

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

IN RE: . Case No. 07-11337 (KG)  
.  
.  
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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1 THE COURT: Welcome.

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

5 MS. DYAS: Good morning, Your Honor.

6 THE COURT: Good morning.

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

8 THE COURT: Thank you, Mr. Lewis.

9 MR. LEWIS: Probably the secret behind it.

10 THE COURT: Thank you.

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

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

15 MR. LEWIS: Your Honor --

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

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

21 THE COURT: -- to your -- fine.

22 MR. LEWIS: Your Honor --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 somebody, either the debtor or somebody else, sought relief.

2 And that's not what Section 362(a) says.

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

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

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

1 just raised up the line.

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

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

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



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

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

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

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

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

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

8 MR. LEWIS: Thank you, Your Honor.

9 (Recess)

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

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

13 THE COURT: Yes, Mr. Lewis.

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

17 THE COURT: Yes.

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

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

24 THE COURT: Yes.

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

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

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

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

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

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

1           And clearly the scope of the automatic stay is broad  
2 and by necessity it is broad. And Associate of Saint Croix  
3 Condominium Owners v. Saint Croix Hotel Corp., a decision by  
4 our Third Circuit, 682 F.2d 446, provides as such. And we do  
5 have, I think, agreement from SUSE that this arbitration -- an  
6 arbitration is also subject to the automatic stay, but I think  
7 its very clear that that is the law in any event. All  
8 proceedings are stayed including arbitration, license  
9 revocation, administrative and judicial proceedings. And that  
10 language is taken from the House of Representatives Report, No.  
11 95-595.

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

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

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

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

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

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

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

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

7           Accordingly, the Court holds that the Swiss  
8 arbitration is subject to the automatic stay and SUSE is  
9 enjoined from proceeding in that arbitration during the  
10 pendency of the bankruptcy case.

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

13           THE COURT: Yes.

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

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

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

19           THE COURT: Yes.

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

24           THE COURT: Yes.

25           MR. LEWIS: And the monetary claims presumably as

1 well.

2 THE COURT: Correct.

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

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

8 MR. LEWIS: Okay.

9 THE COURT: Mr. Eaton.

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

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

24 MR. LEWIS: Okay.

25 THE COURT: And -- proceed.