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 1              IN THE UNITED STATES DISTRICT COURT

 2         FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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   SCO GROUP,                    )
 5                               )
                                 )
 6            Plaintiffs,        )
                                 )
 7      vs.                      )Case No. 2:04-CV-139 DAK
                                 )
 8 NOVELL, INC.,                 )
                                 )
 9                               )
                Defendant.       )
10 _____)

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12

13

14         BEFORE THE HONORABLE DALE A. KIMBALL

15              DATE:  JULY 17, 2006

16         REPORTER'S TRANSCRIPT OF PROCEEDINGS

17                  MOTION HEARING

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24              Reporter:  REBECCA JANKE, CSR, RMR

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 1                    A P P E A R A N C E S

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1 JULY 17, 2006   SALT LAKE CITY, UTAH

2   P R O C E E D I N G S

3   * * *

4   THE COURT: We're here this morning in the

5 matter of SCO Group vs. Novell, Inc., 2:04-CV-139. For

6 plaintiff, Mr. Brent Hatch. There you are. Mr. Brent

7 Hatch. Mr. William Dzurilla -- did I say that right --

8 and Mr. Stuart Singer.

9   MR. SINGER: Good morning, Your Honor.

10   THE COURT: For defendant, Mr. Thomas

11 Karrenberg and Mr. Mike Jacobs, correct?

12   MR. KARRENBERG: Good morning, Your Honor.

13   THE COURT: Let's see. These are your motions.

14 Who's going to argue?

15   MR. KARRENBERG: Mr. Jacobs will, Your Honor.

16   THE COURT: Who is going to argue for you

17 folks?

18   MR. SINGER: I will, Your Honor.

19   THE COURT: Mr. Singer?

20   MR. SINGER: Yes.

21   THE COURT: Go ahead, Mr. Jacobs.

22   MR. JACOBS: Your Honor, I've been informed by

23 Mr. Singer that SCO will be amending its pleading and

24 will be specifying that the unfair competition claim

25 arises out of Utah law, so I think that the motion for a

1 more definite statement should be susceptible of

2 resolution without need for an opinion. Mr. Singer

3 can --

4   THE COURT: All right. Is that right,

5 Mr. Singer?

6   MR. SINGER: That's correct.

7   THE COURT: So, we assume for now that the

8 motion for more definite statement is moot. All right.

9 So argue the arbitration motion.

10   MR. JACOBS: First let me update Your Honor on

11 the status of the arbitration. Both sides have appointed

12 arbitrators. There is a procedural step in the ICC

13 arbitrations where the ICC decides to set the arbitration

14 in motion, and that has occurred. The party-appointed

15 arbitrators are now conferring about the appointment of

16 a -- of a third arbitrator. All three arbitrators will

17 then be neutral and the arbitration will be underway.

18   Some of the issues that SCO is raising here

19 will be raised in the arbitration based on the pleadings

20 they have filed. The arbitration, of course, takes place

21 under Swiss law, and the arbitration clause in the

22 relevant agreements is governed by Swiss law. So, in

23 terms of what this Court should be doing in view of the

24 fact that an arbitration is underway, I think it's

25 important to note that the arbitration is, indeed, as we

1 represented, getting underway.

