divest SCO of ownership of certain alleged intellectual property rights in certain software. Again, divesting ownership with respect to an asset of the estate.

They are seeking an order to prevent SCO from making any public statements relating to certain software and other issues, specifically getting a preliminary injunction or a permanent injunction against SCO.

And finally, Your Honor, they're seeking damages of $100 million which is big. The $100 million aspect of the Swiss arbitration, Your Honor, as I understand it, is in a different phase than what is currently teed up because as I understand it, I don't think there's a dispute. The current Phase II is to contemplate a declaratory and injunctive relief

that SUSE is affirmatively seeking and also with respect to SCO's counter-claims against them.

The problem, Your Honor, is with respect to the SCO counter-claims, is that many of the counter-claims overlap with respect to defenses such that if there's a determination of a SCO counter-claim and it were against SCO, that wipe out a defense to an affirmative claim that SUSE is making.

So with that background, Your Honor, we get to the issues that are before the Court. And I think, as I already pointed out, Your Honor, the automatic stay applies to all proceedings that are blocked against the debtor. And I think that in and of itself demonstrates why the automatic stay applies. And the reason why we need an order from the Court is because SUSE doesn't believe -- SUSE doesn't believe that it applies and has affirmatively taken the position it does not.

With respect to their argument about service, Your Honor, the service issue was served on a number of different persons and entities when it was filed. The motion was served overnight on SUSE in Germany. It was served on SUSE's Swiss counsel by overnight mail. It was served by facsimile and on SUSE's United States attorneys in San Francisco, the Morrison and Foerster attorneys. And it was also served, Your Honor, on what we believe is SUSE's agent, their parent company, Novell, by hand-delivery on their counsel.

SUSE takes the position that the only way to

effectuate service was through use of the Hague Convention. And the Hague Convention would apply if you wanted to try to serve someone in Germany and do it through German. But the Hague Convention doesn't apply if you're trying to serve an agent that's located within the United States. And we believe we have properly done that. We've served SUSE's United States attorneys and we served Novell, its parent, in the United States.

There's no dispute that they were served. They're here. They filed a response. And I understand that their opposition reserve their rights on jurisdiction. But the bottom line is, the key is, they received notice and everybody is here in court today to address the substance with respect to the automatic stay.

SUSE's parent, Your Honor, is not just a company that owns SUSE. In 2004, the operations -- until 2004, SUSE operated in the United States. It was based in Oakland. It had employees in the United States. All of its contacts were here.

When Novell took over the operations, it functioned in the same fashion that SUSE did. It continued operating SUSE software. It did all of the activities in the United States. Novell officers were, in effect, the CEO of SUSE in the United States. And we've attached to our reply several website references that were public available to demonstrate some of

those contacts because at this juncture, we haven't had an opportunity to take any discovery to get into more specifics for an evidentiary hearing.

We've also served the Morrison and Foerster firm. And the Morrison and Foerster is not just -- its not just their attorneys in connection with the Swiss arbitration. Attached to our reply was a copy of a power of attorney that SUSE executed in favor of the Morrison and Foerster department. And I'm sure Your Honor's had a chance to look at it. It didn't just allow them to take any and all action necessary to protect their rights and to do things in connection with the Swiss arbitration. It also allowed an authorized debtor to do anything that was necessary to take action on their behalf and protecting their rights in related proceedings.

Well, this is a related proceeding, Your Honor. Its related to the debtor's assets. Its related to the debtor's creditors. And the assets that are in question include software, litigation rights which they're trying to go after, "they're" meaning SUSE is trying to go after during the Swiss arbitration.

So from our perspective, service has properly been effectuated already. But even if the Court believes that its not, there's still a way to resolve the issue, Your Honor, and that is through Rule 2004, or Rule 4(f)(3) which is incorporated through Rule 7004, which allows the Court to

authorize a different method of service. The Court could order an interim order declaring that we may serve SUSE through its agents in the United States, i.e. their Novell parent or its attorneys Morrison and Foerster. I don't think we need to go through that exercise because I think we've already properly served them and the Court could so find. But if the Court believes that an order through Rule 4(f)(3) is necessary, we would respectfully request that the Court makes such a ruling and make it nunc pro tunc to the time of the service so that we can get to the meet which is does the automatic stay apply.

Next order of attention, Your Honor, to the other argument they made which is that they don't have the requisite minimum contacts with the United States. And we believe we've laid out more than sufficient facts, not only to establish specific jurisdiction, but also general jurisdiction. But we don't need to have both. One is enough. And I think that for purposes here, we will focus our discussion on the specific jurisdiction and why the Court has it.

And in order to be subject to specific jurisdiction, it can take place and be found in any suit in which the actions relate to a single purposeful act in the United States or one that can have an effect in the United States, and specifically here on the bankruptcy case. And I believe one of the decisions they've cited to in their reply, the O'Conner v. Sandy Lane decision from the Third Circuit said that at least

one contact must relate to the plaintiff's claim.

Well, here, the claims are relating to the debtor's assets. Its relating to litigation. Its relating to the debtor's rights with respect to certain copyrights. And the action that they want to take is to divest the debtor of that and make a determination that the debtor doesn't have any rights and to prevent the debtor from enforcing or seeking recoveries on any litigation claims it may have.

They're affirmatively taking that position pre-petition. They are now trying an affirmatively taking that position post-petition. In fact, Your Honor, on October 30th, SUSE filed its memorandum with the Swiss Tribunal which laid out all of the reasons why the Court should find in its favor on all of its prayers for relief.

Now, we cited to a number of cases in our memorandum which show that taking action against property of the estate is enough to satisfy the requisite conduct that would necessitate and require in support of finding for minimum contacts. And I'm specifically referring, Your Honor, to the Lykes Brothers decision from the Middle District of Florida. And I'm also citing, Your Honor, to the Childs Power decision. And as well, Your Honor, the decision of McClain -- McClain decision. And here they have affirmatively taken those acts with respect to property of the estate. But they also have other contacts, Your Honor.

The Swiss arbitration is based upon, Your Honor, the United Linux agreements and alleged breaches by SCO of those agreements. The position that SUSE takes is that their arbitration -- if their arbitration doesn't relate at all to the Delaware LLC that was formed in which they had a 25 percent ownership interest. Its kind of surprising they've taken that tact because they've even alleged in their statement of claim, 74 times, they make reference to the Delaware LLC which was a at all times envisioned to be the joint venture entity that would be the basis upon which those contracts would operate. And they know that they have the 25 percent ownership interest and that was going to be the vehicle that was going to be used.

The negotiations for the execution of the agreements that are the subject of the litigation in Switzerland, the arbitration in Switzerland, are admitted by SUSE to have taken place in Salt Lake City, New York and Atlanta. Its found in their own statement of claim. And we've provided the Court with the citations to those contacts.

There has been numerous emails and faxes and calls to SCO with SCO's attorneys in the United States with respect to those contracts. And all of those are set forth in the statement of claim that took place which, I don't believe is in dispute, its in their own statement of claim.

In the October 30th arbitration filing that SUSE just made, they make it a point to say that, well, you know what?

The Delaware LLC has nothing to do with the underlying arbitration which we find somewhat surprising in light of the previous 74 references in their own statement of claim. And I think the Court can just look at the statement of claim to see the importance of the Delaware LLC to the claims that are the subject of the arbitration in Switzerland to understand why those provide the requisite -- you know, part of the requisite contacts in the United States.

SUSE's arbitration is being pursued not just by Swiss counsel. Its also being pursued, the arbitration itself, is being prosecuted by their attorneys at Morrison and Foerster. Morrison and Foerster has participated in telephonic hearings from the United States. Its had conduct in -- excuse me, its had telephone calls and communications with SCO's attorneys in the United States, all pertaining to the Swiss arbitration which are the contacts in the United States which I think would be additional evidence or additional indicia of the minimum contacts necessary to satisfy specific jurisdiction, Your Honor.

And, Your Honor, the reason why I think its important with respect to the Delaware LLC, as I understand it, is that part of the argument that is being articulated by SUSE in the Swiss arbitration is that the Delaware LLC assigned to SUSE its use in the United States and worldwide for certain of the software that is in essence at issue in the litigation.

So, the Delaware LLC, which was a joint venture that had been contemplated by the parties as part of the very agreements at issue lies at the heart of that litigation and is a contact they have with the United States.

Your Honor, the Lykes decision and the McClain Industries decision and the Childs Power decision, Your Honor, I think all demonstrate that the minimum contact which allows this Court to exercise the jurisdiction over SUSE has been more than met simply with respect to the relief relating to the property of the estate, namely the copyright infringement claims and divesting ownership.

The other indicia that we've articulated and the other factors we've articulated relate to some of the other non-bankruptcy cases that we've set forth in our motion. But I think one or both, and certainly all show that they have the necessary contacts related to the specific issue of what is at issue in the Swiss arbitration and how it impacts the bankruptcy case and the effect on the bankruptcy here in the United States.

On the general jurisdiction, Your Honor, we set forth and attached to our reply a number of matters that have been the matter of public record, both interviews with former SUSE officers. We attached information that I understand is in German that reflect other indicia which were specifically officers and directors or officers of SUSE, how they were in

the United States and had United States operations on behalf of SUSE after, after Novell took over the operations.

I don't want to spend a lot of time going through the general jurisdiction other than to point out that we do believe its met. But I think we don't need to go there because that's really getting into more, and acknowledges more than evidentiary issue which would require a certain degree of discovery which has not been taken. But I didn't want the Court to believe or understand that we were not seeking to have a determination of belief that the general jurisdiction requirements have been met in this particular case.

THE COURT: And I understood that.

MR. EATON: And I appreciate that, Your Honor. So the one decision that was the focus, I think, of SUSE's response was the Fotochrome decisions from the Eastern District of New York in the Second Circuit which specifically dealt with a situation in which -- under the Bankruptcy Act, not the Bankruptcy Code -- in which there had been an arbitration pending in Japan. An arbitration award was made post-petition and then the Japanese entity came into the United States and sought enforcement of that arbitration in the bankruptcy court. And the court, in that particular case, held that they didn't have the requisite minimum contacts.

Interestingly, Your Honor, there was zero discussion as I saw in my reading of the cases of what contacts they had.

Here, we've established what the contacts are. So from a factual standpoint, the case is wholly in opposite and does not apply. But there's other interesting aspects to it, Your Honor, which show why it doesn't apply here. And one of the most important is, is (1) the focus was not on what the Third Circuit has held in Maritime Electronic which is the bread of the automatic stay in its worldwide application.

And also, Your Honor, there was a specific statement by the Second Circuit that shows why that decision doesn't apply here under the Bankruptcy Code. One, it had no statutory basis akin to the automatic stay of the worldwide application. And in fact, Your Honor, I believe the court in that case said there was not an issue there because the court said that the jurisdiction over the estate property was not exclusive. That's not the case, Your Honor, under the Bankruptcy Code. Your Honor's well aware that Your Honor has the exclusive jurisdiction of all property of the debtor.

So I don't think that the Photochrome decision really has any application in this particular case. And I think the bankruptcy cases that we've cited and have even been referred to by SUSE, the Lykes decision, the McClain Industry decision, the Childs Power decision reflect why, under the current Code, the minimum contacts can take place with respect to one particular act pertaining to property of the estate.

So that, Your Honor, brings us back to again the

point of why we're all here. Does the automatic stay apply. And I think the Court can simply just look to the Maritime Electric decision from the Third Circuit and which the Court specifically held that you look at the initiation of the lawsuit, or the arbitration as the case may be. Was it initiated against the debtor? Its admitted here, Your Honor. There is no dispute that they initiate it. The argument that it was defensive in nature to protect their rights, quite frankly, Your Honor, would apply to any lawsuit that a plaintiff brought because presumably any lawsuit is to protect their rights.

That's -- even assuming that is the law, its not the law in the Third Circuit in light of the Maritime Electric decision. And Your Honor, I would also point out that 362(b) sets forth about 28 different types of matters that are not subject to the automatic stay. Nowhere in there will you see anything relating to an arbitration in a foreign jurisdiction. There's nothing in there that says it doesn't apply to a defensive claim.

I think the Court can just simply look at the Third Circuit's decision in the Maritime Electric and see that in this particular case, its very clear that the automatic stay applies. Its very clear that we need to have a direction to SUSE and, more importantly, Your Honor, to the Tribunal in Switzerland letting them know that the automatic stay applies

so that debtor can move forward with its reorganization efforts and not have to deal with the time and expense relating to the Swiss arbitration.

We attached the form of a proposed order, Your Honor. I don't believe that evidence is required with respect to the matters to show the requisite context, the requisite service. We've attached the documents to our motion and our reply. To the extent that SUSE disputes it, we can certainly have a discovery schedule established by the Court. Discovery could be taken. I think that would be expensive. I think its not necessary when the Court has before it and has before it, the parties, the specific issue relating to the applicability of the automatic stay. And for that reason, Your Honor, we simply request that the motion be granted.

THE COURT: Thank you, Mr. Eaton. Mr. Lewis.

MR. LEWIS: Good morning, Your Honor. Thank you. Adam Lewis of Morrison and Foerster. If I may just take a moment with you today.

THE COURT: Please.

MR. LEWIS: Mr. Nestor from Young Conaway.

THE COURT: Yes, Mr. Nestor.

MR. NESTOR: Good morning, Your Honor.

MR. LEWIS: And my co-partner and co-counsel, Mr. Jacobs --

MR. JACOBS: Good morning, Your Honor.

THE COURT: Welcome.

MR. LEWIS: -- who's been involved in the patent litigation from Morrison and Foerster. And my associate Julie Dyas --

MS. DYAS: Good morning, Your Honor.

THE COURT: Good morning.

MR. LEWIS: -- is helping on this case.

THE COURT: Thank you, Mr. Lewis.

MR. LEWIS: Probably the secret behind it.

THE COURT: Thank you.

MR. LEWIS: And I appreciate appearing in front of the Court for the first time.

THE COURT: Thank you. It's a pleasure to have you here, Mr. Lewis.

MR. LEWIS: Your Honor --

THE COURT: I don't want to interfere, but as you're making your presentation, I think a principal concern of mine is the argument that this is a defensive action taken by -- may we call them SUSE? Is that acceptable to --

MR. LEWIS: Sure, sure, Your Honor. That's fine.

THE COURT: -- to your -- fine.

MR. LEWIS: Your Honor --

THE COURT: And I don't ask you that you address that right off the back, but just in certainly making your argument.

MR. LEWIS: Well, as it happens, Your Honor, that's

exactly what I was going to do because I think once we've gone over what that arbitration's all about with some care, you will see, I hope, that it is not covered by the automatic stay except in the very limited way and we're prepared to deal with that limited way this morning. So let me go over that very briefly.

You can break the arbitration issues into three components. The first component is the debtor's claims against SUSE. Those are clearly not barred by the automatic stay. The debtor claims, well, gee, they're so related to the other claims that are barred by the automatic stay that there's some kind of presto chango protection that comes with the automatic stay to the extent that it applies to SUSE's claims. But there's nothing in the law that says that.

So far as we're concerned, the debtor's admitted the automatic stay, in its own papers, is not covered although it took a different position initially with the Arbitral Tribunal. The fact is, it is not covered by the automatic stay and whether they proceed in the Arbitral Tribunal with their claims against SUSE, their counter-claims, is between them and the Tribunal and to some extent us as parties, that is SUSE, to the proceeding in Switzerland. So that's not covered. That's out. You don't have to discuss that this morning.

