MORRISON & FOERSTER LLP
Michael A. Jacobs, *pro hac vice*
David E. Melaugh, *pro hac vice*
425 Market Street
San Francisco, CA 94105-2482
Telephone: (415) 268-7000
Facsimile: (415) 268-7522

ANDERSON & KARRENBERG
Thomas R. Karrenberg, #3726
Heather M. Sneddon, #9520
700 Chase Tower
50 West Broadway
Salt Lake City, UT 84101
Telephone: (801) 534-1700
Facsimile: (801) 364-7697

Attorneys for Defendant and Counterclaim-Plaintiff Novell, Inc.

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP, INC., a Delaware corporation, Plaintiff and Counterclaim-Defendant, v. NOVELL, INC., a Delaware corporation, Defendant and Counterclaim-Plaintiff.	**NOVELL'S OPPOSITION TO SCO'S MOTIONS FOR VOLUNTARY DISMISSAL OF STAYED CLAIMS, ENTRY OF FINAL JUDGMENT, AND CERTIFICATION AND ENTRY OF PARTIAL FINAL JUDGMENT** Case No. 2:04CV00139 Judge Dale A. Kimball

INTRODUCTION

Under the final judgment rule, federal appellate jurisdiction requires "a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *F.D.I.C. v. McGlamery*, 74 F.3d 218, 221 (10th Cir. 1996) (internal citations omitted). This requirement "evinces a legislative judgment that restricting appellate review to final decisions prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy." *Id.*

SCO has made no secret of its desire for a prompt appeal. To that end, SCO now seeks to voluntarily dismiss its claims stayed pending arbitration and, having dispensed with that "last impediment to finality" (SCO's Memorandum in Support of Its Motion for Entry of Final Judgment ("SCO's Final Judgment"), filed September 15, 2008, PACER No. 555, at 5), obtain entry of final judgment. Additionally, whether or not this Court dismisses the stayed claims, SCO seeks certification of the "Court-resolved claims" so that these, at least, may be appealed without the Tenth Circuit's raising awkward questions about finality. (*Id.* at 8-10.) At the same time, SCO would like to preserve the option to "resurrect[]" its dismissed claims post-appeal, if the Tenth Circuit's legal conclusions give it an opening to do so. (*Id.* at 7.) Thus, in negotiations with Novell, SCO has refused to commit to a position on whether Novell infringed post-APA code, an issue left open by the Court's summary judgment order from last summer. All in all, the judgment SCO seeks can be described as "final enough — but not *too* final."

SCO's finality problems are entirely of its own making. For twelve months, Novell has been briefing, arguing, and negotiating the remaining obstacles to finality, and SCO hasn't listened; indeed, it barely mentions these issues in its brief. First, portions of the case — indeed, of individual claims — are stayed pending arbitration pursuant to Section 3 of the Federal Arbitration Act. Whether the stay should be lifted at SCO's whim, so as to permit dismissal, has not been addressed. Second, SCO's refusal to "come to the stake" on whether Novell infringed

post-APA code creates significant uncertainty for Novell, making SCO's requested relief inappropriate. Third and similarly, SCO's stated hope of reviving its dismissed claims post-appeal creates too much uncertainty to warrant a "final" judgment.

Until these loose ends are tied up, SCO's quest for what it deems "finality" is premature.

FACTUAL BACKGROUND

August 2006: Portions of Claims Stayed Pending SUSE Arbitration. In its Second Amended Complaint, SCO asserted copyright infringement and other claims based on Novell's distribution of SUSE Linux, a version of the Linux operating system developed by Novell subsidiary SUSE. (*See* Memorandum Decision and Order ("Stay Order"), filed August 21, 2006, PACER No. 139, at 2.) SCO and SUSE had previously entered into two contracts regarding the joint development of a Linux operating system, UnitedLinux; both required any disputes arising under the contracts to be resolved by arbitration. (*See id.* at 2-3.) SUSE submitted a Request for Arbitration against SCO regarding the effect of the UnitedLinux agreements on SCO's claims against SUSE Linux, the outcome of which would affect the related litigation between SCO and Novell. (*See id.* at 3-4, 7.)