2   Could the arbitration conceivably result in a

3 threshold determination that might cause this Court to

4 revisit a grant of a stay? I suppose that's right, and

5 so one of the things we would be contemplating is -- one

6 side or the other would -- if the stay were granted as

7 we've requested, if there were an outcome in the

8 arbitration that led the stay to be no longer relevant,

9 one side or the other would come to the Court and advise

10 the Court, but I think our basic argument to you, Your

11 Honor, is that with that arbitration underway and with

12 the parties broadly in agreement that there is overlap

13 between many of the issues between SCO and Novell --

14   THE COURT: Not all.

15   MR. JACOBS: Not all. That's correct. And let

16 me distinguish -- let me go to that, Your Honor, because

17 I think it is appropriate to distinguish the claims that

18 are the subject of the motion to stay, put them into two

19 baskets. Basket one are the claims that SCO newly added

20 in its Amended Complaint at the turn of the year. And

21 those are the claims that specifically cited SUSE and

22 SUSE LINUX as infringing and were the claims that gave

23 rise to the united Linux arbitration. So I would put

24 those claims into basket one. I don't think there could

25 be any credible argument whatsoever of delay or waiver --

1 or, actually, as it arises under Section 3, I realize

2 after rereading the statute, the term is "default" under

3 Section 3.

4   But as to those claims, those are all new in

5 this litigation, and there is really -- I don't think

6 there is any colorable argument that Novell has in some

7 way or SUSE has in some way acted so as to defeat

8 Novell's motion under Section 3 of the FAA.

9   Then there is the motion -- the part of the

10 motion that addresses the overlap between the slander of

11 title claim SCO has brought and the ownership in Linux

12 issue that is in the arbitration. Just to make clear

13 exactly what that argument is, in the arbitration, SUSE

14 will be -- is contending that by operation of the United

15 Linux agreements, if SCO owned UNIX and if there was UNIX

16 code in Linux that SCO otherwise would have had a claim

17 to, it gave up that claim, if you will, by operation of

18 those agreements.

19   So it's a pretty heavily conditional argument

20 even in the arbitration. It would, nonetheless, have a

21 substantial impact on the slander of title claim were

22 SUSE to prevail on that contention because what SCO would

23 then -- SCO's argument here on slander of title is that

24 Novell has slandered its title to UNIX, especially

25 insofar as SCO has asserted that there is UNIX in Linux.

1 And the arbitration would address that.

2   There is, of course, the different chronology.

3 That claim was filed. We have had a fair amount of

4 motion practice under it, and so one could differentiate

5 the slander of title claim from the copyright claims and

6 the claims that are derivative of the copyright claims

7 that SCO has brought here. And I emphasize that, as to

8 those copyright claims, SCO has specifically cited SUSE

9 and SUSE Linux. Its Exhibit B to the Complaint says,

10 "This function is implemented in SUSE Linux. This

11 function as implemented in SUSE Linux."

12   I mention that because after rereading the

13 Section 3 cases in preparation for the argument, I

14 actually don't think that our fact pattern is very well

15 explicated or revealed in the case law in Section 3.

16 What this case presents is the case where -- let's just

17 use the parties here. SCO has an intellectual property

18 agreement with SUSE. SUSE is a licensor of Novell, and

19 Novell distributes the code that SUSE licenses to Novell.

20 SCO then sues Novell based on the code that Novell

21 distributes from SUSE. And there's an agreement between

22 SUSE and SCO, that intellectual property agreement, and

23 that intellectual property agreement has an arbitration

24 clause.

25   The meaning of that agreement, the impact of

1 that agreement, therefore, should, I think -- maybe I

2 should say must be arbitrated, and it would not be

3 appropriate, given the deference to arbitration,

4 particularly in the international context, for the Court

5 to have to construe that agreement when Novell would

6 interpose that agreement and its impact on SCO. And so,

7 having -- SCO having made this choice, at the highest

8 level, the choice SCO has made is to change business

9 direction.

10   During the period of United Linux, it was a

11 pro-Linux company. It was an advocate of Linux. It was

12 a supporter of Linux. And, hence, it signed the United

13 Linux agreement and it signed up to an arbitration clause

14 with SUSE.

15   That's the next level of the decision-making it

16 made. It agreed to arbitrate with SUSE its disputes

17 arising out of the United Linux agreements. What we're

18 really doing in Section 3 -- in our Section 3 motion here

19 is saying -- is saying to the Court: Defer to that

20 arbitration. Let that arbitration proceed so that the

21 arbitrators can confirm that we're correct, we hope, as

22 to the meaning of that agreement and its impact on SCO's

23 copyright claims.