The second component is SUSE's damage claim. I want to come back to that at the end because I think in some ways

it's the least important. The third component which I want to talk about now is probably the one the Court is the most interested in and the most controversial. And I want to talk about how that arose. And to do that, I have to talk a little about SUSE and then about O'Dell because I think it helps to throw some light on the situation.

As the Court is aware from the pleadings, the litigation in Utah was stayed with respect to the arbitration issues. And here's the reason why. The debtor's, in the Utah litigation, made various claims against Novell. Some of them had to do with Novell's use of IP, intellectual property, that it had licensed from SUSE. And the way that Novell handles those claims is by raising its license from SUSE as an affirmative defense. Not as an affirmative claim, just an affirmative defense.

What's going on in Switzerland is the very same thing except up the line one step. That is, the party involved is the party that licensed to Novell. And although its made an -- its brought a declaratory relief action against the debtor in the arbitration, the declaratory relief action really is all about the affirmative defenses that nobody claims are stayed in the litigation in Utah that Novell has raised. It's the same defenses.

So while SUSE has taken the initiative in Utah, its really taken the initiative, in effect, saying, well, SCO,

we're not going to wait for you to sue us like you sued Novell in Utah and then raise these as affirmative defenses. We're just going to get this thing underway because you're messing with our business in Europe. And that's all its about.

And, indeed, to the extent that SUSE -- that the debtor claims that Novell and SUSE are one in the same, essentially, for purposes of the jurisdictional and automatic stay issues, how can they then argue that its not really a defensive claim because its really just exactly what Novell is doing that there's argument about, is defensive in Utah and is not barred by the automatic stay.

SUSE's answer to that question is, well -- I mean, the debtor's answer to that question is, well, you started it in Europe. That's what it amounts to. And we come down to that work against in section 362(a). And the question is, what's the real key language in that provision of 362. And they say that the key language is "brought". And so the key issue is who started it, who filed the complaint, who started the proceeding.

We believe that that's trivializing that statute. What the "against" means is attempts to recover from the debtor, whoever starts it. And if the Court agrees with us on that score, that the statute has to be interpreted in terms of whether you're trying to recover from the debtor, not who just started the litigation, that's almost irrelevant, then the stay

simply does not apply to those claims that are brought, the declaratory relief part, of the arbitration. Its as simple as that.

Now, we've heard a lot about the cases, the Maritime case, but if you look at the Maritime case, Your Honor, the underlying issue there was a claim against the debtor, to recover from the debtor. All of the cases that the debtor has sited in its favor involve either outright claims against the debtor which came up in various ways, or claims against property that everybody admitted that the debtor owned, like the insurance proceeds in the one particular case. That was property of the estate. It was just this party trying to get its hands on it.

We're not arguing over trying to get our hands on property of the estate. The issue really here, ultimately, in the arbitration, is whether its property of the estate at all. And we don't have to wait around until the debtor is ready to deal with that anymore than we do in Utah in order to protect our rights and protect our business. And that surely is what the automatic stay is about.

Otherwise, the argument is -- reduces itself to the argument that, well, the real purpose of the automatic stay is to save the debtor litigation costs. But if that were the purpose of the automatic stay, then the automatic stay would stay all litigation, including brought by the debtor, until

somebody, either the debtor or somebody else, sought relief. And that's not what Section 362(a) says.

And I remind the Court that its not simply a matter of what the debtor chooses or not -- chooses not to do with respect to the automatic stay. Remember, anybody who is barred by the automatic stay from doing something has to get relief from the bankruptcy court. The debtor cannot unilaterally go the court and say -- or on its own, without going to the court, and say to the other party to litigation that the debtors initiate it, well, even though this is barred by the automatic stay, we're willing to go ahead, so let's go ahead. The debtor would have to come to this court for that relief.

And so, two, if the automatic stay really barred -- was really designed to simply stay litigation costs, there is a larger interest at -- that would be at issue then simply what the debtor chose to do. There's preservation of the estate for the benefit of all creditors meaning that the debtor would have to come to this court to ask this court's guidance on whether its wise to get stay relief to be able to continue with its own claims. But of course, the automatic stay doesn't cover claims that they've brought.

And the claims that have been brought in Switzerland are no more than the defensive claims that everybody admits are still at issue and can still be litigated in Utah that Novell has raised as affirmative defenses. They are the same claims,

just raised up the line.

So the debtor's interpretation of the word "against" trivializes the automatic stay and makes that statute meaningless. And also, I think, is not consistent with the actual facts of the cases, whatever the broad language is that is sometimes used in some of those cases may say in a kind of general way. In everyone of those cases, the automatic stay was held to apply because assets of the estate, money that -- either the other property was seeking money or was seeking property that everybody admitted belonged to the estate. We don't have that here and I don't think those cases serve as precedent.

Incidently, the debtor spent some time arguing that we claimed that the automatic stay doesn't apply to arbitration. We never made any such claim.

So, now we have two components that I've talked about so far of the Swiss arbitration. The first is the debtor's claims, the counter-claims. And clearly they're not barred by the automatic stay. In fact, we sort of just talked about, at a second time, in a way, in talking about the second component which is the defensive declaratory relief action that is simply the Novell defenses, affirmative defenses in Utah repackage by SUSE so that it doesn't have to wait around while the debtor continues to bad mouth its business in Europe and interfere with its business in Europe.

The third issue is the damage claims. And we acknowledge, Your Honor, that the damage claims would be covered by the automatic stay. Let me, at first, however, just say that the notion that the damage claims are $100 million is a complete misstatement of what's in the record. A $100 million is determined as follows.

Under the Swiss arbitration rules, we have to put a value on the case, as it were, in order to determine what the fees are to be paid to the arbitrators. We did that. Not by asserting a damage claim, but by calculating what the injury to our business would be if this went on and on and on. That's where the $100 million came from. Its not the damage claim.

But that said, we acknowledge that the affirmative claims for monetary relief is barred by the automatic stay. A couple of points about that. The first is as everybody acknowledges, its not teed up yet. And we're prepared to ask this Court for stay relief at the right time if we need to do that. The Court can always just grant us that if the Court's otherwise inclined to let the arbitration go forward as we think it should.

Second thing is, if we need to, we are prepared to consider waiving that damage claim so that the arbitration can go ahead in some sensible fashion.

And that leads to the next point here. It will take, perhaps, 6 to 12 months to get another arbitration proceeding

set if we can't go forward as scheduled right now. Subject, of course, to whatever the Arbitration Tribunal wants to do. We don't control that.

THE COURT: When was the arbitration proceeding commenced? On what date? Do you recall?

MR. LEWIS: I think it was commenced in 2006, is that right? I think it was April 10th, maybe, in 2006.

So on the third point, it's a non-issue in this instant. We acknowledge that the automatic stay would apply here. We'd ask the Court to consider granting stay relief sua sponte today. And if not, to simply postpone the issue until it comes up because its not ripe yet. Because no one is at that phase of the arbitration proceedings. The phase we're at is, the critical phase, who has what. Who owns those copyrights. The same critical issues that we're asking this Court to allow to finish off in Utah, that are critical to this case, to the debtor as the debtor's own recent motion to sell reflects and critical to the creditors.

THE COURT: Could this have joined in the Utah litigation? I'm sorry, could SUSE --

MR. LEWIS: I'm going to defer to Mr. Jacobs on that.

THE COURT: Oh, that's fine. Mr. Jacobs, thank you. Could SUSE not have joined in the Utah litigation?

MR. JACOBS: I don't know the answer to -- we didn't look at that specific question because of the scope of the

United Linux agreements, which is what's at issue in the Zurich arbitration, is an arbitral issue by the terms of those agreements. So the exact sequence was counter-claim -- amended complaint by SCO in Utah asserting copyright infringement against Novell by virtue of Novell's distribution of SUSE Linux, step one.

Step two, SUSE files an arbitration in -- its an ICC arbitration in Zurich. Files an arbitration demand seeking, among other things, declaratory relief that SCO doesn't have a claim relating to SUSE Linux by virtue of the United Linux agreements.

Novell goes into the district court in Utah and says, these issues -- there are issues now in the litigation that are referable to arbitration within the meeting of the federal arbitration acts, asks the district court to stay those issues. The district court parses through the complaint that's not operative in Salt Lake City and says, I see, yes, these claims relating to SUSE Linux, they are arbitral under the United Linux agreements, makes a preliminary reading of those agreements, decides, in fact, that those issues are referable to arbitration and stays component of the Utah litigation.

So there's two different stays at issue here. It's a little bit complex. The point, I think, that we're driving at is the automatic stay doesn't apply to SCO's affirmative claim against Novell in Salt Lake City for copyright infringement

because that's their claim. That's an affirmative claim they're making. And this is in the nature of a precondition to the assertion by Novel of the affirmative defense. The scope of the United Linux agreements drives the scope of Novell's affirmative defense in Salt Lake City. Hence, the defensive nature of the declaratory relief claim.

One way to -- there's a little riddle I was realizing as Mr. Lewis was talking. If we went back to -- if we went back to Judge Kimball in Salt Lake City and said, you know, this affirmative claim from SCO isn't stayed by the automatic stay. So, you can continue on with that. The automatic stay applies to our counter-claim. You have the lift stay motion. But this affirmative claim by SCO isn't stayed. He would say, but how can I proceed with that claim. The issues are referable to arbitration in Zurich. The arbitration has to be completed first.

It should be the result, we submit, that because of the defensive nature of the arbitration claim, the automatic stay doesn't apply to that component of SUSE.

THE COURT: I understand. Thank you.

MR. LEWIS: Does that answer your question, Your Honor?

THE COURT: Yes. Thank you, Mr. Lewis, that was a good answer you gave me.

MR. LEWIS: I can think of other situations where

both domestic and legal where I would like to send Mr. Jacobs to represent me as.

Okay. So I think that's my argument on the merits of the scope of the stay. And I guess my basic point, once again, is we just don't think the stay applies except to very limited extent we're prepared to live with whatever the Court decides to do about that limited extent. Although we would recommend that since the stay doesn't apply to the defensive, the territory relief action that SUSE has brought and certainly does not apply to SCO's affirmative claims in the arbitration, if those are going to go forward, then we might as well have everything go forward together. Let's get it done together and let's get it done and we'll all know better where things stand.

This is not the kind of thing to put off for 6 or 12 months. The parties are ready, or should be ready. They've had plenty of notice. And it would make much more sense to let this go forward where the parties agree that would be decided with their arbitration clause which referred it to Swiss arbitration and its governed by Swiss law. And I don't think there's any dispute about that.

So with that said, let me turn now to the jurisdictional issues and let me start by saying that we don't contend that the Court couldn't authorize the kind of service that the debtor affected in this case. But the debtor didn't affect that service in this case with this Court's authority

which is what the rule requires. What the debtor didn't do was go and look at the rule which is in black and white in the Federal Rules as adopted by the Bankruptcy Rules about what they had to do.

One thing they could have done if they read the rule was come to this Court in the first place and ask for authority to serve whomever. And that would have been decided and we probably would have agreed. We probably wouldn't have opposed an attempt to service counsel once we'd had a chance to confer with our client. I don't know what would have happened for sure because we didn't get the chance.

But they didn't do that and that's what the rule says they're suppose to do and they're attitude seems to be, well, rules, rules, you know, we all know what's really going on here. Let's just not play by the rules. We'll just kind of make it up as we go along. You know, we're the debtor and we need special care and attention. And we ask you to give us that special care and attention. That's not how it works. That's not due process. Its not in accordance with the rules.

The debtor claims that we, Morrison and Foerster, through the power of attorney in the arbitration somehow consented to this, to having Morrison and Foerster served in this bankruptcy case because this is a, quote, related proceeding. Well, as in other arguments they've made, the debtor trivializes the language. There's no reason a debtor

would be suing a non-debtor except as it somehow related to the debtor's welfare. Its not enough to say that it's a related proceeding because the debtor's now in bankruptcy and the assets are somehow related to what's going on. No one is envisioning bankruptcy. We're talking about related proceedings on the merits. That's what that's -- that's what that provision means.

And to read it otherwise is, again, to say that somehow the -- SUSE is saying, well, whatever happens, whatever may come, fine, you can serve Morrison and Foerster if it has the slightest connection now or in the future with the arbitration proceedings out of which the power of attorney grows. You have to read that in connection with the proceeding in which its filed and to which it refers in its very first sentence.

Now, the debtor also argues that we have all kinds of contacts because we're controlled by Novell and so on and so forth. And the debtor admits it doesn't really have any evidence here. No admissible evidence, no competent evidence. It has a lot of speculation and stuff its pulled of Google. And we all appreciate Google, but Google is not admissible evidence.

But just a couple of comments on this. The debtor's argument amounts to the -- amounts to claiming in many ways that because we're a wholly-owned subsidiary and because we

happen to share certain management personnel that we're one in the same as Novell, in essence. That's an alter ego argument. There's no evidence for alter ego grounds here. Every related company -- surely in Delaware, this is something that we all know -- every related company, every subsidiary is going to share some officers and managers. And there's going to be some relationship in how they're run. You wouldn't buy a subsidiary if you didn't want to try to influence its affairs. If that's enough, then every company is an alter ego of its parents and every company can be served however you want to. That's not what the law is.

And so, the mere fact that Novell -- and I remind the Court that SUSE is not a direct subsidiary. Its -- there's a number of intervening companies between Novell and SUSE. The fact that they share some management, that they share some strategic visions and objectives, that they talk to each other, that's not enough to turn them into nothing more than Novell. And I don't think the law says anything to the contrary. On the --

THE COURT: Did they not operate, though, in the United States?

MR. LEWIS: They -- what they do in the United States, its my understanding, is they basically sell through -- they have no office in the United States. They may have at one time, they no longer do. They sell through Novell exclusively

in the United States. They have no people in the United States on any permanent basis. People may come and go on occasion to the United States.

But to turn occasional contacts and sort of some form of minimal commercial intercourse into minimal contacts for the purposes of suit would be back public policy to say the least. And that's all we have in front of the Court in terms of evidence right now.

The debtor argues that the -- that somehow the fact that the Delaware LLC is involved in some way is significant.

THE COURT: Yes. The joint venture.

MR. LEWIS: Let me explain to the Court as best I can how the Delaware LLC is involved. As the Court recalls, four parties formed the Delaware LLC. So there's the LLC agreement copy which is attached, too.

THE COURT: Yes.

MR. LEWIS: There are some other agreements, however, between those same four parties. And in those -- those other two agreements. There's an identical provision in each of the two that does not appear in the LLC agreement. And in that agreement and those provisions they say, in essence, each party will license its software to the other party. And the licenses will either be through LLC or directly, okay.

So, its true that -- and part of the arbitration is over whether those -- what those licenses are and where they

are and who they are and so on. But the point here is that the Delaware LLC is a mere conduit for those licenses. I think -- and I'm not expert in patent law, but I've learned some stuff over the years and there's a doctrine, I believe, in patent law called an implied license. This is a license that's deemed to have been given when the parties agreed it would be given and it would be unjust not to, regardless of whether there's actually a writing, a specific written license which would be nice, because its evidence. Makes the third parties feel more comfortable. And -- but its not required in this situation. And I think this would be the kind of situation where you'd have an implied license, that is, a license by operation of law given what these two agreements say.

