EXHIBIT A

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	
	)	Chapter 11
The SCO Group, Inc., et al.,	)	
	)	Case No. 07-11337 (KG)
Debtors.	)	(Jointly Administered)
	)	**REF. DOCKET NOS. 951, 992, 995**

SUSE'S REPLY IN SUPPORT OF ITS MOTION FOR RELIEF FROM THE AUTOMATIC STAY TO COMPLETE INTERNATIONAL ARBITRATION

In support of its Motion for Relief from the Automatic Stay to Complete International Arbitration (the "Motion"), SUSE Linux GmbH ("SUSE") replies to the Objection of Chapter 11 Trustee to SUSE's Motion for Relief from the Automatic Stay to Complete International Arbitration (the "Objection") of Edward N. Cahn, the Trustee for the bankruptcy estates of the SCO Group Inc., et al. (the "SCO Trustee").

I. INTRODUCTION

The SCO Trustee does not dispute the critical premise of SUSE's Motion: Completing the SUSE Arbitration is essential to determine both the ownership and the value of the UNIX copyrights that supposedly constitute SCO's most important asset. In fact, as SUSE explained in its Motion, an arbitral award that accepts SUSE's claims would mean that (1) SCO does not own any UNIX copyrights that are needed to use the version of the Linux operating system that SCO and SUSE jointly developed ("UnitedLinux"); (2) SUSE has a royalty-free license to use such copyrights and to sublicense them to others, including Novell and IBM; and (3) SCO is required by the "open source" General Public License to license to the public any UNIX copyrights needed to use the UnitedLinux kernel. (Motion at 3.) Such a ruling would decimate the value of SCO's claim that Novell, IBM, and other Linux vendors and users are infringing SCO's copyrights and should pay billions of dollars to SCO.

The SCO Trustee attempts to sidestep this critical point by focusing instead on the upcoming trial with Novell on SCO's claims that it acquired ownership of the UNIX copyrights from Novell and that Novell slandered SCO's title. But that trial is merely one part of the overall dispute. Acquiring ownership of the UNIX copyrights is necessary, but not sufficient, for SCO to pursue its copyright infringement claims. Even if SCO prevails in the Utah trial, SCO's copyright claims will have little, if any, value if SUSE prevails in the Arbitration. Indeed, a win for SUSE would mean that SCO does not own any UNIX copyrights that are needed to use UnitedLinux. Therefore, prompt resolution of the Arbitration is essential to determine both the ownership and the value of the UNIX copyrights and of SCO's related claims.

The SCO Trustee proposes a piecemeal approach in which SCO is allowed to pursue its claims against Novell, but SUSE is prohibited from pursuing related claims that will directly affect SCO's claims against SUSE, Novell, IBM, and others. The courts, however, uniformly reject use of the stay as a sword instead of a shield. This Court should do the same, especially since SCO has already had *more than two years* of "breathing room" in which to reorganize.

The SCO Trustee makes several other arguments, all of which are without merit. Contrary to the SCO Trustee's assertion, SUSE is *not* seeking to "interfere with the Utah Litigation"; rather, it merely seeks to get the long-pending Arbitration back on track. Nor is SUSE requesting "reconsideration" of this Court's November 2007 ruling that the automatic stay applies to the Arbitration. SUSE does not contest that the stay applies; the issue is whether stay relief should be granted, which has never been briefed or decided. And stay relief is appropriate in view of the Tenth Circuit's recent reversal of the summary judgment ruling on copyright ownership, which revived SCO's previously dismissed copyright claims that are at issue in both the Arbitration and the Utah Litigation.

The SCO Trustee makes the contradictory arguments that (a) proceeding with the Arbitration would "distract" SCO from the Novell trial in March; and (b) lifting the stay serves no point since the Arbitration hearing will not occur until after the trial. Of course, if the Arbitration hearing is later (which SUSE agrees is the only realistic scenario), it does not conflict

with the trial. And this is precisely why the stay should be lifted now: to get the Arbitration back on track, so SUSE's claims can be decided as soon as possible after the Utah trial is completed.