24   The other aspect of this, the more formal

25 aspect of this motion, that very few of the cases treat,

1 is the fact that the arbitration is underway, and there

2 is no -- usually the cases come up where there is a

3 Section 3 and a Section 4 motion, and one reads the

4 decisions, and it appears the Courts conflate the Section

5 3 analysis with the section 4 analysis. Our case before

6 you requires teasing out a little bit the distinction

7 between Section 3 and Section 4, and, hence, the focus in

8 our brief on the "issues" language of Section 3.

9   And at the end of the day, after we have

10 parsed -- I think perhaps the most useful part of our

11 reply brief is that section where we parsed the two

12 sides' competing views of what impact the arbitration

13 would have on the claims here. And while there is

14 disagreement, I would say, at the margins about how

15 significant the arbitration would be for the claims SCO

16 has brought here, the copyright basket of claims in

17 particular, there is agreement that it will have an

18 impact. And, hence, we think that agreement confirms

19 that relying on the "issues" language of Section 3,

20 Novell is entitled to a stay.

21   THE COURT: Thank you, Mr. Jacobs.

22   Mr. Singer.

23   MR. SINGER: Thank you, Your Honor. Your

24 Honor, this is the first time I've had the opportunity to

25 appear before this Court, before Your Honor,

1 specifically, in these cases, and I appreciate that

2 opportunity.

3   On this motion to stay, I'd like to start with

4 what is the second argument in our brief, what we believe

5 is the logical starting point here, which is that no stay

6 under 9 USC Section 3 is authorized or appropriate here

7 because the issues and claims in the lawsuit we have

8 brought against Novell are not shown to be arbitrable.

9   Now, the language of Section 3 says that the

10 Federal Arbitration Act requires a stay if a suit is,

11 quote, brought in any of the Courts of the United States,

12 quote, upon any issue referable to arbitration. So we

13 disagree with Novell on the idea that somehow the Court

14 can impose a stay, under Section 3, without considering

15 the issue of whether or not the claims in this suit, the

16 issues in this suit as framed by those claims are

17 arbitrable. We think the Court has to do that, and the

18 cases support that, and that because they have brought a

19 motion to stay in this Court, it is this Court, and not

20 the Swiss arbitration, that decides whether the claims

21 brought here in this action are in fact arbitrable. And

22 you cannot separate that and put it aside from the issue

23 of whether a stay should be granted.

24   Now the focus under the case law on whether or

25 not claims are arbitrable are on the plaintiff's case.

1 The statute itself we think addresses that. 9 USC

2 Section 3 talks about a suit brought upon an issue

3 referable to arbitration. And the Tenth Circuit, we

4 think, indicates that it's the issue of whether claims

5 are referable to arbitration. It's to be determined by a

6 three-part test that really the Court adopted from the

7 Second Circuit. And I'm referring to the Tenth Circuit

8 case of Cummings vs. Federal Express, which is found at

9 404 F3d 1250, a 2005 case.

10   And the Court expressly said that to determine

11 whether a particular dispute falls within the cope of an

12 agreement of arbitration clause, the first part of that

13 test is to examine whether it is a narrow clause or a

14 broad clause. And then, if it's a narrow clause --

15   THE COURT: The arbitration clause.

16   MR. SINGER: The arbitration clause, exactly,

17 Your Honor. If the arbitration clause is narrow, then it

18 has to be -- it says the dispute should be determined as

19 to whether its over an issue that is, on its face, within

20 the purview of the clause and that, generally -- and this

21 seems to be the third part of the test -- that the

22 collateral matters will in that case be beyond the

23 purview of arbitration.

24   Now, the Cummings case also has two other

25 holdings we think are very important. First of all, they

1 said that while generally there is a presumption in favor

2 of arbitration, a policy in favor of arbitration, that

3 isn't the same if you have a narrow arbitration clause.