There may also be expressed licenses. There may also be licenses that are direct and we're not sure which of these would the be ones that would be at issue in Switzerland. So it may be that there's no involvement of the LLC at all in the licenses in Switzerland if they're direct licenses. But if it is involved as a licensor, its involved as a licensor only by operation of law because it's a conduit under these agreements. Its not actively involved in anyway.

And so whether its referred to 74 times or 150 times in the other pleadings, as the Court can see, that's kind of inevitable. But its not enough to say how many times its referred in some pleadings in the Swiss arbitration. Its also

important to understand what the references are about. And now the Court understands what the references are about. They are about, to the extent that licenses from the LLC are involved in the Swiss arbitration. And they may not be. They are involved because they are automatic. And the Swiss -- and the LLC is a mere conduit for the creation of these licenses and not because it was involved in active business dealings or transactions.

So the LLC is really not involved. And the mere fact that the company SUSE is a shareholder, a 25 percent shareholder in the Delaware LLC, its not enough, I think, to raise minimum special or general minimum contacts for purposes of jurisdiction anymore than any particular shareholders role as a shareholder would be enough. Again, and I know Delaware is very familiar with corporate law and that would be a pretty bad rule under corporate law if every time you were a shareholder in a company that was a U.S. company, people could serve you because you were a shareholder out of state, let's say. And we're not even talking about international.

So that would be -- that's, I think, our main point. There are, as the debtor says, various factual issues regarding the relationship of the parties. If those need to be elaborated, I guess they'll be elaborated through a discover. But again I suggest to Your Honor that we don't need to get there because the stay doesn't apply to the Swiss arbitration except in a very limited way, a way the Court can deal with

this morning. Either we can stay all damage issues or the Court can grant stay relief now or we can simply postpone the issue on our representation it will come back to the Court to seek stay relief on the damages if and when we get there. But that's down the line.

The alternative is for us to wait 6 to 12 months to try to get some critical issues decided here that are also critical to the Utah litigation and that we'll be talking about a little bit later on, all of which in turn are critical to this Chapter 11 case and to the parties, both the debtor and the non-debtors. Any questions, Your Honor, that I can answer now?

THE COURT: No, I may have some for Mr. Eaton, but you've been very clear, Mr. Lewis.

MR. LEWIS: Thank you so much, Your Honor, I appreciate the time.

THE COURT: Thank you. Thank you. Mr. Eaton.

MR. EATON: Thank you, Your Honor. And to the extent there are specific questions, Your Honor, about the Swiss arbitration --

THE COURT: Well --

MR. EATON: -- I may have to turn over to some colleagues who are more familiar with that. But I want to address --

THE COURT: The defensive issue, if you would,

please.

MR. EATON: Yeah, I did want to go there --

THE COURT: Yes.

MR. EATON: -- because the argument was made that it only -- the argument at this stage is really only going to apply when you're trying to recover from the debtor. If that's the case, then injunctive and declaratory relief would never, ever be stayed. That's not the law. Okay. Its just not. And we've cited to the cases specifically that address that particular point.

And I understand what counsel believes we'd like the law to be or what the policy reasons are about trying to get the estate assets. Let's just look to what the Third Circuit said in Maritime Electric. And Your Honor, I'm turning to page 1204 of the decision.

"Whether a specific judicial proceeding falls within the scope of the automatic stay must be determined by looking at the proceeding 'at its inception'," citation omitted. "That determination should not change depending on the particular stage of the litigation at which the filing of the petition in bankruptcy occurs."

Thus the dispositive question is whether a proceeding was originally brought against the debtor. It doesn't talk about whether it was to get money or recover from the debtor. It was whether or not the litigation was brought against the

debtor. End of story.

They chose to bring a Swiss arbitration, whatever the reason, because there was a Swiss -- there was an arbitration provision, whatever. The fact is they made the decision to commence an action against the debtor. And under the Third Circuit, which is what we have to go by, that is stated. And I think -- I don't know how else I can address the point with respect to the defensive nature, Your Honor. There is no dispute that they initiated the action. And from our perspective, that's the end of the story.

There was an argument made, Your Honor, that -- well, the damages claims aren't being tried now. That's Phase IV. There's one problem with that. As I understand it, a determination of liability now with respect to Phase II will be applicable with respect to when it came to determine damages in Phase IV. And that is with respect to the affirmative claims at this point. And for that reason, Your Honor, it does have an impact. Even if they say they're not going forward with damages now, it absolutely relates to that issue and is impacted by that issue.

The argument is made that, well, we're already to go. Everybody's geared up. Its set for December 3rd, it may take 6 to 12 months. I don't know whether, in fact, its true that nobody can get in front of the arbitration in 6 to 12 months assuming a proper motion for stay relief is filed.

But the fact is, as of right now, SCO does not have counsel retained with respect to the Swiss arbitration. Our Swiss counsel has resigned. We do not have Swiss counsel. So from the debtor's perspective, from just a logistical standpoint, we don't have anybody ready to go now. And furthermore, Your Honor, we're talking about a litigation that will take from December 3rd to December 14th which will require substantial resources, which will require attendance by the debtor, when right now, we're going through the drilling with issues -- fundamentals of the reorganization which Mr. Spector will talk about a little bit later.

But the bottom line is, we're not in a position to go forward right now. And quite frankly, that's not the issue at all in determining whether or not the automatic stay applies. Its just -- respectfully, its just not relevant to that particular point.

Your Honor, I think there's been an acknowledgment. I thought I heard that they really -- if the debtor had filed a motion under Rule 4(f)(3) they probably would not have objected. Respectfully, Your Honor, I think we can do that now, nunc pro tunc. We've all addressed the merits. So I think that particular concession by counsel, and I appreciate it, kind of gets us to the merits that we were discussing earlier.

And I do believe the power of attorney that was

reflected with respect to Morrison and Foerster is a little bit broader. Its not just to represent in the arbitration proceeding. It is any related proceedings. The related proceeding that we're talking about is not a lawsuit against SUSE to recover money. Its not any type of action to divest them of any property right or to take anything from them. Its simply to get a determination that the arbitration that it instituted, being prosecuted by its United States attorneys, should go forward when they're making their position affirmatively in the arbitration that it is not so.

And in light of that, Your Honor, I think it is specifically related for the matters upon which they have been retained, which is to prosecute that action. So I think that addresses the point that counsel's making, that the -- excuse me, that the power of attorney did not apply.

As to the argument on Novell and that what we're really trying to do is some sort of alter ego. We're not making that point, Your Honor. It has nothing to do with alter ego analysis. It has nothing to do with piercing the corporate veil analysis. The point that we're simply making is that Novel can be considered and deemed to be their agent for purposes of jurisdiction, not that they are one in the same, but that Novell would be considered SUSE's agent for purposes of establishing the requisite minimum contacts with the United States sufficient to exercise jurisdiction over them with

respect to the very agreements in question.

I thought I heard counsel state -- Your Honor asked the question, didn't they operate in the United States. They did. They operated in the United States after they entered into the very agreements in question, Your Honor. And from my perspective, that in and of itself, shows why there is not just the specific jurisdiction, it also shows the continuous jurisdiction necessary to establish general jurisdiction over them.

And finally, Your Honor, the argument with respect to the Delaware LLC and the LLC agreement not being really subject to the litigation. As I understand it, Your Honor, all of these agreements that were entered into were done at the same time or on or around the same time. All of them were part of the intention of these four entities to have a joint venture that was going to be created through the U.S. entity to operate in the United States and worldwide. You can't parse them out and separate them out. It was all part of one concept that actually came to fruition, occurred, and as counsel indicated, it related and resulted in the company actually operating in the United States.

So, Your Honor, I think for all of the reasons that we've set forth here today and in our briefs, I believe that the motion as filed should be granted.

THE COURT: Thank you, Mr. Eaton.

MR. LEWIS: Your Honor, may I respond briefly?

THE COURT: You may.

MR. LEWIS: Thank you, Your Honor.

THE COURT: Yes, you may.

MR. LEWIS: Your Honor, to turn to the Maritime case first, its, as I think in someways the lynch pin here.

THE COURT: Yes, please, because that's the central case. Yes.

MR. LEWIS: The debtor has read some language from the Maritime case where it says it doesn't matter what the stage of the case is. It matters whose -- who is proceeding against whom. And its that word "against" that I think is the key. That's been my whole point. Its not who starts it. Its not who initiates the litigation, who's first to court. It's the nature of the litigation.

And in this case, the nature of the litigation is defensive. Why should it matter for purposes of the stay who starts it. Why should it matter whether its just because Novell raised it as an affirmative defense. It can -- you know, those claims are not stayed, no one's saying they are. But because SUSE, not willing to wait around while its business continues to be affected by the debtor's activities decides its not going to wait to be sued to raise the same affirmative defenses, in essence, that Novell has raised. It makes no sense.

We're talking about attributing a sensible provision to Congress's intent which we're required to do. That would not be sensible. I think I've talked about that some as well, that Congress would otherwise have simply stayed everything because they only reason for such a provision would be to stop the expenditure of attorneys' fees generally. Congress didn't do that.

Now, on the question of the nature of the claims in the Swiss arbitration where counsel says, well, the affirmative claims, while the damage claim is, you know, may not be going forward, to allow the defensive claims to go forward would be effecting the damage claims. But the fact is, SCO has to continue with its claims in the Swiss arbitration.

The automatic stay, and the debtor has not argued this and couldn't, those claims, those counter-claims that SCO brought are still alive. They're going to get into the merits of the same kinds of issues that the declaratory relief action is going to get into anyhow. So its going to happen one way or the other. We might as well have it all happen together.

THE COURT: But they're not seeking to pursue those claims at this time.

MR. LEWIS: Your Honor, they have to get the arbitrators agreement not to do that. That hasn't happened yet. And those -- there's nothing which allows them unilaterally to stay the arbitration anymore than they can --

if they had sued Novell in Utah and Novell had not made any counter-claims, the debtor would not be in a position to unilaterally to tell Judge Kimball, well, fine, we're just going to wait. We -- you know, we'd be able to make a motion for failure to prosecute if we wanted to.

So those are still alive and they're still set to go forward. And it may be that their appeals to the Arbitral Tribunal based upon the recent resignation of their Swiss counsel might get the Arbitral Tribunal's attention. But that's up to the Arbitral Tribunal. That's not here today. And their resignation of counsel took weeks -- took place weeks after the case was filed. And I just find very puzzling to have happen at the last possible moment when it looks like everything else failed to try to stop the Arbitral Tribunal from proceeding as it may intend to do.

They had the ability to be ready. They had the ability, for example, also to ask for other counsel, go to their Swiss counsel right away and say this is critical, will you be with us. And if not, we need to find somebody else sooner than later. None of that evidently happened. And all of a sudden, out of the clear blue, after Swiss counsel did write some letters, I might point out, in the arbitration, post-bankruptcy to the tribunal, apparently happy to continue to represent them for a while, all of a sudden, out of the clear blue, says at the last possible moment, well, we don't

want any part of this bankruptcy. And I don't know what their real reasons are. They just say they don't want to be supervised by the bankruptcy court. Whatever their real reasons are, maybe those are, maybe they aren't.

So -- and I think the important point here again is these claims need to be decided. We can't wait to have them decided. The debtor's motion to sell, which has now been put off, only points that up further. We'll probably discuss that more on the stay with these motions.

THE COURT: Sure.

MR. LEWIS: But its really the same point. You just can't pretend that this case doesn't even know about these issues regarding their critical assets. Who owns them. What their money is going to be. All of those kinds of things which we'll talk about more later are in essence encapsulated to some extent in the Swiss arbitration anyhow. So we should get on with it.

The notion that we're somehow going to distract from the attention of the debtor, the debtor apparently has been quite able to put together this sale motion. We see no signs of a plan. If at some point or another later on that becomes an issue, the debtor can always come back here and ask for some kind of further relief or can go to the Swiss Arbitral Tribunal and ask for further relief. I think we ought to get on with what needs to be done in this case for all concerned, not just

for the debtor. Not for the debtor's narrow interest because other interests are stake, namely the interest of other creditors including Novell and SUSE.

The argument that we're just arguing that Novell is the agent of SUSE and we're not arguing alter ego is technically correct, but if you look at the motion, its not accurate. The reason they're arguing that Novell is SUSE's agent is they're arguing that Novell is, in essence, SUSE. The evidence that they adduce or purport to adduce on that subject is that kind of evidence. And that's the only evidence. And even there, there's not -- most of its not real evidence. Most of its just some speculation which may or may not be true.

On the Delaware LLC, once again, their argument originally was, well, gee, the LLC is intricately involved and therefore there is jurisdiction. As we've shown, the LLC is not intricately involved. It's a virtual bystander. And so the mere fact that the parties created the LLC doesn't really matter anymore than if there was a complete stranger corporation of some sort.

So, again, I'd ask the Court to find the stay does not apply to the arbitration insofar as it concerns the defensive aspects of the arbitration. It clearly does not apply to the debtor's claims in the arbitration. And if it applies, as it does, to the affirmative damage claims which are nowhere near $100 million, then we ask the Court to either

grant stay relief, to just say its stayed if that's what the Court prefers to do, or to let us bring that issue back to the Court at some later date when its really and issue.

If, for example, in the unlikely event, in our view, we lose the arbitration, then we won't have to worry about the damage claim at all. I don't think that's going to happen, but it just makes the point.

Thank you, Your Honor. I appreciate the time.

THE COURT: Of course, Mr. Lewis.

MR. EATON: Your Honor --

THE COURT: Mr. Eaton, you want to address the issue of the debtor proceeding with the counter-claims in the arbitration?

MR. EATON: Yeah, Your Honor, and I think to the extent that the Court has specific questions about the interim relationship between the Swiss arbitration and the claims being asserted in the Utah litigation. I think Mr. Singer can of address those because he's been primarily -- but the bottom line is, as we put in our motion and as we even told the Tribunal, we are prepared to stop with the prosecution of the counter-claims for the very reasons we've articulated, that they are interrelated because the -- they do have an impact on the defenses that are being asserted with respect to their claims. And Mr. Singer can address the specifics as to what -- of how that works.

THE COURT: That would be helpful.

MR. EATON: But we have specifically said, we are not intending to go forward with our counter-claims in the Swiss arbitration. We have told that to this Court and we have told it to the Tribunal as well, Your Honor.

THE COURT: Thank you, Mr. Eaton. Mr. Singer, would you like to come to the podium and I don't know the procedures, of course, for the arbitration and how simple it is just to tell the panel that we're not proceeding with the counter-claim.

MR. SINGER: Thank you, Your Honor. First of all, I'm Stuart Singer from Boies Schiller & Flexner and counsel, both, in the Utah litigation and in the arbitration.

THE COURT: Yes, welcome to you.

MR. SINGER: Thank you. We have indicated to the panel that we do not intend to pursue the counter-claim in light of our belief that the whole proceeding, or the claims against the debtor, are stayed. And there's been no indication from the panel that they will not accept that, no indication from the panel that they would do what would be unusual in going forward with those -- with that counter-claim piece especially since its factually integrated with certain defenses to the claims of Novell if the action is stayed. We have no reason to believe that the panel would do that.

With the Court's permission, may I make two further

statements regarding the interaction of the arbitration and the Utah litigation?

THE COURT: Yes, please.