Novell moved for a stay of the entire case pending the SUSE arbitration; SCO opposed a stay of any claims. (*See id.* at 4-5.) In its August 21, 2006 Stay Order, this Court ruled that, pursuant to Section 3 of the Federal Arbitration Act, "portions of the claims relating to SUSE should be stayed in this court pending SUSE's arbitration" while "[t]he claims asserted in relation to the APA and TLA should go forward." (*Id.* at 6, 8.)

August 2007: Court Issues Summary Judgment Order. On August 10, 2007, the Court issued its Memorandum Decision and Order addressing the parties' motions for summary judgment. ("Summary Judgment Order," PACER No. 377.) The Court held that "Novell owns the UNIX and UnixWare copyrights" pre-dating the APA. (*Id.* at 62.) Though the Court noted that there was no dispute that SCO owned the copyrights to post-APA derivative works, the

Court declined to rule on the merits of any claims based on such copyrights, on the grounds that the parties had not "addressed whether any of SCO's copyright infringement claims are based on copyrights SCO may have obtained in derivatives of the technology included in the Assets." (*Id.* at 66.) SCO nevertheless now asks the Court to assume the Summary Judgment Order resolved such claims.

August 2007: Parties File Joint Statement on Claim Status. After the Court issued the Summary Judgment Order, the parties, at the Court's direction (PACER No. 378), filed a Joint Statement "identifying remaining claims in the case that are proceeding to trial[.]" (PACER No. 379.) In their Joint Statement, the parties agreed that summary judgment had rendered two claims entirely dismissed: SCO's slander of title claim and its alternative contract claim seeking specific performance. Other claims, the parties agreed, were partially dismissed: SCO's claims of breach of the APA/TLA and unfair competition were dismissed to the extent they concerned UNIX and UnixWare copyrights that the Court held were retained by Novell. The parties further agreed that Novell's claim for accounting was rendered moot, and that Novell would voluntarily dismiss its slander of title claim "without prejudice to renewing it should there be any subsequent adjudication or trial of copyright or ownership-related issues." Various other claims remained "live" as trial approached.

As to claims stayed pending the SUSE arbitration, the parties agreed that the copyright infringement claim was stayed in its entirety. Also, to the extent that portions of SCO's breach of APA/TLA and unfair competition claims survived summary judgment, "any such portion is stayed by the [Stay Order]. No aspect of this claim will be tried during the September 2007 trial." (*Id.* at 2-3.)

November 2007: At SCO's Request, Bankruptcy Court Stays Arbitration. On the eve of the scheduled September 2007 trial, SCO filed for bankruptcy, and an automatic stay went into effect, halting this action and the upcoming trial. SUSE and SCO were also scheduled for a

December hearing on the merits of the parties' respective claims in the arbitration. SUSE disputed the effect of the automatic stay on the arbitration, but SCO argued to the Bankruptcy Court that the automatic stay should apply to stop the arbitration.

At the November 6, 2007 bankruptcy hearing, Novell observed that, if the Bankruptcy Court stayed the arbitration, SCO would seek to appeal in this action even though the copyright claim had not been resolved because the arbitration had not been completed, and that any resulting appealability issues would be solely SCO's fault:

> [SCO] could still conceivably go back [to the District Court] . . . and say certify [the case for appeal] 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 objecti[ves], 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.

(Declaration of David E. Melaugh in Support of Novell's Opposition to SCO's Motions for Voluntary Dismissal of Stayed Claims, Entry of Final Judgment, and Certification and Entry of Partial Final Judgment ("Melaugh Opp. Decl."), filed herein, Ex. 1 (Transcript of November 6, 2007, *In re: The SCO Group, Inc.*, Bankruptcy Hearing 61:6-25).)