4 The Court noted that arbitration is a matter of contract,

5 and a party cannot be required to submit to arbitration

6 in any dispute which he has not agreed so to submit, and

7 when an arbitration clause is narrowly drawn, the policy

8 in favor of arbitration does not have the strong effect

9 here it would have if we were construing a broad

10 arbitration clause.

11   The second point I would make about Cummings is

12 that it seems to indicate that it is not enough that

13 there is a defense that the defendant would seek to raise

14 which may involve interpretation of an agreement that is

15 subject to arbitration. In the Cummings case itself --

16 it was a Federal Express contractor who said there were

17 various oral representations. You had a narrow

18 arbitration agreement that dealt with the written

19 document. The Court said these were not within -- the

20 oral representation claims were not within the scope of

21 the arbitration clause.

22   And then they dealt with Federal Express'

23 argument saying that, well, but, there is a merger

24 clause, and that merger clause would give us a defense of

25 a written agreement that would prevent you having a valid

1 oral representation claim. And the Court, at page 1263,

2 said that this argument is only relevant to the question

3 of whether Fed Ex has defenses, not to the question of

4 whether the claims are subject to arbitration.

5   And we think that is consistent with how other

6 Courts have looked at the issue of arbitrability. For

7 example, cited in our brief is the Tracer Research Corp.

8 case in the Ninth Circuit, 42 F3d 1292, where you had a

9 misappropriation-of-trade-secrets claim that the Court

10 found did not arise from a licensing agreement that had

11 an arbitration claim, even though there was some

12 relationship between the two.

13   So we think it's important, then, to turn to

14 the arbitration clause in this case and whether it is

15 narrow or broad. And we have briefed this issue, and

16 there doesn't seem to be a defense of the breadth of the

17 clause in the reply, so I'm not going to spend a lot of

18 time here, but I do want to note the language of those

19 clauses. There are two. One is in the master

20 transaction agreement, and the other is in what's called

21 the joint development contact. Both of these were

22 entered into between SCO and SUSE back in 2002.

23   And the language is almost identical. In the

24 master transaction agreement, Section 9.2 -- and these

25 are in the exhibits before the Court -- it says that any

1 differences or disputes arising from this MTA, this

2 master transaction agreement, or from contracts regarding

3 its performance shall be -- and it says settled by an

4 amicable effort, and if the parties couldn't settle it,

5 then it goes to arbitration. In Section 12.2 of the

6 joint development contract, it provides that any

7 differences or disputes arising from this JDC or for

8 contracts regarding its performance shall be settled by

9 amicable efforts and, if necessary, arbitration.

10   There is no relating-to language. There is

11 nothing which is, in a broad form, saying any disputes

12 arising from or relating to these agreements are subject

13 to arbitration. It is simply disputes basically over the

14 interpretation arising from this development agreement

15 where it is a contract that implements it.

16   THE COURT: How would you define the boundaries

17 between arising from and relating to?

18   MR. SINGER: That's a question I think

19 certainly the Courts have struggled with, but I think

20 that the Courts have said relating to is broader, that

21 arising from, meaning that it's the source of the claim,

22 that the claim arises from, say, a contract. If you have

23 a dispute over whether an interpretation of an agreement

24 is right, that that dispute arises from it; whereas, a

25 collateral dispute, like whether or not it might create a

1 defense, might relate to those agreements, but the

2 dispute does not arise from those agreements.

3   This is, therefore, a narrow clause, not a

4 broad clause. And I would submit, Your Honor, that an

5 analysis of the claims in our Second Amended Complaint

6 show that they do not arise from this joint development

7 agreement that SCO entered into with SUSE in 2002, but

8 rather they arise from the asset purchase agreement

9 entered into seven years later -- or excuse me -- seven

10 years earlier, in 1995, between SCO and Novell.