MR. SINGER: First of those is that the affirmative defenses in the Utah litigation are not nearly as broad as the SUSE arbitration claims. While its true that in -- as an affirmative defense, Novell raised to SCO's copyright infringement claims, they have pled the affirmative defense of license.

The claims in the arbitration go far beyond that. They are seeking a worldwide injunction against SCO proceeding to make any steps to enforce its intellectual property against SUSE Linux. That would be far greater relief than simply an affirmative defense to a copyright infringement action in the United States based on Novell's distribution of SUSE Linux.

They have also sought to have a declaration that our intellectual property rights and certain Unix intellectual property were contributed to the joint venture. That's not raised at all by an affirmative defense with respect to licensing.

And, of course, they're trying to set in this phase at least a predicate for damages in whatever amount they're seeking. We only can go by the addendum amount that they chose, but in whatever amount they're seeking, the predicate for that would be the decision in this phase that we have acted

wrongly in seeking to enforce our intellectual property rights in light of the joint venture agreements and the associated agreements.

The other point, Your Honor, I wanted to raise was in connection with the assertion that the timing of this arbitration is critical with respect to the resolution of intellectual property issues that Novell and others have an interest to see resolved. And I think that that is not the case, respectfully, in like of Judge Kimball's ruling in August of this year with respect to the ownership of the copyrights. We disagree, very much, with the correctness of that ruling. But Judge Kimball ruled that we do not own the copyrights in Unix and Unix^2 as of the time of the asset purchase agreement in 1995 when Novell sold those entire Unix business to our predecessor in interest.

That issue, that decision on summary judgment, which hopefully will be reviewed by the Tenth Circuit, is what will decide the ownership of intellectual property rights that are key here. In fact, if we were arguing today the issue of stay relief, we would argue that it hardly makes sense for an arbitration as a prudential matter to go forward with the question of whether we gave away to the joint venture intellectual property rights that a U.S. District Court judge has ruled we didn't own in the first place.

So the arbitration isn't needed to go forward to

resolve those issues. Thank you, Your Honor.

MR. LEWIS: Your Honor --

THE COURT: Yes, Mr. Lewis.

MR. LEWIS: -- I'm going to send Mr. Jacobs into battle here.

THE COURT: Mr. Jacobs.

MR. LEWIS: Its sort of see you one and raise you one response. But before --

UNKNOWN PERSON: Touche, Your Honor.

MR. LEWIS: But before I do that, I just want to comment on the comment about an injunction as part of the relief.

THE COURT: Yes, please, yes.

MR. LEWIS: Your Honor, nothing in the Bankruptcy Code allows the debtor to go about interfering with other people's businesses post-petition just because it's a bankruptcy debtor anymore than it can continue to impose a nuisance. Each new infringement, as the Court knows, is a new violation. And so, the debtor's position here that somehow the fact that we're also seeking injunctive relief magically changes into something else is just wrong. We're entitled to defend ourselves and to defend our business. And that may include obtaining, not a mandatory injunction, but a prohibitory injunction, a classic defensive maneuver.

Thank you, Your Honor. I'll turn --

THE COURT: But that has to be brought here, doesn't it? In this court?

MR. LEWIS: No, I don't believe it does, Your Honor. I don't -- I think if someone was interfering with our business post-petition, I think under, what is it, 959 we could bring that anywhere, 28 USC 959, just as we could bring a nuisance claim against someone anywhere, in any court of competent. We can sue the trustee. And I don't think that's any different here, nothing in the Bankruptcy Code or the automatic stay give the debtor the power to sort of lay about and interfere with other businesses and other property interests just because it's a debtor.

And now I'll turn it over to Mr. Jacobs. Thank you, Your Honor.

THE COURT: Thank you, Mr. Lewis. Mr. Jacobs, please.

MR. JACOBS: Your Honor, I think -- thank you, Your Honor, for all the time on this somewhat complicated procedural question.

THE COURT: Its helpful.

MR. JACOBS: I think they're in a bit of pickle, that is the debtor SCO. They're in a bit of a pickle because as Mr. Singer indicated, in the Utah case, they want to get that ruling up on appeal. But one of the causes of action is stayed pending the outcome of an arbitration in Switzerland.

Before filing bankruptcy, SCO went to Judge Kimball and said, take your summary judgment ruling and certify it for appeal. Judge Kimball said, no, I'm not going to parse this ruling. We're going to get all the issues decided at the district court level.

Now, they could still conceivably go back and say, if you were to grant us stay relief so we can go back on our affirmative -- on our counter-claims for dollars with Judge Kimball, maybe they'd go back to him and say certify it even though this copyright infringement claim is stayed.

We'd resist that. We would say, they had all the opportunity in the world to resolve the -- to get the arbitration done, to resolve the issues that have been referred to arbitration that relates to this claim in Utah. They went to you. They asked you for -- to shut down the arbitration. Its their own fault for dividing up the causes of action in this -- in the district court case in Utah and making it impossible to reach a final judgment on all causes of action. So we would oppose certification, partial certification and entry of final judgment so that the case could go up on appeal.

So in order -- even for them to accomplish their appellate objections, it seems to us the arbitration should go forward and the scope of the United Linux intellectual property provision should be decided. Once those are decided, we can go back to Judge Kimball on the copyright infringement claim.

There will be two reasons, if we are successful, why he should grant judgment to Novell on the copyright infringement claim; (1) Judge Kimball decided they never owned the Unix copyrights in the first place; (2) if they did, under the United Linux agreements, they were divested or licensed to SUSE and, hence, no affirmative claim against Novell.

So when you look at this litigation, we step back and look at what SCO needs to accomplish, even by their own terms because they're out there publically, I think we submitted this to Your Honor, the CEO of SCO is saying, we're going to appeal, we're confident. Judge Kimball, like he says, you know, gets it wrong all the time. And so this case has to get on the road and get done. That's the first high-level point.

The second point, I don't think they're really grappling with this point. The counter-claims are not subject to the automatic stay. The counter-claims in the arbitration are not subject to the automatic stay. They can protest to the Tribunal all they want, that the Tribunal should not go forward with the arbitration in December even if you grant their motion on the automatic stay with respect to our affirmative claims.

They can protest all they want. The Tribunal, these are distinguished arbitrators. They zealously guard their jurisdiction. It wouldn't surprise you to learn that, I suspect. And they will make their own decision on whether --

THE COURT: But if I grant their motion and stay you

from proceeding in the arbitration, I can't imagine you won't be in there yelling that the counter-claims should not proceed.

MR. JACOBS: We want the counter-claims to proceed, absolutely. I will say that on the record. You can -- they can hold me to this. You can hold us to this. We would just -- we would very much like to try those counter-claims in December, Your Honor. And I'll be very straight up with you about why they're very weak, number one. But number two, we really -- getting three busy international arbitrators together with counsel is a scheduling train wreck. And so to lose that hearing date is something that we're very concerned about.

And, candidly, yes, as counsel for the debtor acknowledged, there's a lot of overlap between the counter-claim issues and the, what we're calling, the defensive affirmative claim that SUSE has brought. Essentially, their counter-claim is that SUSE acted in bad faith and by asserting the intellectual property provisions that it has.

So, there's some technical bankruptcy issues that I think bankruptcy counsel has very well addressed, Your Honor. But just thinking about how to get this -- the issues resolved so that the bankruptcy can be resolved it seems to us that the stay should not be -- the stay motion should not be granted. In any case, the counter-claims will go forward if the Tribunal chooses to do so. They have no real answer to that conundrum. That's up to the Tribunal.

THE COURT: Thank you.

MR. JACOBS: There's one other thing, Your Honor, I wanted to mention. We did not submit, but it seems to us it could be helpful to Your Honor to have Judge Kimball's ruling on the motion to stay the copyright infringement claim pending the United Linux arbitration outcome because Judge Kimball parsed through these agreements sufficiently to decide what issues on their affirmative copyright claim were referable to arbitration. So, if that would be helpful, I have copies here of that.

THE COURT: Any objection?

MR. EATON: I have no objection, Your Honor.

THE COURT: Thank you. I would certainly accept them.

MR. JACOBS: May I approach?

THE COURT: Yes, you may. Thank you very much, Mr. Jacobs. Thank you, sir. Yes, thank you. Thank you for doing that.

MR. EATON: Your Honor, I don't know whether the counsel's finished, I want to --

MR. JACOBS: Yes, I am. Thank you very much.

MR. EATON: I didn't mean to interrupt you. Your Honor, if Your Honor is going to look at any of the case law and probatively look at the issue, I would ask the Court to take a look at a Third Circuit decision called ACandS, Inc. v.

Travelers, we cite it with respect to the motion for stay relief of Novell, 435 F.3d 252 in the Third Circuit which addressed an arbitration and the court discussed some of the meshing that takes place in an arbitration setting delineating to counter-claims and defenses and incidently held that the arbitration should have stopped once it became apparent that regardless of how you couch things, it would affect and impact on the debtor's estate and that the decision of the arbitration panel was worth (indiscernible) analysis.

THE COURT: Have you had an opportunity to review that case, Mr. Lewis?

MR. LEWIS: No, Your Honor, I actually just had a small point that I wanted to raise that I've been reminded we failed to address specifically in our last part of the argument. And that is the debtor got up again and said, well, we think you can do it nunc pro tunc in terms of authorizing the service.

I just wanted to say, we don't think the Court can. And while it may look like we're being hyper-technical, I think its important to us that this case from the start, in all respects, follow some reasonable due process procedures. We don't want to set a precedent whereby the debtor is always say, well, gosh, doesn't really matter. We're all here and so on. I think its important to adhere to the rules that are set forth. We will try to do so and we ask that the debtor be

required to do so as well.

If the Court wishes to authorize service by service on Morrison and Foerster at the debtor's request pursuant to a motion, I think we can deal with that when the time comes. We don't think there's any authority to do it nunc pro tunc. It would make no sense to talk about the power to bring a party before the Court in the first instance after the fact. Thank you.

THE COURT: I don't disagree with that, but just practically speaking, assume that they did file such a motion and I granted authority. We would just be back in the same posture and perhaps --

MR. LEWIS: Yes, Your Honor. And I think we're prepared to discuss the possibility that we might just consent. I think we just need a moment or two to do that. But I do ask the Court to take seriously our concern about the employment of proper procedure from now on.

THE COURT: Well, I do, I certainly do. And I share your view on a nunc pro tunc application certainly.

MR. LEWIS: Thank you, Your Honor. If we'd just have a chance to consult maybe at the end of the hearing this morning, we've had a chance to whisper a little bit, we can tell the Court how we feel about that.

THE COURT: Thank you.

MR. LEWIS: Thank you. I appreciate the inquiry.

THE COURT: I was thinking of taking a short recess just to review my notes here and the arguments of counsel. And just to see where I would like to proceed from here as far as whether we need an evidentiary hearing or if, in fact, I might even be prepared to rule at this time. So if we could take maybe a 15-minute recess and the parties can also relax a little bit before we proceed further. Thank you.

MR. LEWIS: Thank you, Your Honor.

(Recess)

THE COURT: Thank you, everyone, you may be seated.

MR. LEWIS: Your Honor, if I may, before the Court does whatever the Court's about to do.

THE COURT: Yes, Mr. Lewis.

MR. LEWIS: I may sometimes be right and sometimes be wrong, but I'm always a man of my word when I try to be. We've talked about the service issue.

THE COURT: Yes.

MR. LEWIS: And a couple of other items. And so before the Court rules, if that's what the Court's about to do, I think we can spare the Court certain kinds of problems, if they were.

First of all, we're prepared to -- for purposes of this motion only --

THE COURT: Yes.

MR. LEWIS: -- stipulate to the form of service and

the issue of personal jurisdiction without prejudice in any other proceeding to whether the same facts or any of those facts would be relevant or decisive. And so, the Court doesn't need to deal with that. And to the extent the Court was thinking about future proceedings after discovery on those issues, I don't think we need to do that.

We're also prepared to waive the damage claim in the arbitration in Switzerland outright. Thank you.

THE COURT: Thank you, Mr. Lewis. Well, I am prepared to rule, I think, at this time. I think its appropriate. I think that the arguments and materials submitted to the Court were just excellent and helpful. Didn't necessarily make the decision easier, but certainly, I think helped highlight the issues and hopefully to make the decision more correct.

And based upon the stipulations of counsel relating just to this motion on the appropriateness of service and the jurisdiction that the Court has, I certainly can, I think, get more directly to the issues at hand. In fact, it shortens the ruling significantly.

So I am going to address the applicability of the automatic stay to SUSE's claims in the Swiss arbitration. We all know what Section 362 of the Bankruptcy Code provides and so I'm not going to quote from it. But I'm referring, of course, to 11 United States Code Section 362(a)(1).

And clearly the scope of the automatic stay is broad and by necessity it is broad. And Associate of Saint Croix Condominium Owners v. Saint Croix Hotel Corp., a decision by our Third Circuit, 682 F.2d 446, provides as such. And we do have, I think, agreement from SUSE that this arbitration -- an arbitration is also subject to the automatic stay, but I think its very clear that that is the law in any event. All proceedings are stayed including arbitration, license revocation, administrative and judicial proceedings. And that language is taken from the House of Representatives Report, No. 95-595.

However, the clear language of Section 362(a) indicates that it stays only proceedings against a debtor. And again Saint Croix is the authority for that point. The statute does not address actions brought by the debtor which would inure to the benefit of the bankruptcy estate.

In determining whether a proceeding is subject to the automatic stay, courts must look at whether the proceeding was originally brought against the debtor. Saint Croix, 682 F.2d at 449. And in making that determination, courts must look at the proceeding at its inception. And again, that is Saint Croix as the authority.

That determination should not change depending on the particular stage of the litigation at which the filing of the petition in bankruptcy occurs. Saint Croix is again authority.

At its inception, the Swiss arbitration at issue here was commenced by SUSE against the debtor. Thus it falls within the scope of the automatic stay.

SUSE argues that the arbitration is not subject to the stay because SCO has asserted counter-claims in that proceeding. However, the fact that SCO has asserted the counter-claim in the arbitration is of no consequence. And I'm going to quote from the Maritime Electric v. United Jersey Bank decision by our Third Circuit which has been argued here at length.

"All proceedings in a single case are not lumped together for purposes of automatic stay analysis. Even if the first claim filed in a case was originally brought against the debtor, Section 362 does not necessarily stay all other claims in the case. Within a single case, some actions may be stayed, others not. Multiple claim and multiple party litigation must be disaggregated so the particular claims, counter-claims, cross-claims and third party claims are treated independently when determining which of their respective proceedings are subject to the bankruptcy stay."

Now SUSE argues that the automatic stay does not apply to the arbitration because their claims are defensive in nature. However, the Court notes that most actions, most lawsuits that are filed are, in effect, protective in nature. And I think that this litigation which clearly was brought

against the debtor is an assertive -- an offensive if you will, action. And it goes far beyond protecting their legal rights to, in effect, seeking specific relief which would impact the bankrupt estate. And accordingly, I find that the defensive nature of the case argument, the protective argument made by SUSE does not control.

Accordingly, the Court holds 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.

MR. EATON: Your Honor, if I may approach? We have a copy of the order that was submitted along with our motion.

THE COURT: Yes.

MR. EATON: If I may approach, Your Honor?

THE COURT: I don't know if you've reviewed the form of order, Mr. Lewis?