Subsequently, on Novell's motion the Bankruptcy Court partially lifted the bankruptcy stay, but only as to the following issues:

> (1) the amount of the royalties to which Novell is entitled from certain SCOSource licenses that the District Court determined to be SVRX Licenses and any additional licenses that are determined to be SVRX Licenses; and (2) whether SCO had the authority to

> enter into licensing agreements with Microsoft Corporation and Sun Microsystems.

(*In re: The SCO Group, Inc.*, No. 07-11337 (KG), Order Granting Novell's Motion for Relief from the Automatic Stay to Proceed with the Lawsuit, PACER No. 233, at 2 (Bankr. D. Del. Nov. 27, 2007).) Otherwise, the copyright claim and portions of the breach of APA/TLA and unfair competition claims remain stayed both by order of this Court and by the automatic stay in bankruptcy. The arbitration also remains stayed by order of the Bankruptcy Court.

September 2008–Present: SCO Seeks to Dismiss Stayed Claims as Obstacles to Appeal. On July 16, 2008, the Court entered its Findings of Fact, Conclusions of Law, and Order ("Trial Order") and directed the parties to file a Final Judgment "consistent with" the Trial Order, the Summary Judgment Order, and the parties' Joint Statement on the status of claims. (PACER No. 542, at 43.) SCO and Novell were unable to reach agreement concerning those portions of claims still stayed. (*See* Novell's Submission Regarding Entry of Final Judgment ("Novell's Final Judgment"), filed August 29, 2008, PACER No. 551, at 2.) In the meet-and-confer discussions, SCO took the position that it could dismiss the stayed claims for purposes of obtaining final judgment or certification, but could revive and litigate those claims in the event of a favorable ruling on appeal. (Melaugh Opp. Decl. at ¶ 2.) SCO also refused to say whether it intended to assert, at some future date, that Novell infringed post-APA code and to pursue claims on that basis. (*Id.* at ¶ 3.)

Novell's Final Judgment set forth its position that entry of final judgment is not appropriate at this time. SCO's motions for voluntary dismissal, Rule 54(b) certification, and final judgment followed. (PACER Nos. 552, 553, 554, all filed September 15, 2008.)

ARGUMENT

I. THIS COURT SHOULD DENY SCO'S MOTIONS FOR DISMISSAL OF ITS STAYED CLAIMS AND RULE 58 FINAL JUDGMENT

A. Because the Claims at Issue Remain Stayed Pending Arbitration, SCO's Motion to Dismiss Is Premature.

SCO seeks to dismiss the stayed claims because they are "blocking the entry of Final Judgment." (SCO's Final Judgment at 2.) But SCO's request is premature: In its haste to appeal, it has not even asked this Court to lift the stay pending arbitration, which remains in effect.

Section 3 of the Federal Arbitration Act, under which the Court entered the stay, reads as follows:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action *until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.*

9 U.S.C. § 3 (italics added). Courts have interpreted the phrase "stay the trial" to apply to "actions" and "proceedings" as well as trial itself. *Dickstein v. duPont*, 320 F. Supp. 150, 154 (D. Mass. 1970) (collecting cases). Thus, there are to be no court proceedings on matters subject to arbitration until the arbitration is complete. *Miller v. Aaacon Auto Transport, Inc.*, 545 F.2d 1019, 1020-21 (5th Cir. 1977); *see also In re Universal Serv. Fund Tel. Billing Practices Litig.*, 370 F. Supp. 2d 1135, 1138 (D. Kan. 2005) (Under *Miller*, "once the court is satisfied that the dispute is referable to arbitration, the court must allow the arbitration to proceed in accordance with the terms of the parties' agreement.").