II. THE ARBITRAL AWARD WILL DIRECTLY AFFECT SCO'S CLAIMS OF COPYRIGHT OWNERSHIP AND INFRINGEMENT

The SCO Trustee does not dispute that the outcome of the Arbitration will directly affect the value of the UNIX copyrights that allegedly constitute SCO's primary asset. Indeed, the SCO Trustee admits that SUSE contends in the Arbitration that SCO "licensed or assigned its right to UNIX to SUSE in 2002," and that SUSE seeks "a ruling barring the Debtors from asserting copyright infringement claims."[1] (Objection ¶¶ 9, 25.)

The SCO Trustee attempts to downplay the Arbitration by arguing that it will not affect whether SCO "acquired the copyrights from Novell," which will be "tried in connection with the Utah Litigation in March." (*Id.* ¶¶ 25, 27.) The Utah trial, however, is only one portion of the overall dispute. Acquiring ownership of the UNIX copyrights does not, by itself, entitle SCO to money. The monetary heart of this dispute — and the reason why SCO contends that the UNIX copyrights are extremely valuable — is SCO's claim that Linux vendors and users are infringing the UNIX copyrights and should pay license fees or damages to SCO. Indeed, SCO has asserted copyright infringement claims against Novell (based on Novell's distribution of SUSE Linux) and IBM in the pending Utah lawsuits, and launched a highly public campaign (dubbed "SCOsource") against the Linux community.[2] (*See* Declaration of Grant L. Kim In Support of SUSE's Motion For Relief from the Automatic Stay, filed November 10, 2009 [Dkt. No. 952] ("Kim Decl."), Ex. C, Request for Arbitration ¶¶ 63-85.)

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[1] A more accurate statement is that SUSE seeks a ruling that SCO assigned ownership of any UNIX copyrights needed to use UnitedLinux to a joint venture company, which in turn licensed those copyrights to SUSE and the other UnitedLinux partners. (Motion at 3.)

[2] The SCO Trustee suggests that SUSE is attempting to "prevent the Trustee from asserting claims that the Trustee has determined not to pursue at this time." (Objection p. 8, fn. 4.) The SCO Trustee has provided no notice of a "determination" to abandon SCO's copyright claims. On the contrary, the SCO Trustee contends that SCO's claims "should be pursued aggressively." (*Id.* ¶ 15.)

An arbitral award for SUSE will indisputably decrease the value of SCO's copyright infringement claims against SUSE, Novell, IBM, and other Linux vendors and users. Moreover, the Arbitration is related to the Utah trial in that both involve the issue of what UNIX copyrights, if any, are owned by SCO. SUSE contends in the Arbitration that the UnitedLinux contracts transferred ownership of any UNIX copyrights owned by SCO to a joint venture company, which then licensed those copyrights to SUSE. (Motion at 3.) Thus, even if the Utah trial results in a ruling that SCO acquired ownership from Novell, the ownership dispute will not be resolved until *both* the Utah Litigation and the Arbitration are completed.

The SCO Trustee attempts to distance the Utah Litigation from the Arbitration by quoting portions of the District Court order staying portions of the Litigation. (Objection ¶ 10.) However, while the District Court concluded that the arbitrable issues do not "predominate," it also noted significant connections between the two cases. The District Court found that "the arbitrator's determination of whether SCO assigned the copyrights at issue to the UnitedLinux entity bears on the question of whether SCO owns the copyrights it is suing upon." (Kim Decl. Ex. D at 7.) The Court also noted that it would consider the preclusive effect of any arbitral award that issued and might revisit whether to stay claims in the litigation. (*Id.* at 8.)

In any event, the critical issue before this Court is not the precise relationship between the Arbitration and the Utah trial. Rather, the question is whether stay relief should be granted in view of the uncontested fact that the Arbitration will affect both the ownership and the value of the UNIX copyrights and of the related claims that are at the heart of this reorganization case. The answer is clearly "yes," as determining the value of these assets — the keys to the reorganization kingdom — will benefit *both* the creditors and the debtors and will promote the efficient resolution of this long-pending case.

III. THE STAY SHOULD NOT BE USED AS A SWORD

The SCO Trustee asserts that SCO's claims against Novell and IBM "should be pursued aggressively." (Objection ¶ 15.) Yet the SCO Trustee is attempting to prevent SUSE from

pursuing claims in the Arbitration that would undercut SCO's claims. The SCO Trustee proposes the ideal scenario for any litigant: freedom to sue opponents with immunity from countersuits. The goal is clear: SCO hopes to obtain a favorable ruling in the Utah Litigation that would increase the value of its copyright claims, without having to confront troubling (to SCO) UnitedLinux questions that may severely undermine those claims.