MR. LEWIS: I think we -- I'd like to just take a real quick look at it, but before I do that --

THE COURT: Yes.

MR. LEWIS: -- I just want to be sure that I'm clear what the Court's ruling is. The Court's ruling, as I understand it is that the arbitration insofar as it involves our claims, our declaratory relief claims is stayed.

THE COURT: Yes.

MR. LEWIS: And the monetary claims presumably as

well.

THE COURT: Correct.

MR. LEWIS: But that it is not stayed insofar as it involves SCO's claims against SUSE, seeking relief against SUSE, is that correct?

THE COURT: Well, let me hear from Mr. Eaton before I indicate my position on that.

MR. LEWIS: Okay.

THE COURT: Mr. Eaton.

MR. EATON: Your Honor, as we'd indicated and argued earlier and in the Court's ruling, its our position the arbitration is stayed for the very reasons we discussed earlier, mainly that the counter-claims also overlap with respect to the affirmative defenses such that if the Court ruled against us on our counter-claims, it is ruling on the affirmative defenses to SUSE's affirmative claims that the Court has already upheld and applied with respect to the automatic stay. The ACandS case that I gave to the Court also stayed the entire arbitration and that's why we believe that the order (indiscernible) applies to the entire arbitration as well, including the counter-claims.

THE COURT: Mr. Lewis, that is the nature of my ruling, yes, that the entire arbitration proceeding is stayed.

MR. LEWIS: Okay.

THE COURT: And -- proceed.

MR. LEWIS: Yeah. I guess from our point of view, you know, no one made SCO make its counter-claims. It can withdraw them, it can drop them, it can do whatever it wants to do, but they are SCO's claims against us and if it wants to have those stayed, I don't see why its not -- I understand there are relations between the issues.

THE COURT: Yes.

MR. LEWIS: But SCO chose to create those relations between the issues and its brought the action and just as it did in Salt Lake City. And it needs to decide what its going to do. And I obviously have lost that argument, but you know, I respectfully have to say I don't agree with that aspect of the Court's ruling in any case.

THE COURT: I appreciate that and I certainly understand that you would not agree.

MR. LEWIS: Yeah, okay.

THE COURT: But I do think that the interrelationship between the claims by necessity and the impact on the debtor requires that the entire arbitration proceeding be stayed.

MR. LEWIS: Your Honor, as far as the order is concerned, I think the order goes way beyond whatever was at issue in this case. The Court orders -- this order purports to enjoin SUSE from doing a whole lot of things that no one's ever talked about us doing someday through itself or its agents. I mean, the issue in this proceeding was is the arbitration

stayed.

THE COURT: Correct.

MR. LEWIS: To the extent that the order purports to go beyond that issue, and I'm not telling the Court that we're going to be running around to some other forum, but I really think its excessive here for the order to do anything.

THE COURT: Perhaps Mr. Eaton could be helpful in --

MR. EATON: Your Honor, what I was going to suggest is that we will get together after the hearing, work out the form of the order that we can submit that's in accordance with the Court's ruling.

THE COURT: I would appreciate that, yes.

MR. EATON: We will, Your Honor.

MR. LEWIS: Thank you, Your Honor. I appreciate that.

THE COURT: Yes. Thank you. And to the extent that you can't, then you certainly may submit alternative forms of order for my consideration.

MR. LEWIS: Very well, thank you, Your Honor.

MR. EATON: We can do that, Your Honor. Thank you very much, Your Honor. Thank you for allowing (indiscernible) --

THE COURT: Of course, Mr. Eaton. Thank you, sir.

(Pause)

THE COURT: I'd like to make a suggestion as we

proceed. I know that the motion to lift stay, Novell's motion to lift the automatic stay will take some time. And I'm wondering if we couldn't perhaps address a motion that might -- the remaining motion on the compelling the payment of the royalties that has been filed. Perhaps that might fit a little bit better prior to, you know, a lunch recess that I think the parties should take and I must confess to you, I was here until after 2:00 this morning mediating a case. So I could use a luncheon break myself and I think that perhaps just from an orderliness standpoint, rather than start and interrupt the hearing on the motion to lift stay, perhaps we could move forward onto the payment motion?

MR. LEWIS: Your Honor, we certainly have no objection to that if the debtor has no objection. And I think it's a good suggestion because it should be fairly simple.

THE COURT: Yes.

MR. LEWIS: Its not a very complicated motion.

THE COURT: Yes.

MR. LEWIS: I think the facts are undisputed that the debtor is receiving money that belongs to us, not the debtor's money, our money. Its our property. Its not property of the estate in any sense. I don't think there's any real issue about that. The question is, are we at risk with respect to what's going to happen to that money. And the related question is, is there a way for this Court to fashion appropriate

relief.

Let me start with the latter question first, that is is there a way for this Court to fashion appropriate relief. The debtor argues, well, the contract says what the contract says and the Bankruptcy Code can't be used to do things that are inconsistent with the Bankruptcy Code's objectives, neither of which, it seems to me, are of any relevance to the ultimate argument here.

We agree that the contract says what the contract says. Bankruptcy courts all the time fashion specialized relief under various circumstances that is not specifically set forth in the Code. Sometimes it is, like adequate protection and this is analogous to that. It doesn't apply here because adequate protection has to do with property that's the estate's property. But its an analogous concept.

THE COURT: Let me ask just one factual question before you proceed.

MR. LEWIS: Yeah, yeah.

THE COURT: Is the debtor current on its payments?

MR. LEWIS: As I understand it, the debtor is current on its payments at the moment. And we do apologize for the mistake in the declarations. Its not something we like to do, it wasn't intentional.

THE COURT: No, I think both sides were operating under a misimpression on that.

MR. LEWIS: Yeah, apparently everybody had the same misunderstanding. In any case, we do apologize for that to all concerned.

So I think there's authority in Section 105(a) and we've cited a couple examples of cases in the Code where there's no specific provision of the Bankruptcy Code but the bankruptcy court can, under 105(a), fashion a remedy as long as its not inconsistent with the purposes of the Code.

This is not inconsistent with the purposes of the Code. One of which is to specifically exclude certain property as property of the estate. Section 541. We're not doing anything that hurts the debtor in that sense. Or that is somehow not provided for in the Bankruptcy Code in some other way. We're just asking the Court to provide us some -- with some additional protection for assets that are excluded from the estate.

So then, the other issue becomes what's the big deal. The debtor says, well, the contract, what it says, what it says and that's true, but again, bankruptcy contracts that say what they say are overridden all the time, both under the Statute itself under specific provisions, like Section 365 is overriding of, you know, anti-assignment clauses, but also when the bankruptcy court fashions the various kinds of relief.

Adequate protection is a classic example of that. There's no specific provision in the adequate protection

statutes necessarily for the various kinds of remedies the Court can fashion for adequate protection. Although a couple are suggestive, its not limited there. And the Court can create a remedy that suits the circumstances.

Are we at risk? Well, the debtor says no, what's the big deal, we're paying. The debtor never really says in its response that, yeah, we're in good shape, there won't be an issue. And that's really our concern here. And the more the debtor resists the idea of turning the money over to us, the more we think that the debtor plans to use that money and then replace it. Its not authorized to do that. Its suppose to put that money aside and give it to us, not put the money aside, use it and then like, you know, taking a little money out of the drawer and put it back in the till next week, nobody will ever know the difference.

And the debtor's resistence to turning the money over to us suggests that our concerns about its financial condition which itself says is a troublesome situation are justified. And all we're asking is that the debtor turn the money over to us as it comes in.

If that isn't an appropriate remedy for some reason, then at least let's have the debtor escrow the money or set it aside or have an order that expressly forbids the debtor from using the money for any purpose whatsoever. Just let it sit in the account if that's what the debtor really feels it needs to

do for some reason I can't fathom, and then pay it to us every month. Surely its not that hard to cut a check once in a while, a little bit more frequently as money comes in.

I think that's the essence of the motion, Your Honor. Thank you.

THE COURT: Thank you, Mr. Lewis. Mr. Singer.

MR. SPECTOR: Good afternoon now, Your Honor.

THE COURT: Good afternoon.

MR. SPECTOR: It's so rare we can get an opportunity and its so sweet to take that opportunity about --

THE COURT: I said Mr. Singer. I meant Mr. Spector, I'm sorry.

MR. SPECTOR: I've been called worse and I'm sure I will be. Its so sweet when you get an opportunity to turn it around. We were admonished by Novell and SUSE not long ago about following the rules. And the Court didn't bother to say -- explicitly give us an admonition do it right the next time, stupid. And we will, however, take that to heart.

But its so sweet to be able to say same to you. But we're not going to make this. I just want to tell you the issues so we can say we give up on it. We never raised them. Actually, we raised them only to say we waive them.

But first, they're asking for an injunctive relief. They're asking the Court to order us to do something under Rule 7001. That's a request for equitable relief that has to be

brought by an adversary proceeding. Everyone of the cases that they cited in their papers that talks about 105(a), the Court has these broad equitable powers, they were all in the context of adversary proceedings.

We could be coming in here, and I've done it in other cases where I had different circumstances, and I said, Judge, this has to be brought in an adversary proceeding. And I know courts frequently, you know, write opinions and say, well, the parties as stipulating and arguing on the merits and therefore I'll go ahead and do it.

In this case, we would say in another court, we are not waiving that issue, we're raising the issue and we don't think the court can entertain this motion. We are waiving expressly here, Judge. We want to get to the thinness of the merits.

What else? They also say that the premise of this case is its their money, its their money, its their money, its their money. Therefore we win. That's the premise. The fact that its their money or its their asset that we are in possession of by contract because they put us in possession of their money doesn't answer the question. It just sets up, it frames the question.

However, some courts would entertain the notion and we would in other places and if there were more at stake, we would be pressing the argument just because the contract says

its your asset doesn't necessarily make it so. We are conceding that point for these purposes, Judge, because whether they have a contractual right which is what we say they have, or a property right which is what they say they have to these funds, good for you. We're going to give you these funds. We don't intend not to give you these funds. We're fighting about nothing.

But we don't have to roll over just because Novell files a motion demanding that we jump through their hoops. They set up the hoops 12 years ago in the contract, Your Honor. They said, this is our property and we want you to say so, too. So the predecessor-in-interest is suppose to say, okay, okay, okay, we'll say its your property.

But did they set up a segregated account system? No. Did they set up an escrow? No. Did they say in the original contract you can hold our funds for three months and change, I don't know how many, 45 days past the end of the quarter, you can hold our funds. And it doesn't say, and therefore, you can't use those funds and then pay us 45 days at the end of the quarter. You can possess our funds. That was the setup.

So what's changed since then other than now we're monthly because there was an amendment and we all missed that one. Although the clients probably didn't miss it, the lawyers missed it. What's changed since then? Well, we're in bankruptcy now and we're in these dire financial straits. We

only have $9 million to cover this months $45,000 note. That's what it comes down to.

They're saying -- their basis for injunctive relief, the prejudice to them if they don't get this important ruling is that maybe on December 1st, the November money won't be there, the $41,000 that is there money, won't be there to pay them unless we set up procedures to cover that.

I thoroughly enjoyed the arguments of Mr. Lewis and Mr. Eaton and their friends and relatives this morning on a very important, you know, academically challenging issues that Your Honor dealt with. I'm embarrassed to say we're arguing over this. I think we should just simply deny it before I get into the rest of my story and let us take a lunch break and come back on something also academically challenging.

THE COURT: Mr. Lewis, you response, please.

MR. LEWIS: Your Honor, the odor you smell in the air is lunch which is just a moment or two off. Again, I revert to the question of if this is not money at risk, if the debtor's not worried about where its going to go, why is it holding onto it so fiercely. And the answer is, I think has to be, its holding onto it fiercely because its hoping to use the money along with its other money because it needs the money to operate. And then it will replace it as it comes in.

That's the risk we face. And if it happens and there isn't money at the end, it will be too late to do something

about that. That's our concern, Your Honor, and we're not asking to impose a really great burden on the debtor. Thank you.

THE COURT: Thank you.

MR. SPECTOR: All right. I'm getting help.

THE COURT: The rest of the story?

MR. SPECTOR: Not giving you the whole rest of the story. The papers really adequately state it. I mean, you talk about 365, if you're talking about analogous situations when an equipment lessor puts equipment into the debtors hands and says, but that's our equipment and not the debtors equipment, you don't entertain them when they come in and say give it back to us now because we're worried they're going to go out of business or they won't have the money to pay the lease payments. You don't do that when a warehouse -- a customer of a warehouse debtor has put its stuff in the warehouse and says well, now they're bankrupt, I want my goods out when they were told they have a contract to be there for nine months or six months.

I'm not going to go and argue the cases about that and I don't think I cited cases on that point. The point is Novell gets a monthly report of the debtor every month. If you ever see -- if Novell ever sees that we are so desperate that we don't have next months $41,000 based on a $500,000 annual divided by 12, we don't have that $41,667 available, well maybe

they should come running back on an emergency relief basis. But this is sill.

THE COURT: Thank you.

MR. SPECTOR: It's a DIP report.

THE COURT: Pardon me?

MR. SPECTOR: The form of the report is a DIP report.

THE COURT: The monthly operating report?

MS. JONES: Yes.

THE COURT: Yes. Well, I understand certainly Novell's concern. But there's been no breach of the relationship between the parties, no breach of -- the debtor has not breached its contractual obligations to Novell. There's no clear evidence of any irreparable harm here. And the Court is available to entertain an emergency application by Novell in the event a payment is -- a required payment is not promptly forthcoming. And I invite Novell to make such an application and I can assure Novell that the Court will entertain that emergency motion as it should immediately.

But at the moment, there is no evidence upon which the Court could, in effect, modify the contract and I think that certainly the debtor's arguments on the relationship with Section 105 under which Novell sought the relief and other provisions of the Bankruptcy Code is persuasive to me. And accordingly I am going to deny Novell's motion. Its denied, as I say, subject to necessity of making an emergency application.

And that is what the Court is here for and I'll be available.

MR. LEWIS: Thank you, Your Honor.

THE COURT: But as of today, I just don't see a basis upon which to modify the contractual relationship between these parties.

MR. SPECTOR: Thank you, Your Honor. We'll hand up the order. We'll send the order on Monday?

THE COURT: Very well. Is there anything else that we should consider perhaps on somewhat of a housekeeping basis? I know that we had I believe it was the retention of Boies Schiller, that application.

MS. JONES: Yes, sir. There are two other matters on the agenda I think we can deal with very quickly, Your Honor, as a matter of housekeeping. One, Your Honor is correct with respect to the retention of the Boies Schiller firm. Your Honor, we had a few more discussions with Mr. McMahon and I think what we'd like to do is go back and discuss it in a more fulsome manner --

THE COURT: Okay.

MS. JONES: -- and, Your Honor, continue that matter over until the November 16 hearing if that's okay with the Court.

THE COURT: That is perfectly acceptable.

MS. JONES: Also, Your Honor, with respect to the ordinary course professionals, Mr. McMahon has had the

opportunity to review the form of order and I understand is now satisfied with that order. I'd like to approach if I may?

THE COURT: Please. Thank you.

(Pause)

THE COURT: I'm signing the order.

MS. JONES: Thank you.

(Pause)

THE COURT: Mr. McMahon, yes, sir.

MR. MCMAHON: Your Honor, good afternoon.

THE COURT: Good afternoon.