To dismiss claims stayed under Section 3, without lifting the stay, has been held error. *Pac. Employers Ins. Co. v. M/V Gloria*, 767 F.2d 229, 243 (5th Cir. 1985) (vacating judgment of

dismissal of claims of indemnity and contribution against third party where claims "were stayed pending arbitration and the stay had not been lifted").[1] By not even mentioning a lift of the stay, SCO treats it as a mere technicality, a procedural detail to be trampled over in its beeline to an appealable judgment. But courts have held that vacating a Section 3 stay is proper only in certain circumstances, such as when the party that originally sought the stay "hindered the progress of arbitration[,] where the parties had not concluded the proceedings within the time specified by the court[,]" or when a court determines the stay to have been "improvidently granted." *Miller*, 545 F.2d at 1020; *see* 9 U.S.C. § 3. In other circumstances, such as when the party seeking to get out of arbitration sabotages the process with its "dilatory tactics, vacating the stay may [be] improper, since [that party] would be profiting from [its] own wrongdoing." *Miller*, 545 F.2d at 1020. Thus, while a Section 3 stay is the equivalent of an injunction and may be "modified or dissolved [at] the discretion of the court when conditions have so changed that it is no longer needed or is rendered inequitable[,]" the decision whether to lift such a stay must be carefully made in light of the circumstances. *See Miller*, 545 F.2d at 1020 (remanding case in which district court vacated Section 3 stay *sua sponte*, with instruction to "reconsider the vacation of its stay in light of the foregoing authorities").

Here, had SCO moved to lift the stay pending arbitration, Novell would have vigorously argued against it. SCO's attempt to avoid arbitration in order to hasten final judgment does not fall under any Section 3 exception. Granting SCO's request would, in fact, subvert the purpose of the FAA, which is to facilitate the enforcement of arbitration agreements by in effect making it impossible for a contracting party to refuse to live up to its arbitration agreement when it

[1] When the party that sought arbitration "show[s] no intention of going forward with the arbitration in good faith," however, a court may order an involuntary dismissal of stayed claims. *Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 653 (9th Cir. 1991); *see* 9 U.S.C. § 3 (stayed arbitration must proceed "provid[ed] th[at] applicant for the stay is not in default in proceeding with such arbitration"). This provision does not apply here.

becomes disadvantageous. *Tepper Realty Co. v. Mosaic Tile Co.*, 259 F. Supp. 688, 693 (S.D.N.Y. 1966) (holding "fundamental purpose" of the FAA "would be thwarted" if party to contract with arbitration clause were permitted to escape arbitration through artful pleading). Just as Novell predicted in Bankruptcy Court back in November, SCO invoked the stay of proceedings when that position served its purpose, and now pretends the stay doesn't exist. (Melaugh Opp. Decl., Ex. 1 at 61:6-25.) But a Section 3 stay is "clearly a remedy intended for a defendant who wants to compel plaintiff to arbitration." *Metro. World Tanker, Corp. v. P.N. Pertambangan Minjakdangas Bumi Nasional*, 427 F. Supp. 2, 4 (S.D.N.Y. 1975). It is not a tactical tool to be deployed and revoked by a plaintiff at will.

In sum, SCO has not even moved to lift the stay and, had it done so, would have encountered strong opposition from Novell — opposition to which it has no good answer. For this reason alone, SCO's premature motion to dismiss its stayed claims should be denied.

B. Premature Dismissal of the Stayed Portions of the Case Would Strongly Prejudice Novell.

Having addressed the prematurity of SCO's request, we turn to whether SCO otherwise meets the standard for obtaining a grant of voluntary dismissal under Fed. R. Civ. Proc. 41(a)(2). SCO correctly states that this question turns on whether Novell will suffer "legal prejudice" if dismissal is granted. *Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997) (Relevant factors include "the opposing party's effort and expense in preparing for trial; . . . insufficient explanation of the need for a dismissal; and the present stage of the litigation.").