Such a use of the stay is wholly inconsistent with the stay's legitimate purposes: preserving the estate and giving the debtor a breathing space. *In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90, 100 (3rd Cir. 2008). The stay should be administered (imposition by statute, termination through stay relief) to "place both debtor and creditors on an *equal* footing." *In re Excelsior Henderson Motorcycle Mfg. Co., Inc.*, 273 B.R. 920, 922 (Bankr. S.D. Fla. 2002) (emphasis added). Giving the Trustee a strategic litigation and negotiating advantage is not a proper office of the stay. Courts have repeatedly held that the filing of bankruptcy to obtain a litigation advantage is improper. *E.g., NMSBPCSLDHB, L.P. v. Integrated Telecom Express, Inc.*, 384 F.3d 108, 120 (3rd. Cir. 2004); *In re Star Broad., Inc.*, 336 B.R. 825 (Bankr. N.D. Fla. 2006) (because debtor filed bankruptcy case in bad faith to stall litigation going against it in the hope of capitalizing on other bankruptcy procedures for an advantage, bankruptcy court grants stay relief to complete litigation (but not dismissal of bankruptcy case)); *In re Double W Enter., Inc.*, 240 B.R. 450, 455 (Bankr. M.D. Fla. 1999). It follows that *continuing* the stay for a litigation advantage is equally improper.[3]

IV. SUSE IS NOT SEEKING "RECONSIDERATION" OF AN ISSUE THAT THIS COURT HAS ALREADY DECIDED

The Objection states, "This Court has already considered *the precise issue it is now being asked to reconsider* [by the Motion] – whether the automatic stay should be lifted to permit the

[3] The SCO Trustee suggests that this Court should defer to his views as to how the litigation should proceed. (Objection ¶¶ 15, 24, 28.) However, the SCO Trustee is not a neutral, although appointed by the Court. Rather, the SCO Trustee's role is to advocate the interests of SCO and the bankruptcy estate. Of course, freedom to sue with immunity from countersuit is in the interest of any litigant. But it is not "equal footing."

SUSE claim against the SCO Group in Arbitration in a Swiss tribunal . . . ." (Objection ¶ 16 (emphasis added).) This is not correct. The only issue that this Court decided in November 2007 was that the automatic stay *applied* to the SUSE's claims in the Arbitration, even though SUSE is a German company and the Arbitration is seated in Switzerland. (Order dated November 13, 2007 (Dkt. No. 204); November 6, 2007, Hearing Transcript at 68, 71 (Objection Ex. C) (stating that the Court is "address[ing] the applicability of the automatic stay to SUSE's claims in the Swiss Arbitration," and concluding that "the Swiss Arbitration is subject to the automatic stay.") Neither the parties nor this Court addressed the issue of whether *relief* from the automatic stay should be granted, which is a different issue involving different considerations.

Moreover, the situation now differs markedly from two years ago. In November 2007, SCO was subject to a summary judgment ruling that it did *not* own the UNIX copyrights that were at issue in the SUSE Arbitration. This ruling had the potential to effectively moot SCO's copyright infringement claims. Now that the Tenth Circuit has reversed the summary judgment ruling, SCO's claims are back in play.

Further, in November 2007, SCO had just filed its bankruptcy petition, and thus arguably needed some "breathing room." Two years later, however, SCO has had more than ample breathing room, without a hint of a viable reorganization plan. And the Arbitration has now been stayed for a longer period than it was active (25 months v. 19 months), leading the Arbitral Tribunal to express concern about "the future conduct of the Arbitration." (Kim Decl. Ex. G.)

V. THE SCO TRUSTEE'S DELAY AND BURDEN ARGUMENTS ARE WITHOUT MERIT

The SCO Trustee asserts sundry arguments concerning alleged delay and burden. All of these arguments lack merit.

First, the SCO Trustee argues that SUSE is attempting "to interfere with the Utah Litigation." (Objection ¶ 18.) But the only relief sought by SUSE is an order allowing the

Arbitration to proceed. SUSE has not requested an order that would delay the Utah trial or otherwise block the Utah Litigation. Of course, SUSE is seeking an order that would protect SUSE and its distributors and customers against SCO's copyright claims. But that is a legitimate exercise of SUSE's contractual rights.