MR. MCMAHON: One comment with respect to the order that I just want to note for the record. It expressly reserves the rights of our office and parties-in-interest who object to the employment and compensation of a specific ordinary course professional when they file an affidavit seeking to be retained. So notwithstanding the debtor's preview of the ordinary course professionals to come on Exhibit A, those rights are expressly reserved under the form of the order.

THE COURT: And I assume that is not agreed, necessarily, to by the debtor's, but understood that that -- that the U.S. Trustee is reserving its rights?

MS. JONES: Yes, sir.

THE COURT: Okay. Thank you. I've signed that order.

MS. JONES: Your Honor, I think that on the agenda

then, that just leaves the motion for relief of stay which we can take up after lunch.

THE COURT: Very well. All right. Let us recess until -- oh, excuse me.

MR. SPECTOR: Your Honor, Mr. Petrofsky may be on the phone still.

THE COURT: Oh, Mr. Petrofsky, are you still on, sir?

MR. PETROFSKY: Yes, I am, actually.

THE COURT: I'm trying to think of the best way to handle this from your standpoint. You can either call back in at 1:30 or I can just leave the line open for a bit.

MR. PETROFSKY: I think on that end, I'll find out from the Courtcall people, I think calling back in would work.

THE COURT: Okay. Then we will be returning at 1:30.

MR. PETROFSKY: Okay.

THE COURT: So you might call in maybe ten minutes earlier.

MR. PETROFSKY: Okay, thank you.

THE COURT: Thank you. We'll stand in recess then until 1:30. Thank you, counsel.

(Lunch recess)

THE COURT: Thank you, everyone. Please be seated. Good afternoon.

MR. LEWIS: Good afternoon, Your Honor.

THE COURT: Well, I think the next matter on the agenda is Novell's motion to life stay.

MR. LEWIS: Thank you, Your Honor. Adam Lewis again of Morrison and Foerster for Novell this time.

THE COURT: Yes, Mr. Lewis.

MR. LEWIS: Again. This is, I think, a pretty straightforward stay relief motion. There's certainly plenty of authority which we've discussed for stay relief under these circumstances. The obvious factors in favor are you have a court in Utah that's intimately familiar with the parties, the background, the underlying fact, all of which will have some bearing on the determination of the rest of the issues before that court.

Its obviously a far advanced piece of litigation. There's really no reason to have it redealt with or retried or any of those issues redecided in this court given the status of things in that court. Discovery is complete. Really all that remains is the trial. Trial briefing is done. Witnesses are done. Exhibit lists are done. People just have to show up with their witnesses for a few days in order to complete those proceedings.

There may be other things that can be done in connection with what remains to be decided short of a trial. There could be, for example, summary judgment motions on this issue or that issue that might also more streamline the outcome

and maybe even narrow what happens in the district court. Those are all possibilities and we've asked simply for sort of a blanket stay of relief to do what makes sense as any party would do were there no stay.

And so, the next question is why stay relief and why now. And the answer is that the issues that remain to be decided in the district court and also have to be decided before there can be any appeal, either side to what happens in the district court, intimately affect what the debtor's estate is, what there is to do, what the debtor could possibly propose as a plan, what the -- any proposed sale of assets could look like, what could or could not be sold especially free and clear.

All issues that, you know, when we filed the motion were obvious issues. The debtor has now made the point for us, in a sense, by filing its motion to sell where we filed our objections. That's been continued by the debtor, I guess, until the 16th.

THE COURT: Yes.

MR. LEWIS: But the fact remains that some of the very points we were making in our stay relief motion are illustrated by that sale motion. What do they have to sell? You know, what are people buying? What are they really going to pay for it? Can they sell it. Those kinds of questions. All are tied up with the question of what remains to be done in

the district court. And the sooner we're able to do that, the better off, I think, everyone will be. And --

THE COURT: Tell me how far Judge Kimball has gone in connection with the, if you will, Phase II of that Utah proceeding.

MR. LEWIS: Well, let me do this, Your Honor. Again, I'm going to perhaps defer to Mr. Jacobs who is much more intimately familiar with it. We do know there's a summary judgment decision that has decided the ownership of the copyrights.

THE COURT: Yes.

MR. LEWIS: Partial summary judgment. Its not yet appealable. Ownership of the copyrights and certain related issues. And what remains to be decided is allocation. If I can put this in a layperson's, that is a non-patent lawyer's terms.

THE COURT: Please.

MR. LEWIS: There's allocation -- that's right. We have to stick together. There's allocation of old -- of new products, so to speak, developed by the debtor that involves some old code and some new code and who owns what. And therefore, proceeds as well go to whom from those. There's the whole constructive trust issue that remains to be decided although Judge Kimball has found that the conditions for a constructive trust exists. And I can read the Court -- this is

on page 97 on his opinion which we've attached as an exhibit.

THE COURT: Yes.

MR. LEWIS: And what Judge Kimball says, this is beginning in the second full paragraph, "To prove a constructive trust cause of action, Novell must demonstrate the 'existence of a race (some property or some interest in property), the plaintiff's right to that race and the defendant's gain of the race by fraud, accident, mistake, undue influence or other wrongful conduct.'" And there's a citation to the Pegg case.

The court then goes on to say in the last most paragraph on that page, "In this case, the res is the XVRS -- SVRX royalties to which Novell retains all right, title and interest. This res is traceable to the monies received from Sun and Microsoft agreements. SCO's conduct also amounts to a breach of fiduciary duty convergent, unjust enrichment and breach of expressed contract, all of which are sufficient wrongful conduct to impose a constructive trust."

So what the judge, Judge Kimball has said plainly in his opinion, which I take to be law of good case, is that the criteria for the imposition of a constructive trust have been proven in the summary judgment motion. The only remaining issue is how much, that is the tracing, of the funds. But --

THE COURT: Well, the reason I asked the question I did --

MR. LEWIS: Yes.

THE COURT: -- and I'm not looking to interrupt to bring Mr. Jacobs up just yet because I want you to be able to complete your argument first, but what you've discussed so far is the significant impact of the remaining issues to be resolved, their impact upon the bankruptcy case.

MR. LEWIS: Yes, Your Honor.

THE COURT: So the question that obviously has to come to my mind is should the case from here forward proceed in Utah before Judge Kimball? Or should it be -- or should these issues be tried before me. And one of the issues I have, of course -- and particularly because of this significance of a constructive trust to the debtor's estate and its creditors.

So the question I've got is how much, if you will, ahead in the work is Judge Kimball than I might be?

MR. LEWIS: Well, Your Honor --

THE COURT: And when I say that I might be, at the moment, you know, I'm still at the beginning. But I don't know how far Judge Kimball has advanced on these issues.

MR. LEWIS: A fair question, Your Honor, and we did try to address it in the brief --

THE COURT: Yes.

MR. LEWIS: -- but I'll try to address it now as well. And I think the short answer is very far along. The passage I've just read you, just talking about the constructive

trust issue, remember there are other issues as well. The allocation issue of code and therefore of revenues from other licenses, those are separate issues from the constructive trust issue. But also those issues are underlaned (phonetic) by his findings about who owns the code and he's going to know what the code is all about. He's going to be the one who's in a position, therefore, to try and determine which pat of the code in these new licenses is really old code and which part is code that they were authorized to develop and did develop.

So he's got the background for that already because of his decision -- the summary judgment decision he's already made. This Court would have to retrace all of those steps. I'm not sure what the purpose would be or whether that would really be appropriate because its been done. And its been done and has been fully and fairly litigated. And what we'd really be talking about here is essentially a second bite at the apple.

And I understand the interest in protecting debtor's estates, but even that interest, it seems to me, has some limitations in terms of fairness and a rational process that respects prior litigation which, after all, it's the debtor that brought this litigation. We didn't. And the parties may cross summary judgment motions so the debtor hoped to get a result of which it would not be complaining had it not lost so far, wouldn't be asking this Court to decide the rest of the

issues. It'd be happy to have it stay in Utah.

That shouldn't be the reason why this Court does or does not grant stay relief. It really comes down to forum shopping and that's just not appropriate.

Let's talk about the constructive trust for a moment. The passage I just read you, Your Honor, indicates that Judge Kimball has made findings on the factual predicates for everything about a constructive trust except applying the lowest intermediate balance rule to decide what the exact dollars are.

THE COURT: Yes.

MR. LEWIS: Now, the oldest intermediate balance rule is frequently a -- pretty much a mechanical thing. I know it can get a little tricky now and again. But even there, there would be some questions about what money is coming from which of the assets and some tracing that would presupposed some background in the proceedings. But in terms of them asking this Court to retry the constructive trust issue, which is really what the debtor is asking this Court to do, that it seems to me to be as wholly inappropriate.

He's already done that. He's already found that there's a res. He's found that the res is traceable to monies from the two -- the Microsoft and Sun licenses. He's found that. And he's found that the -- its traceable as a result of a breach of fiduciary duty, conversion, unjust enrichment and

breach of expressed contract. He's made these factual findings.

Why would this Court want to, or should it, reinvent that wheel that's been fully and fairly litigated before Judge Kimball? Now, the debtor may disagree with that result. Obviously does. And will, at someday, I assume, proceed with an appeal if we get that far. But that's a different (indiscernible) than this Court, exceeding to the debtor's request to allow you to, in effect, second guess what Judge Kimball did.

Because whether this affects the bankruptcy estate or not, the test for a constructive trust is the same. It doesn't change. Judge Kimball's applied that test and he's found that its satisfied. And it shouldn't matter, in theory, it shouldn't matter which judge applies the test. It should be applied in the same way at the same -- by any judge because it's the same test. There's no bankruptcy aura to the tests if this Court applies it. At least, I'm aware of -- unaware of any law that says that.

And so, the bottom line here is, Your Honor, this is far advanced. Judge Kimball has determined a whole lot, both in making rulings, but also in the process of making those rulings, he knows an awful lot about this case and the parties and the facts and the background.

We've had proceedings that have lasted four years. I

can't, of course, tell the Court it would take four years to do it all over again. But neither are we talking, Your Honor, about some little quick, mini-motion that this Court would preside over to decide whatever is left to be decided in that case, even just the constructive judgments. And there's no reason to redo that other than the debtor doesn't like the outcome. That's what appeals are for, Your Honor, not bankruptcies.

And so, I think in that sense, this is a case that should proceed as expeditiously as Judge Kimball can do so with stay relief here to resolve the rest of the issues by whatever means are appropriate, whether it's the further trial, whether it's partial summary adjudication on certain issues.

Maybe the parties will settle if stay relief is granted, I don't know. That might be an incentive to them to do that, too. But all of that remains to be seen. That would be the usual outcome following the granting of stay relief to complete litigation in another forum that's specialized litigation. We're talking patents here. That is before a judge that is wholly familiar, that's very far advanced with very little left to do. Literally very little left to do unless you're going to do it all over again.

And so, that would be the reasons for granting stay relief. And as I say, the motion that the debtor has filed with respect to its sale, its proposed sale of certain assets,

only illustrates the point. Even if the debtor withdraws that motion or the debtor revises the motion, the points are still the same. What has the debtor got to sell? What have people got to buy? What are over-bidders going to be looking at? You know, can the debtor sell property it doesn't even own? The case law, I think, on that is pretty darn clear that it can't. And until the debtor knows what it owns, it certainly can't sell that kind of stuff.

And in terms of a distraction from the debtor's current efforts, first of all, once again, I want to emphasize, there's not that much left to do if we do it in Judge Kimball's court because most of its been done and we won't be starting all over again.

You're talking about a five-day trial. A couple additional days, maybe, for preparation of a witness here and there, but not everybody's sitting around twiddling his thumbs in some hotel room for, you know, two weeks waiting from this trial to take place and waiting for his ten minutes with -- to be prepared for it. Again, Mr. Jacobs, I think, can probably speak more, and other counsel I'm sure will, to exactly what we can envision here.

THE COURT: And the timing is an obvious concern since --

MR. LEWIS: The timing is we don't know the answer on unfortunately, other than we won't know the answer until we're

free to find out the answer. And the longer it takes us to get this teed up, the further out the trial will be. Whatever that delay is going to be.

If we have stay relief now to go back to Judge Kimball and see what we can do about getting these issues resolved, I suppose if something developed that turned out to be a real problem for the debtor in terms of distractions, one, we might be able to make an arrangement with Judge Kimball to deal with that voluntarily; or two, if the debtor continues to be disaffected, it could come back here and ask for further relief.

But to speculate about the effect of this litigation on the debtor's management when we don't even really have anything in front of us yet is to let the tail wag the dog on the stay relief motion. That is the tail. This has to be decided. These issues have to be decided. I don't think anybody's arguing against that.

And more importantly here, these issues have to be decided because the estate needs to know and its creditors need to know in order to assess whatever the estate's planning to do what there is. Who owns what. What future income might be. To assess a sale price, you'd have to know those kinds of things or at least have some pretty good idea on them.

At some point, if there's a plan, we need to know who much money is in the till. That includes what the debtor may

be able to generate from the sale, but it also includes how much of the money is in that constructive trust. Those issues have to be decided, too. And sooner than later. This is not just some peripheral claim that some creditor really would like to have liquidated.

This is the claim of a party who's proceedings are, in that sense, essential to this case. Its not just another creditor. And for all of those reasons we think stay relief at this juncture so we can go back to Judge Kimball, see what we can do, do it with the least interference with everybody's interests and if an issue arises with the debtor, genuinely can make a case to this Court that a specific proceeding is a real problem for the debtor given exactly what its doing at that point, then the debtor can come back to this Court and ask for some further relief if they can't work something out with us and Judge Kimball.

Any other questions, Your Honor?

THE COURT: I don't think so. I would like to hear from Mr. Jacobs.

MR. LEWIS: Please, thank you, Your Honor.

THE COURT: Thank you, Mr. Lewis. Because what I'm really interested in is, Mr. Jacobs, is the timing and a sense of how complicated the issues are that remain to be tried or at least resolved by a court even on the summary judgment.

MR. JACOBS: I think that the most accurate answer on

your latter question, Your Honor, is those of us who have been living with the case thing that now its pretty simple because we have worked through many of these issues. The hardest issues were addressed by Judge Kimball's summary judgment ruling. And I think what you're probably thinking is, okay, if I take the summary judgment ruling and I pick up from there, what would I really have to do.

THE COURT: Correct.

MR. JACOBS: And the -- so it may be helpful to know that Judge Kimball decided 11 motions after the summary judgment ruling. One I think was a motion for reconsideration, the SCO file.

THE COURT: Yes.

MR. JACOBS: So that's already -- that presumably would be stable. There were some seven in limine motions and then three other motions I just got a tally from my office. So there was -- so there are a lot of trial-related motions that Judge Kimball decided that have the affect of clarifying for the parties what the evidentiary issues were going to be, what the expert testimony issues would be limited to. And as the trial was approaching, it was getting clearer and clearer exactly what we were going to do at that trial. The trial was getting shorter and shorter.

In fact, I think we were all thinking four days at the most by the time the trial was ready to go. The exact

sequence was we were going to start the trial on Monday and SCO went into bankruptcy on Friday. So we were all gathered for the trial to begin. That's how far along we were.

THE COURT: Okay.

MR. JACOBS: And it was a bench trial. So it was not -- we had -- he had -- one of the motions he decided after the summary judgment ruling is that our claims are fundamentally equitable and not legal. There was some shaping of the pleadings that lead to that ruling.