SCO paints a rosy picture for Novell in the event SCO's stayed claims are dismissed. (SCO's Final Judgment at 6.) The dismissal "would benefit both parties," SCO explains, because "[s]hould the Tenth Circuit affirm the Court's summary judgment ruling, for example, the litigation with Novell would end, and Novell would avoid a potential trial and exposure on any portion of the stayed claims." (*Id.*) What SCO fails to mention are the other possibilities: Suppose — against the odds, to be sure — the Tenth Circuit reverses the summary judgment

ruling in whole or in part and remands at least part of the case for further adjudication. Suppose, too, that SCO makes good on its stated intent to revive its voluntarily dismissed claims — and perhaps others — to the extent made possible by appeal. (*Id.* at 7 ("Here, SCO proposes . . . dismissal of claims that will be resurrected only if the Tenth Circuit reverses this Court's summary judgment rulings[.]").)

Ordinarily, under the finality rule requiring resolution of the entire litigation before appeal, Novell would have to relitigate only those portions of the case remanded by the Tenth Circuit. Under SCO's plan, however, those aspects of the case that were never resolved below — the copyright claim, a portion of the TLA/APA claim, a portion of the unfair competition claim, and any issues still outstanding in Bankruptcy Court — would be thrown into limbo. Would the Section 3 stay of proceedings on claims relating to post-APA code be summarily reinstated on remand? Or would Novell-SUSE have to apply for another stay after determining what portions of those claims remained "live" — and thus, subject to arbitration — post-appeal? The answer and its implications are unclear, creating far more uncertainty for Novell than if the final judgment rule were followed.

This uncertainty concern is particularly acute as it relates to claims purportedly based on post-APA code. SCO refuses to tell Novell whether SCO intends to pursue such claims. The Summary Judgment Order explicitly leaves post-APA claims undecided. (Summary Judgment Order at 66.) SCO nevertheless asks for dismissal of post-APA claims "on the basis of the Court's rulings in its August 10, 2007 Memorandum Decision and Order." (PACER No. 552 at 2.) What does it mean for the Court to dismiss post-APA claims "on the basis of" an order that leaves such claims explicitly undecided? What sort of appellate decision is necessary for SCO to

pursue post-APA claims on remand? Novell does not know, and SCO's motion provides no guidance. This is yet another attempt by SCO to hedge its bets to Novell's detriment.[2]

The circumstances under which SCO seeks to dismiss its stayed claims render such dismissal highly prejudicial to Novell. Given the massive "effort and expense" Novell has spent litigating this case, it deserves a *bona fide* final judgment, not one that leaves parts of the case in various and uncertain postures. *See Ohlander*, 114 F.3d at 1537. Aside from its self-interest in a speedy appeal, SCO has not explained why dismissal of the stayed claims is necessary. *See id.* The "present stage of the litigation" is that, while most of the claims have been resolved on summary judgment and at trial, other claims are wholly or partially stayed pending arbitration, while other issues remain to be resolved in Bankruptcy Court. *See id.* Finally, SCO's proposed course of action would needlessly create uncertainty for Novell with respect to the status of the stayed claims and the prospect of future, related litigation. *See Paulucci v. City of Duluth*, 826 F.2d 780 (8th Cir. 1987) (affirming denial of motion to voluntarily dismiss claim where, in conjunction with other factors, future uncertainty as to title to land and development rights would prejudice defendants).

SCO suggests that, because Novell successfully argued for voluntary dismissal of its counterclaim for breach of contract, SCO deserves the same outcome here. (SCO's Final Judgment at 5-6.) But the circumstances are quite different. Novell's dismissal of its breach of contract counterclaim was part of a larger effort to simplify and streamline the case as it headed into trial — a task achieved, for the most part, through agreement with SCO. (PACER No. 443, at 1.) SCO, in contrast, seeks to dismiss its stayed claims for the sole purpose of advancing to appeal without the delay of arbitration, while preserving the option to revive those claims, and

[2] SCO also has not addressed how the Bankruptcy Court's automatic stay affects SCO's copyright infringement claim or its right to appeal this Court's rulings.

before bankruptcy proceedings have concluded. While voluntary dismissal in the first instance did not prejudice SCO, the same procedure in these circumstances stands to strongly prejudice Novell.