Second, the SCO Trustee complains of an alleged pattern of "delay" by SUSE and Novell, such as Novell's petition for rehearing en banc by the Tenth Circuit, which the Tenth Circuit denied after directing SCO to file a response. (Objection ¶ 18.) Once again, SUSE and Novell have simply exercised their legal rights. Moreover, this plea of "delay" is highly ironic. SCO initiated this Chapter 11 proceeding *more than two years ago*, yet never proposed anything close to a viable reorganization plan. The Arbitration was filed nearly four years ago (April 2006), and has now been stayed for over two years, prompting the Arbitral Tribunal to express concerns about "difficulties" arising from the prolonged delay. (Kim Decl. Ex. G.) Any complaints of delay should come from SUSE and Novell, not SCO.

Third, the SCO Trustee suggests that lifting the stay would serve no point because "even if the stay is lifted, it is more than likely the Utah Litigation will be completed well before the Swiss Tribunal would even begin its proceedings." (Objection ¶ 17.) At the same time, the SCO Trustee makes the contradictory argument that lifting the stay would be "prejudicial" because the SCO Trustee would be "distracted" from the Utah trial, and the estate would need to "devote critical and limited resources to the Arbitration." (*Id.* ¶¶ 22-23.) This makes no sense. If no proceedings take place in the Arbitration until after the March trial in Utah, the Arbitration will not "distract" the SCO Trustee from the trial or require major resources.

SUSE agrees that once the stay is lifted, at least several months of "start-up" time will be required, meaning that the Arbitral Tribunal could not hold a hearing on liability until after the Utah trial in March. Thus, allowing the Arbitration to resume will not "distract" the SCO Trustee or require large expenditures during the next few months. But this is precisely why the stay should be lifted now: to put the Arbitration back on calendar and to avoid still further delay.

Of course, continuing the Arbitration will involve some expense, especially in connection with a liability hearing that would take place after the Utah trial is completed in March. But the SCO Trustee has made no showing whatever regarding the estate's resources or how they would be consumed by the Arbitration.[4] In fact, the cost of obtaining an arbitral award on the key pending claims is likely to be limited, given that the parties were on the eve of the merits hearing and had completed almost all prehearing submissions when the Arbitration was stayed.[5] (Motion at 6.) And lead counsel for the estate is working on the Arbitration at 50% of its normal billing rates. (*See* Debtors' Application, Pursuant to 11 U.S.C. §§ 327(e), 328 and 330, for Approval of Employment of Boies, Schiller [etc.] 4 ¶ 14 (Dkt. No. 115); Order [etc.] (Dkt. No. 269); Motion of Chapter 11 Trustee for Entry of Order Authorizing Modification of Retention Order [etc.] (proposing modification of earlier retention terms that does not affect Arbitration) (Dkt. No. 941); Order [etc.] (Dkt. No. 970.)

Finally, even if the Arbitration were deemed to be some burden on the estate, the fact remains that the issues the Arbitration encompasses need to be decided, so that the Court, the SCO Trustee, the debtors, and the creditors can determine whether reorganization or liquidation of the debtors is appropriate. It is incumbent on all concerned to get both the Utah Litigation and the Arbitration decided as soon as possible. After almost 28 months of these chapter 11 cases

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[4] As Mr. Petrofsky noted in his recent motion (Dkt. No. 990), information about the estate's current condition or resources is lacking because required reports have not been filed, although some money was apparently received from the recent Autozone settlement (Dkts. 935, 971).

[5] The SCO Trustee asserts — without any real explanation — that the Arbitration will be "costly and protracted" because it is in the "second of a four-phase proceeding." (Objection ¶ 24.) SCO fails to note that the current Phase 2 should resolve *all* of SUSE's claims for declaratory relief, including whether SCO is precluded from asserting copyright infringement claims because the relevant copyrights are (a) not owned by SCO; (b) already licensed to SUSE; or (c) required to be made available to the public by the General Public License that SCO agreed to respect. Phase 3 was reserved for detailed technical issues *if* such issues need to be resolved (which SCO has asserted is unlikely). Phase 4 is limited to damages. Thus, Phase 2 is by far the most important, especially as to the ownership and value of the UNIX copyright and of SCO's related claims.

already, including five months under the SCO Trustee's regime, there is no legitimate reason for stringing matters out any further.[6]

VI. SUSE HAS A MORE THAN ADEQUATE PROBABILITY OF SUCCESS

The SCO Trustee "strongly disagrees" with SUSE's assessment of its likelihood of prevailing on its claims in the Arbitration, arguing that SUSE's description fails to address certain evidence and counter-arguments. (Objection ¶ 26.) Yet the SCO Trustee does not even attempt to explain the evidence and arguments that supposedly support SCO's position.