And so the two big issues for trial, and I think this is important, Your Honor, to understand where the constructive trust issue fits. The two big issues for trial were, one, a question whether SCO had the authority to enter into an agreement with Sun and Microsoft that led to SCO's collection of a lot of money that we claim is ours. Its an authority issue.

And then the second issue is having entered into those license agreements, having collected a lot of money, and then having entered into about a million dollars worth of what we might call miscellaneous license agreements, how much of that money should be apportioned to Novell under Judge Kimball's view of the way the asset purchase agreement works. So it was an apportionment trial which was going to decide the, if you will, the gross amount of Novell's claim from your vantage point as a creditor in the bankruptcy.

Then there was going to have to be subsequent phase in which we would address the exact amount of the constructive trust. We anticipated doing that on motion. The two are severable in that sense. What Judge Kimball would be deciding is the gross amounts, if we went back to him for trial. And then we would be going back to him and saying, okay, apply the lowest intermediate balance rule and figure out how much is in the bank account that's traceable and that's our constructive trust. That is, we think, fairly mechanical.

So that's where we were. That's where we would be if you lifted the stay. If your -- if the focus -- the focus of their opposition is the constructive trust.

THE COURT: Yes.

MR. JACOBS: And which is sort of -- which is interesting because they really didn't resist the question of whether we should be back to him for an apportionment trial or a trial, or perhaps we're thinking now a motion for summary judgment on this authority question. The focus was the constructive trust.

You could lift the stay for an apportionment trial and to decide that authority question. And then we can come back to you and we can decide what to do about the construction trust after that's done.

THE COURT: Thank you. That was helpful, Mr. Jacobs. I appreciated it. Mr. Lewis, have you completed your

presentation?

MR. LEWIS: I did, Your Honor, thank you.

THE COURT: All right. Thank you. Mr. Spector.

MR. SPECTOR: Your Honor, I've been listening now for 23 minutes, two different lawyers, two able lawyers, and I haven't yet heard how Novell is being harmed by allowing the debtor what every other debtor gets in Chapter 11, a breathing spell from litigation so it can do its Chapter 11. And I think that's probably because they can't show that they are in harm by waiting a few more months.

They keep telling us, let's go. This is for your own interest. This is for your own good. Don't you want to know what you have to sell? Don't you want to know what your plan is going to look like? Thanks, but we don't need their help. We have our own ideas of how we're going to come out of bankruptcy and how we're going to file the plan and how we're going to sell certain assets and do other things of a reorganization nature that will help us get creditors paid. And you know what? Maybe, if we win the litigation, get stockholders paid because they're in this game, too.

Let me plainly state what we believe the status of the litigation in Utah is. And you know, I don't quibble with able counsel from Novell. They really have it pretty close to what we would agree.

In the court's summary judgment ruling, it delivered

to what the Novell reply brief euphemistically called the software community.

THE COURT: Yes.

MR. SPECTOR: The -- what it wanted to do, the big issue being who owns the Unix and Unixware copyrights. The court decided that question. It's a big question.

THE COURT: Yes.

MR. SPECTOR: It's the question that the software community thinks there's a public interest in, okay. What they don't think there's a -- and again, that's my argument. I'll wait for my argument. Point two, it also ruled that the requisite wrongful act to set up a constructive trust existed in the form of SCO's breach of its contract. The Novell agreement was a contract between Novell and Santa Crux Operations which is a predecessor for SCO, of SCO. And it was a very difficult contract.

I think -- and, Your Honor, we are not trying to retry the case, but to speak fairly, anybody looking at that contract would think that Santa Crux operations bought the copyrights from Novell. There's a body of evidence that would suggest that it did. The judge ruled otherwise. That's the law of the case. We have to live with that until and unless its reversed on appeal.

Nevertheless, based on years of experience and never having been told otherwise, SCO understood that it had the

rights to do what it did, sold certain rights to Sun Microsystems and Microsoft Corporation. Those funds, it turns out in retrospect, were received because apparently SCO got it wrong. They didn't have the rights that Novell claims that it owned. And therefore, that was the wrongful act.

Now, the judge, in his opinion, called it conversion, called it breach of fiduciary duty, called it mopary (phonetic). Whatever, it was bad enough to be the wrongful act it has to find, the court has to find in order to even set up an argument for constructive trust.

But let us be clear. On the same page that Mr. Lewis asked you to look at, page 97, the court stated, "The Court denies SCO's motion for summary judgment" --

THE COURT: Yes.

MR. SPECTOR: Pardon me. The Court denied both Novell's and SCO's motions regarding the constructive trust issue. So Novell's motion for the imposition of a constructive trust was denied. So please, don't tell me that the judge set up a constructive trust. He didn't. He was asked to and didn't.

That doesn't mean that the court didn't already make certain findings of fact, as Mr. Lewis put it or Mr. Jacobs put it, I forget who, with regard to the predicates coming up with that.

THE COURT: Correct.

MR. SPECTOR: And we don't agree with them of course.

THE COURT: Right.

MR. SPECTOR: But we agree that if Your Honor would -- were to take any part of this case and move on from there, you would have to start from those findings of fact. We don't ask you to reexamine them or second guess them.

The court also said with respect to the constructive trust issue that the res is, as stated by counsel, the royalties received by SCO from the Sun Microsystems and Microsoft Corporation agreements. And perhaps the million dollars worth of miscellaneous sales as well.

One of the reasons it did not grant summary judgment on the constructive trust issue in favor of Novell, and you know, if you've read that opinion --

THE COURT: I have.

MR. SPECTOR: -- there's precious little that we can take out of that and see if it was something that we could live with. The one thing that we did get there is the court denied the constructive trust summary judgment motion by Novell. One of the reasons why is the court says, well, there's a res but I don't know what size of a res.

What Mr. Jacobs didn't fully explain and I apologize because I'm probably the last one that ought to be trying this, but in what SCO licensed to Sun Microsystems and Microsoft Corporation, and I may be using that term "licensed" broadly

and I hope I have license to do so, is some of that product really was, and everybody, I think, agrees, some of that was SCO's product. And because this is in code, some of it may be attributable to Novell.

THE COURT: Right.

MR. SPECTOR: So there's a portion of it, we'll call the questioned royalties, that the judge will have to determine goes to Novell and maybe some of it stays with SCO. So the court couldn't, didn't grapple in the summary judgment with that allocation or apportionment as they put it.

THE COURT: Correct.

MR. SPECTOR: Okay. So the court denied summary judgment. And for reasons the court probably didn't know about, but had it known, it probably would have said, and the second reason why is those funds that SCO got in 2003 I'm sure were long since spent. The company was losing money forever, right? Except maybe the year 2003 when it got that money. But that money's gone. The res is gone.

Of course, that money went -- it was money. It went into a bank account. And since that bank account received those funds, new monies from customer sales and a $40 million recapitalization occurred. So maybe some of those funds could still be there using the lowest intermediate balance test and the court didn't know because it really wasn't teed up, it wasn't really addressed. There really wasn't any discover or

argument on the issue of how the lowest intermediate balance test would apply in this case. And so that would be another reason, if he knew about it, that Judge Kimball would have said, well, I can't grant summary judgment here.

The trial was set to being on September 14th, was, as stated by Novell in its motion, intended to decide nothing more than how much of the royalties received by SCO are royalties to which Novell was entitled. In Novell's September 14th trial brief to the court, prepping the court on how we perceive this case should be handled from hereon, they said, in essence, the tracing issue is a discreet issue and we should cover it after we finish the five-day trial on the apportionment and the authority issues that Mr. Jacobs just talked to us about. That was their suggestion and that's what would have happened because that wasn't teed up for the five-day trial.

So Your Honor, this gets me to the answer that you were asking before. What is it for this Court to do if the Court were inclined to do anything with regard to this case? Well, we would say, you take everything that precedes, we grit our teeth and bear it, and then you say, okay, there's going to be a constructive trust in the amount of whatever its been determined elsewhere, whatever that number is. And here's how much of that is now being held by SCO. And that's how much, through the lowest intermediate balance test, that's how much would be potentially set asideable, if that were a word, for

Novell.

This Court could do that. It doesn't need to reinvent the wheel. It doesn't have to pour through 1500 pages of summary judgment briefing or anything else. It's a simply -- its not simply at all. A statement of the issue is simple, but the actual going through it is not simple at all. It is evidence specific. It's difficult because the funds were originally placed four years ago, going on five years ago, I guess. So it would take some time. But it would take time wherever it is. And it's not even proposed to be part of the five-day trial anyway.

So, that's where the status, I believe, of the Novell litigations in Utah are all about right now. And as I said before, we don't contest it, I've said it enough times.

THE COURT: Now, you mentioned that I would essentially take the allocation determined -- is that how you stated it? Determined elsewhere.

MR. SPECTOR: Yeah, we're not asking you to do that, Your Honor.

THE COURT: Okay.

MR. SPECTOR: I mean, we're not being ridiculous. They're right. Its simply, we don't fight everything. They're right. We wouldn't ask this of Your Honor, to go and try to disassemble the string of code and then determine how much of that was Novell's source and how much of that was SCO's. We

wouldn't put you through that. So, if there's going to be a trail --

THE COURT: But it's a timing issue is what you're basically saying.

MR. SPECTOR: Well, that's one thing. If -- I've already discussed why -- well, I haven't discussed wholly why the constructive trust issue is important that it be separated out even though Novell already did separate it out. But we think it ought to be separated out and tried here. But the timing issue is the other issue.

I'll go to that first since Your Honor raised it. Novell has multiply stated that SCO is trying to avoid certainty or finality and they're the engines of finality and certainty. If you'll only let us get to Judge Kimball and we can have this five-day trial, it would be wonderful. We would have the finality that's necessary and then the debtor would know.

Well, excuse me, the debtor would then know? All it would know is some portion of those evil questioned royalties really do belong to Novell. A dollar amount would be established. It's a liquidation of a claim, that's what it is. Because the judge already made the major determination of who owns that code, that software. Who owns the copyrights for that, I should say.

That's the major issue in the case. That's the issue

of public interest. That's the issue. If they want finality, they should have stipulated to a 54(b) certification and we would be already arguing our appeals to the Tenth Circuit. If they were really interested in finality and certainty, we wouldn't heard Mr. Jacobs this morning and say, well, you know, really, the way it ought to go is we ought to go back to Switzerland, try the arbitration, then come back to Utah, fit that result into the Utah litigation. Then -- of course, we would have already had a five-day trial on allocation. Then there are other issues that have to be decided based on what happened in Switzerland. And then, we can have our appeal go up.

If we go down that pathway, Judge, we don't get certainty in our lifetime, or we'll be a lot older. Why not do it the way bankruptcy courts and debtor's-in-possession do it in Delaware all the time and New York all the time and lots of other places all the time.

We know this litigation. We proceed in Chapter 11 which is a breathing spell from litigation. We come up with a plan that will resolve if not the litigation in a way that the opponents would be satisfied, at least we say, here's the alternative, Judge. If the company, the debtor, wins this litigation, this is what we're going to do with the proceeds. If we lose the litigation, stockholders are going to most likely be wiped out and what remains are going to go to Novell

if it gets a money judgment, which I was told, in order to get -- and this is an side -- I was told that in order to get the waiver of the jury trial that was -- is a big issue recently, in September, they waived, Novell waived their money damages claim. And I'll stand corrected if counsel wants to correct me on that. Is that incorrect?

MR. JACOBS: That is incorrect.

MR. SPECTOR: Okay. Then they would have a claim in the estate if they should win. I just wanted to clarify that.

So if we -- if the plan was to, say, we'll look at the alternatives. If we lose the litigation, Novell wins. They'll have a claim and here's how we'll deal with their claim as well as everybody else's, okay. That isn't unusual. Northwest just pulled a plan like that. There's -- our firm represents a creditor with a very, very large antitrust claim and that's going to go to trial post-confirmation in Detroit. There are other creditors with large claims like that. They're going to go to trial post-confirmation in wherever. One of them also is in Detroit. That Your Honor I'm sure knows, that that is not terribly unusual.

We propose that we should be given the same opportunity and not have this case chopped up into little trials all over the world. Switzerland, Utah, then come back here and try to fit that into a plan.

When would we be fitting those results into the plan?

The day after Judge Kimball rules on that five-day trial? Well, that's not final. You know darn well, we'd want to appeal that if we can. It may be that Judge Kimball's going to agree with Novell, oh, I'm sorry, we don't have the result of the SUSE arbitration in Switzerland. I can't send this up for appeal yet.

We'd be here forever waiting for that day. We don't think creditors, stockholders or the Court should be held hostage to that type of trial schedule. We should proceed with our Chapter 11 and we shouldn't be held up by that type of litigation.

THE COURT: But Novell says you're about to sell our property.

MR. SPECTOR: Well, you know, its very difficult when you have to deal with generalities because sometimes exceptions and specifics overrule them. You know, he says that -- counsel stated that you can't -- its well-known, the law's plain, you can't sell what you don't own.

THE COURT: Right.

MR. SPECTOR: Sometimes that's true. I know a lot of Chapter 7 trustees who sold causes of action of -- ridiculous causes of action to people. There's really nothing there. I've seen quit claim deeds and personality quit claim deeds type in realty. You buy whatever it is we have. We have with us today some folks that have some interest in this issue. Mr.

Scott McNutt, counsel from San Francisco representing York Capital Management.

THE COURT: Hello, Mr. McNutt.

MR. SPECTOR: He flew in because he saw the kind of bad-mouthing his client received on the backhand meant for us and would be happy to address the Court on that particular issue if the Court were willing to listen to more of that.

THE COURT: Yes, I would be. Yes, thank you.

MR. SPECTOR: Oh, I'm sorry.

THE COURT: Mr. Rosner.

MR. ROSNER: For the record, Fred Rosner, Duane Morris.

THE COURT: Yes.

MR. ROSNER: I'd just rise to introduce Mr. McNutt of McNutt and Litteneker who's admission pro hoc vitae, we'll file the appropriate papers.

THE COURT: That's fine, Mr. Rosner.

MR. ROSNER: Thank you.

THE COURT: Thank you, sir. Mr. McNutt, welcome.

MR. MCNUTT: (Attorney not near microphone) Thank you, Your Honor. I represent York Capital. York Capital is the leading investment fund. It has many, many millions of dollars in assets. York's Private Equity Fund specializes in turnarounds in general and software businesses in particular. York had devoted substantial time and resources for achieving a

transaction along the lines of the term sheet attached as an exhibit in the sales procedure motion that's just been continued from this date to the 16th.

Since 2005, York has followed SCO's struggles and has dedicated a team of investment professionals with deep software experience to analyze the value in the SCO business, the SCO/Unix business, the (indiscernible) business and to try to take apart and put back together the different, many different moving pieces in a high technology, software kind of business with 35 years of history, maybe more since this Unix product was conceived in the early 60s.

Essential to achieving York's objective to acquire Unix is the assembly of the experienced management team, York has committed substantial resources, identified management teams. That team has extensively participated in due diligence and would be spread equal and prepared to take over the Unix business if we are the successful bidder at the auction sale of the assets.

THE COURT: Okay. Thank you. Thank you, Mr. McNutt.

MR. SPECTOR: Thank you, Your Honor. And York Capital Management is one. There are others and we're going to get into that when we get to the bid procedures motion.