II. THIS COURT SHOULD DENY SCO'S MOTION FOR RULE 54(b) CERTIFICATION AND PARTIAL FINAL JUDGMENT

In addition to, or in lieu of, obtaining Rule 54 final judgment, SCO seeks partial judgment and certification of the "Court-resolved claims." (SCO's Final Judgment at 9, 10.) By "Court-resolved claims," SCO means those claims "resolved by" the Trial Order and the Summary Judgment Order (PACER No. 553 at 2), including claims resolved by agreement of the parties (in light of the Summary Judgment Order) in their Joint Statement. (SCO's Final Judgment at 6-7.) Thus, the "Court-resolved claims" include portions of SCO's breach of APA/TLA claim and unfair competition claim "to the extent [they] concern[] the UNIX and UnixWare copyrights the Court has held were retained by Novell, and to the extent [they] concern[] Novell's waiver of claims asserted against IBM [and Sequent.]" (Joint Statement at 2-3.) However, to the extent SCO seeks certification of claims "resolved by" the Trial Order, it is unclear which claims SCO means, as for the reasons set forth in Novell's Final Judgment, the parties have not filed a judgment "consistent with" the Trial Order on the status of outstanding claims.

SCO's last attempt to obtain partial final judgment was unsuccessful, given this Court's "serious concerns over whether the policy considerations underlying Rule 54(b) would be met by allowing a Rule 54(b) certification in this case." (Order ("Pretrial Order"), filed September 7, 2007, PACER No. 453, at 3.) While the circumstances this time around are not identical, the Court's reasons for declining to grant a disfavored Rule 54(b) motion apply now with equal force. *See Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 10 (1980) ("Plainly, sound judicial administration does not require that Rule 54(b) requests be granted routinely."); *Okla.*

Tpk. Aut. v. Bruner, 259 F.3d 1236, 1242 (10th Cir. 2001) (denying motion because claims were intertwined, noting "trial courts should be reluctant to enter Rule 54(b) orders")

As set forth by this Court, the standard for Rule 54(b) motions is as follows:

> An analysis of whether Rule 54(b) certification is appropriate requires the court: (1) to determine that the order to be certified is a final judgment; and (2) to find there is no just reason to delay appellate review of the order until the conclusion of the entire case.
>
> In making these determinations, the district court should act as a "dispatcher" weighing Rule 54(b)'s policy of preventing piecemeal appeals against the inequities that could result from delaying an appeal. The court should consider "whether the claims under review [are] separable from the others remaining to be adjudicated and whether the nature of the claims already determined [are] such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals."

(Pretrial Order at 2-3 [internal citations omitted].)

As before, SCO seeks certification of portions of claims, which this Court concluded "do not constitute individual claims for the purpose of Rule 54(b)." (*Id.* at 4.) *See, e.g., Jordan v. Pugh*, 425 F.3d 820, 827 (10th Cir. 2005) ("For purposes of Rule 54(b), a claim comprises all factually or legally connected elements of a case, but there is no bright-line rule to distinguish multiple claims, which may be appealed separately, from multiple legal grounds in a single claim, which may not.") (citation omitted); *Monument Mgmt. Ltd. P'Ship I v. City of Pearl, Miss.*, 952 F.2d 883, 885 (5th Cir. 1992) (Rule 54(b) certification "of one claim among multiple claims . . . must dispose of that claim *entirely*.") (italics in original); *Minn. Mining & Mfg. Co. v. Research Med. Co.*, 691 F. Supp. 1305, 1308 (D. Utah 1988) (even *claims* so closely related as to "fall afoul of the rule against splitting claims" do not qualify as "separate claims" under Rule 54(b)).

With respect to the remaining claims SCO seeks to have certified, "the issue before the court is whether there should be any just reason for delay of entry of final judgment in light of

the strong policy against piecemeal appeals." (Pretrial Order at 4.) Here, as before, there is "no compelling reason to separate the[] remaining claims for an immediate appeal[.]" (*Id.* at 5.)