The issue before this Court is not whether the SCO Trustee "agrees" with SUSE's position. Rather, under the standard in the *Rexene* case that both sides have cited and that this Court relied on in its decision granting Novell's motion for relief from the automatic stay, "[e]ven a slight probability of success on the merits may be sufficient to support lifting the automatic stay in an appropriate case [citations omitted]." *In re The SCO Group, Inc.*, 395 B.R. 852, 857, 859 (Bankr. D. Del. 2007); *In re Rexene Prods. Co.*, 141 B.R. 574, 576 (Bankr. D. Del. 1992). (*See also* Motion at. 10-11; Objection ¶ 21.)

SUSE has certainly shown at least a "slight probability of success" on the merits. As SUSE noted in its motion, SUSE's claims are solidly based on the language and purpose of the UnitedLinux contracts that SCO and SUSE signed. (Motion at 13-14.) This is illustrated by the District Court's description of the UnitedLinux contracts in its opinion on SUSE's motion to stay claims raising issues subject to Arbitration:

> The UnitedLinux members agreed that each member would have a broad license to use the technology included in the UnitedLinux Software, including any related intellectual property rights of the other members. The contracts provided that "All intellectual property rights related to the UnitedLinux

[6] The SCO Trustee suggests in a footnote that it would be a waste of resources to continue the Arbitration if the District Court determines in the upcoming trial that SCO did not acquire ownership of the UNIX copyrights. (Objection p. 9, fn. 5.) But as noted above, SCO is unlikely to incur major expenses in the Arbitration until *after* the March trial is completed, due to the start-up time required to get the Arbitration back on track.

> Software"[7] (with the exception of certain "Pre-Existing Technology" and "Enhancements" thereto) shall be assigned by the members to a new company, United Linux LLC. In addition, the contracts provided that [e]ach[8] member shall have a broad, royalty-free license to all intellectual property rights in the UnitedLinux Software, entitling each member to "use, copy, modify, distribute, market, advertise, sell, offer for sale, sublicense…in any manner the Software, including the rights to make derivative works of the Software, to provide access to the Source Code and/or Object Code to any third party, to incorporate the Software into other product or bundle the Software with other products for its own business purposes and any other unlimited right of exploitation." The contracts further state that the UnitedLinux Software shall be subject to any existing "open source" licenses.

(Kim Decl. Ex. D at 2-3.)

Finally, the SCO Trustee suggests that SUSE's claims in the Arbitration have somehow been undermined by the Tenth Circuit's reversal of the summary judgment on copyright ownership, because "the Trustee has repeatedly stated that the Tenth Circuit ruling was very favorable for the Debtors and that the Debtors' claims should be pursued aggressively." (Objection ¶ 26.) But the Tenth Circuit did not even mention the UnitedLinux contracts, let alone purport to opine on their meaning. Moreover, the SCO Trustee's intent to aggressively pursue SCO's claims is exactly why stay relief should be granted. It would be manifestly unfair to allow SCO to pursue its claims while preventing SUSE from pursuing related claims that are essential to resolving the ownership and value of the UNIX copyrights that are SCO's primary asset.

VII. CONCLUSION

Prompt resolution of the Arbitration is indispensable to breaking the logjam in these very old cases. Whatever inconveniences that process may pose are slight in comparison to the

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[7] The closed quotation mark following "Software" and before the parenthetical does not appear in the District Court opinion, but clearly belongs here, as otherwise there would be no matching pair for the open quotation mark earlier in this sentence.

[8] The District Court included a quotation mark before "[e]ach," but it does not belong here as there is no matching pair and the quote does not begin until two lines later ("use, copy…").

continued uncertainty that leaving the Arbitration in limbo will entail. SUSE respectfully requests the Court to grant stay relief to get the Arbitration back on calendar.

Dated: December 23, 2009
Wilmington, Delaware

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