THE COURT: Of course.

MR. SPECTOR: The only thing I want to say is there's been an extreme amount of due diligence. This case, the Novell

case is a matter of wide public -- I don't want to say interest, but at least, its like notoriety we'll say. And a lot of people in the so-called software community have been following it for years. And a lot of the other bidders out there know that there's a terrible decision out of Utah in the case and they didn't -- it didn't stop them from coming and trying to purchase the assets. You'll hear all the details of that when that comes before you.

So can a debtor sell what it doesn't own? I think we'll leave that to the marketplace. Let the buyers come in and say, you know what, Judge, whatever it is they own, we'll take a chance and we'll pay a few million dollars on that change. So that -- and we'll get to that issue also.

But if the question was, Judge, what do we have to get to make it marketable to people like York Capital Management? Do we have to get the imprimatur of -- and the reversal of Judge Kimball's ruling? If we need to do that before we can sell it, well, we're talking a long way.

Now, I may have misspoken when I said after the five-day trial we might have to wait for SUSE's arbitration. That's just by way of argument about Novell's position because that's the position they espoused this morning. Judge Kimball, I am told, actually has stated, at least he has officially ruled in an order, he basically stated, I'm told, that when our 54(b) motion was denied and the judge sustained their objection to

that, he said, well, when the five-day trial is over, we may think otherwise.

So it may be possible that if the stay were lifted or if, after the plan is confirmed, we would have a trial in the five-day -- you know, the allocation issue, that apportionment issue. Perhaps the judge will, indeed, give us a 54(b) certification to go up on appeal at that point.

But right now, where we are with the real reorganization engines going, with 363, 4 and 5 relief and a plan behind it, all coming to the fore in the next month or so, we don't want to be distracted. And most debtors-in-possession wouldn't be forced to distracted to go back to the litigation hell-hole they came from. We do want a resolution. We have to have a resolution. But we don't think this is the time for that resolution.

The constructive trust issue argument, I spoke about earlier, briefly. But I have to reiterate that the issue is one of the exclusive jurisdiction, not concurrent jurisdiction. But the bankruptcy court has exclusive jurisdiction over property of the estate under 28 USC Section 1334. Implicit in that is the determination whether something is or is not property of the estate.

We are not asking Your Honor to do the apportionment issue. We're not asking Your Honor to do a lot of the technical question issues that will be in the Utah case. But

we are asking this Court, if there's going to be an issue about the constructive trust tracing, that this court, which is the court you would expect to be the one to do it.

So who is it that's asking for or is seeking forum shopping? Not us. We never said that the apportionment issue should come here and you should try the case over again. We never said that. Who's asking for forum shopping is Novell asking this Court to advocate its role as the arbiter of what is and is not property of the estate and run off to Utah and have the judge who hasn't begun to focus on the issue.

In the 102 page decision, there was one word, it was this "traceable to", but it was not in the context of tracing. On page 97, I think he says the bad act was traceable to the royalties that were recovered. That isn't the same issue of how do you trace it to what's in the hands of SCO at the present time. It was never addressed.

I understand that there hasn't really been any focus by the parties in the discovery process to do any of the work necessary to do the tracing. And so I'll say it again, that is an issue for this Court. Judge Kimball is no farther ahead than this Court is. This Court has greater expertise, I would surmise, in doing the exercise as do most bankruptcy courts because the issue comes up in a lot of context in bankruptcy. And we see no good reason why that should go off to Utah for trial.

Now, they could be arguing now, well, we never really said that. We just want the apportionment. But they said both ways. Almost embarrassed to say they want the constructive trust tracing issue to be done in Utah because in the motion they never say it. We had to clarify that.

THE COURT: Yes.

MR. SPECTOR: They say in footnotes and other places, well, we want -- and all other issues, too. Well, all other issues will come up after the five-day trial because they said, it's a discreet issue, after the apportionment is done, then we can consider the tracing issue. Well, there are other issues as well. They want all the issues, including the tracing issue, tried in Utah. They're seeking the forum shopping.

(Pause)

MR. SPECTOR: I may have covered this before, but Novell is trying to confuse the Court, I don't think it got away with it, on what is in the public interest. I think I may have covered this before. The public interest was in deciding who owned the software or the copyrights.

THE COURT: Correct.

MR. SPECTOR: Not in how much of a royalty claim they can monetize.

THE COURT: That's right.

MR. SPECTOR: SCO and its outside counsel firmly believe that the district court ruling is seriously wrong. Our

opinion, of course, doesn't carry a lot of water. It's the opinion of the Tenth Circuit that matters.

This litigation is an enormous asset of the estate. Although SCO believes that the Novell ruling leaves various causes of action against IBM intact, IBM and Novell have argued, no, it basically guts our case against IBM. You haven't heard anything about IBM yet.

THE COURT: No.

MR. SPECTOR: But its another major litigation. And I'm sure that given one outcome of today's ruling, we may be seeing them a week later. The IBM litigation could bring hundreds of millions of dollars to the estate for creditors and for stockholders. If -- what Novell and IBM, therefore, jointly are trying to do in all -- in our estimation, it should be plain, is to seek the demise of SCO before they can get their day in court, the Tenth Circuit. And after Tenth Circuit, remand to -- for a new trial or a trial.

We think that's the end game. We think that they don't want this case to ever see a real trial with a real -- well, maybe it won't be a jury. Maybe it will be reversed on appeal and there will be a jury. That may be one of the issues. But that's really the game plan here is to kill the case anyway they can because then we won't ever get our rights and the benefits for the stockholders and creditors before a court.

So we think the Court should deny the motion for these reasons and the reasons stated in our response.

THE COURT: Thank you, Mr. Spector. Mr. Lewis.

MR. LEWIS: Thank you, Your Honor. There's a lot that's just been said that just has no basis in anything that anybody has said. The alleged scheme between IBM and Novell is pure fantasy. If IBM wanted to be here, they would be here today.

And further more, by asking for stay relief to litigate the case, we're not trying to kill the case before it can be litigated. We're trying to get the case litigated. I mean, that's just nonsense. Its foolishness.

We're glad to hear that SCO has changed what its position is. We've just heard that SCO, oh, no, we just want to try the tracing issue. That's not what SCO said in its brief. And let me read you, Your Honor, this is from page 19 of their brief. "This Court therefore should make" -- "This Court should, therefore, make any determination as to what or what is not property of the estate and if a constructive trust can be imposed and in what amount."

They were asking this Court to redo the constructive trust issue. But evidently they've abandoned that now and that's fine because we don't think the Court should and they evidently agree. But let's not kid ourselves about what they were arguing. They were arguing this Court should do that

because they think of this Court as a more favorable forum. And that is the point I want to make because it also reflects on the motives for a lot of their arguments. They think this Court is a forum.

Its not a question of what's a more favorable forum. It's a question of who is familiar with this case and what studying up would be need -- to do in order to do what remains to be done. If the Court wants to do the tracing issue, as such, once everything else is done, if its that important, I guess that's what will happen. We don't see why Judge Kimball shouldn't just do that, too.

Debtor said its pretty much mechanical. I think I agree. I think I said that. There can be complications. I think we can trust Judge Kimball to do that notwithstanding the debtor's disagreement with Judge Kimball's rulings. Not surprising, they lost and lost badly. But I understand that.

But the fact remains, most of what remains to be done really should be done by the judge who is familiar with the case and there's no reason not to let him just do the mechanical tracing thing.

If you look at the case law in the lowest intermediate balance, there is -- there are, of course, cases in bankruptcy court. But there are also just scads of cases in the district courts and in other courts. And there are articles all over the place on the lowest intermediate balance.

Normally, its not rocket science. It is what it is. There can be tricky questions. Judges know those tricky questions do come up occasionally and have to make some decisions. But just because the debtor lost in front of Judge Kimball has no reason to say to this Court, well, we should really have you do that instead.

In term to the harm to us, remember, too, there is also the question of what's happening to the money in the meantime. We've just heard counsel say, well, gee, there's -- we don't think there's anything left. Well, I wonder how that happened, Your Honor. And if the issue of a constructive trust gets delayed and they claim it's a million dollars or less and we claim its more, what's going to happen when that money isn't there at the end. Where's it going to go? Are we going to hear more tracing arguments? Well, we had a million dollars when we filed this case, Your Honor, but you know, we successfully resisted stay relief. We spent all that money in the meantime. We've got lots more money in from other things. We got the sale money. And all that money's gone. All the rest of it, whatever was there.

I don't want to be hearing that when the time comes. Lets get the issue decided now while the bank account is discernible. And what we -- and we know what's in it. And we can -- don't add another six or eight months or a year to the tracing problem.

So, in terms of the harm -- and then the public harm, yes, the major issue about who owns the copyright has been decided. But there are other public interest issues like how much of the other code which somebody might choose to try to license belongs to whom? Some of those licenses from SCO to someone else where the allocation issue, the apportionment issue was still alive, what are those people going to do in the meantime about trying to sublicense or relicense or defend themselves. There are more interests here at stake than simply the estate's interest.

Now, the debtor says, well, gee, we don't need anybody to tell us how to run our case. Your Honor, I submit that may not be true in general and probably is not true in this case. If you look at the motion that was filed for sale, in my opinion, it was an ill-advised motion. Maybe there's all this activity behind it that we haven't been told about until we heard today that there allegedly is. Why wouldn't you include that? This is a motion that was filed out of the clear blue by a debtor that said its main interest was in coming out at the other end as an operating company. That's not where we're going apparently and we're talking about sale that's basically going to set the course of this case.

Now, maybe the debtor wants to retain control over who it gets to negotiate with and so on. But other parties-in-interest, and we're not the only ones, might like to know more

about what's going on, might like to have a more responsible process, might want to know what else there is in the estate and what can be sold.

York has gotten up here today and said, we've looked at this and we're comfortable buying it. We don't know what other parties feel about it. Maybe York's the only one that thinks that way, but other creditors might say we'd really like to have some further exposure here on a reasonable basis, not on a short notice basis. I don't want to argue the sale motion here, but the point is, in terms of how this case is conducted and whether there should some additional checks on that and whether people might want to have some knowledge about the outcome of this litigation, that is for today. And my points are really directed at that.

Even the York comments, we're told they've been looking at this for a long time, they tell us. But they haven't even been able to reach an asset purchase agreement which we were told was going to be available for the 6th in their motion and apparently, may or may not be available by the 16th. We'll see about that when the time comes.

So there are other larger interests that I think this Court ought to take into consideration when deciding this stay relief motion, interests that might like to see something more definitive develop with respect to the litigation and what its outcome will be and what's going to be in the till before they

decide on whether to approve a sale. Or decide what position to take on a proposed sale.

And that's why there's a larger public interest in this as well, as well as the interest of other parties in what they have that they can license or sublicense. Until those apportionment issues are decided, they're not in a -- they're holding up not only their own boat, they're holding up a lot of boats. And the public interest, it seems to me weighs on the side of opening up the locks and letting that water flow so that we know where we stand.

And if some of this can be done by summary judgment, that won't be all that distracting. We've all prepared summary judgment motions and we harass our clients to read a draft and we harass our clients to look at draft declarations if we need them. But that isn't having people sitting around, twiddling their thumbs, doing nothing at all. And as Mr. Jacobs said, they were literally ready to go. We have four or five days. And we're probably not talking about four or five days tomorrow. I'm sure Judge Kimball's not going to crook his finger and wag it at us and say, you all come on in, we'll try this tomorrow.

But if we don't get stay relief today, we're just going to be that much further down the road and I, again, I submit, Your Honor, give a stay relief today. Let's get these issues tried. There's no secret about our wanting to do the

tracing in the district court as well. If the Court wants to do that, that's fine. We're not concealing that as the debtor has somewhat disingenuously suggested in its argument. We've always said that openly, that we want to do whatever it takes to finish that litigation. That would include that.

And if that problem develops, let us come back before this Court and deal with that problem. But if we don't at least open the flood gates, then we'll be having these arguments and having to deal with all those problems -- these problems in six months or a year or two years. Thank you, Your Honor.

THE COURT: Thank you, Mr. Lewis.

MR. SPECTOR: You know, sometimes when you're in litigation, you wind up saying things and you say, oh, gee, did I really say that then, I didn't mean it. And Novell previously told Judge Kimball that he ought to grant an immediate injunction to freeze those funds because you know what happens if they go into bankruptcy, we'll never be able to get them because there's no right to them there.

They now say, and they're probably right, they overstated their case at that point because there is relief in the bankruptcy court in that case. However, its putting the cart before the horse to say its their money and therefore, the Court should immediately lift the stay so they can run off and get their money. It doesn't work that way either.

You know, lifting the stay is a serious matter. I know I don't -- I don't want to sound pedantic. The Court knows that lifting the stay is a serious matter.

THE COURT: Certainly.

MR. SPECTOR: We've been in bankruptcy six weeks, Your Honor, six weeks. This is a serious matter. We knew it was coming. On the first day they told us it was coming and we were gearing up for it frankly from that first day when they put us on notice.

But we were doing other things. We were doing the business-type things that you want a debtor to do. We were out there -- when we walked out of court, we got phone calls from people saying let's do business. And one of them is now in court through counsel. There are others that thought there was some promise in this company. We stated we owe it to our customers that there be a stable business to continue running the Novell operating system.

One of the things that actuated the board of directors to choose York, and it could have chosen others as well, is that they have a confidence this is a company of heft and they will be responsible to the customers and feel comfortable -- the board of directors feel comfortable that McDonald's will still be able to sell hamburgers and maybe missiles will still be able to get to their targets and the like because those are the things that the Unix platform

provide.

So this is all consistent. They try to point out in their reply we're being inconsistent, we want -- we never said we were going to keep the Unix business forever. We told you a lot about the future. The Unix business is a legacy business. There are people out there that think they can make something out of it. The board of SCO thinks maybe reorganization and Chapter 11 is a good way to look -- to get rid of the past and look to the future. And we're vesting money, as you can tell from the agreement, which you haven't seen yet, that there will be money being used to the future investment of ME, Inc. and the things that come with that.

So, this is what reorganization is about. That's what we are about. And we don't think its asking too much to ask the Court to allow us the breathing spell to get this off the ground. I believe that's all I have, Your Honor.

THE COURT: Thank you. Thank you, Mr. Spector.

MR. LEWIS: I have nothing further, Your Honor, thank you.

THE COURT: Nothing further? I'm going to take this one under advisement and I won't take long because I recognize that to take long is to deny the relief you've requested and I'm certainly not about to do that. But I would like to just give the matter a little bit more thought based upon the helpful arguments, go back and look at the record a little bit

and I'll issue an opinion as quickly as I can here.

MR. LEWIS: Thank you, Your Honor.

MR. SPECTOR: Thank you, Your Honor. We appreciate the care and attention.

THE COURT: Absolutely. And with that --

MR. LEWIS: We appreciate the time you've allotted to us, too.

THE COURT: Pardon me?

MR. LEWIS: We appreciated as well the time you've allotted to these matters as well.

THE COURT: Absolutely. They're important matters and its an important case. And I appreciate counsels hard work on the papers. They were just excellent and very helpful. And I thank you and good day.

ALL ATTORNEYS: Thank you, Your Honor.

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C E R T I F I C A T I O N

I, Susan Holcomb, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

/s/ Susan Holcomb Date: November 13, 2007

Susan Holcomb AAERT CET **00273

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