First, as this Court previously noted, Rule 54(b) certification of some subset of claims would not achieve SCO's goal of securing federal appellate jurisdiction over those claims. (*Id.* at 4.) *See McKinney v. Gannett Co.*, 694 F.2d 1240, 1247 (10th Cir. 1982) (jurisdictional defect cannot be cured by means of a Rule 54(b) certification) (citation omitted); *see also Sussex Drug Prods. v. Kanasco, Ltd.*, 920 F.2d 1150, 1153 (3d Cir. 1990) (partial adjudication of single claim not appealable despite Rule 54(b) certification); *United States v. Burnett,* 262 F.2d 55, 59 (9th Cir. 1958) (court's language calling a judgment final is not determinative if its own import was to dispose of only a portion of the damages issues presented by a single claim). All it would serve to do is send some parts of the case up on appeal (though at risk of rejection for lack of finality), while other parts remain scattered below in arbitration, bankruptcy proceedings, or simple uncertainty — the very type of outcome the final judgment rule aims to prevent.

Second, because the Trial Order's effect on the status of outstanding claims is not yet clear, it is premature to speak of these claims as "Court-resolved" and ripe for certification.

Third, Novell does not dispute that many — even most — of the issues in this case have been resolved by summary judgment and trial. While the outstanding issues are significant and cannot simply be brushed aside in SCO's eagerness to appeal, there is no reason the parties cannot remain on course to resolving them in a timely manner. Indeed, but for SCO's declaration of bankruptcy, trial in September 2007 would have been followed by an arbitration hearing three months later. As it now stands, the stayed claims are due to be arbitrated, after which the stay can be lifted and a complete and final judgment entered. As this Court reasoned before, there is no compelling reason to enter partial final judgment on fewer than all the claims, risking piecemeal appeals, so that SCO can accelerate the appeals process by perhaps a few months. (Pretrial Order at 5.)

In sum, certifying and entering partial final judgment on some subset of whole and partial claims is not the answer to SCO's finality problems, as both legal and practical considerations strongly disfavor such a course. Rather, the answer is for SCO to remove the self-imposed obstacles to complete resolution of this case that, as Novell has set forth here and elsewhere, stand in the way of final judgment.

CONCLUSION

For the reasons stated above, Novell requests that the Court deny SCO's Motion to Voluntarily Dismiss its Stayed Claims, Its Motion for Entry of Final Judgment, and its Motion for Certification and Entry of Partial Final Judgment Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

DATED: October 3, 2008

ANDERSON & KARRENBERG

By: */s/ Heather M. Sneddon*

Thomas R. Karrenberg
Heather M. Sneddon

-and-

MORRISON & FOERSTER LLP
Michael A. Jacobs, *pro hac vice*
David E. Melaugh, *pro hac vice*

Attorneys for Defendant and Counterclaim-Plaintiff Novell, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of October, 2008, I caused a true and correct copy of **NOVELL'S OPPOSITION TO SCO'S MOTIONS FOR VOLUNTARY DISMISSAL OF STAYED CLAIMS, ENTRY OF FINAL JUDGMENT, AND CERTIFICATION AND ENTRY OF PARTIAL FINAL JUDGMENT** to be served to the following:

Via CM/ECF:

Brent O. Hatch
Mark F. James
HATCH JAMES & DODGE, P.C.
10 West Broadway, Suite 400
Salt Lake City, Utah 84101

Stuart H. Singer
William T. Dzurilla
Sashi Bach Boruchow
BOIES, SCHILLER & FLEXNER LLP
401 East Las Olas Blvd., Suite 1200
Fort Lauderdale, Florida 33301

David Boies
Edward J. Normand
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504

Devan V. Padmanabhan
John J. Brogan
DORSEY & WHITNEY, LLP
50 South Sixth Street, Suite 1500
Minneapolis, Minnesota 55401

Via U.S. Mail, postage prepaid:

Stephen Neal Zack
BOIES, SCHILLER & FLEXNER LLP
100 Southeast Second Street, Suite 2800
Miami, Florida 33131

/s/ Heather M. Sneddon