11   And one item of support for that -- not only do

12 our own pleadings say that, but, interestingly, if one

13 were to turn to the other motion that was before the

14 Court today, the motion by Novell for a more definite

15 statement, on page 1 how they characterize this case,

16 they say the following quote: "As the Court is aware,

17 this case arises from an asset purchase agreement entered

18 into on September 19, 1995, between Novell and the Santa

19 Cruise operation," our predecessor in interest, under

20 which we allegedly acquired all rights under the APA

21 through a subsequent acquisition of Santa Cruise's

22 assets.

23   And we think that's right. The first cause of

24 action we have is a slander of title action that has been

25 pending from the beginning of this case. And it's the

1 issue of whether we are the owner by virtue of that asset

2 purchase agreement to all UNIX and UnixWare copyrights

3 and whether Novell has slandered our title by -- in

4 various forms, not all related to SUSE Linux activities,

5 but simply going public and saying, no, we don't have

6 those copyrights and other activities spelled out in the

7 Complaint. That does not arise within the scope of the

8 SUSE Linux agreement and, therefore, is not arbitrable.

9   Similarly, the argument for breach of that

10 agreement, the non-compete provision, which says that

11 Novell should not compete by using the technology which

12 is being licensed under that agreement -- that is Section

13 1.6 of the asset purchase agreement -- that issue arises

14 from that agreement. It is a question of whether that

15 contract has been broken. Now, maybe there is a defense

16 that Novell wants to argue that under some later

17 agreement that has been changed. And they can raise that

18 on the merits in this Court, but it doesn't mean that our

19 claim for breach of the APA suddenly becomes arbitrable.

20   There is no arbitration provision in the APA.

21 The parties had an opportunity to agree on how they would

22 resolve disputes arising under that agreement, and they

23 didn't put an arbitration agreement in there. Even

24 Novell agrees, I believe, that the third claim, one for

25 specific performance as an alternative, if these

1 contracts had not conveyed this intellectual property, in

2 the sense that all the documents were signed, that the

3 transfers effectuated, we are entitled to specific

4 performance of that. Even Novell is not claiming that is

5 arbitrable.

6   The fourth claim is the one that they focus on,

7 which is added in our Second Amended Complaint, and that

8 is a claim for copyright infringement. But, again, we

9 made our case for copyright infringement by virtue of

10 Novell's distribution and use of technology infringes our

11 copyrights. Whether they have a defense related to the

12 fact -- which we dispute, of course, on the merits --

13 that SUSE Linux and the United Linux Consortium gained

14 rights to certain intellectual property that Novell can

15 now use, that may be a defense, but it does not make the

16 copyright infringement claim arbitrable.

17   And the unfair competition claim goes back to a

18 variety of issues, including the effect on our business

19 by Novell publicly saying that we do not own the

20 copyrights which we believe we acquired back in 1995

21 under the asset purchase agreement.

22   So, a stay under Section 3 requires arbitrable

23 claims, and it's interesting, Novell has not sought to

24 compel arbitration of these claims. If they really

25 believed these were arbitrable claims, they should have

1 filed a motion to compel action. Instead, they haven't.

2 And, instead, they have brought their own Counterclaims,

3 seven Counterclaims, which they are curiously silent

4 about what is to happen with those. But those also have

5 invoked the Court's judicial authority.

6   Now, the second issue --

7   THE COURT: Maybe they want me to stay your

8 case and let them proceed on the Counterclaim.

9   MR. SINGER: Well, I can understand why if that

10 was what they intended, they hesitate to articulate that.

11 We think that -- we assume, at least, that when they are

12 calling for a stay, they are not suggesting that it be a

13 one-sided stay.

14   THE COURT: I assume that's so.

15   MR. SINGER: But we think that bringing of

16 those Counterclaims is still significant because it is,

17 to use the language of the Courts when they are talking

18 about waiver, the next issue I wanted to address, it is a

19 clear invocation of the judicial machinery to bring

20 Counterclaims. And they brought Counterclaims in 2005,

21 with respect to the first Amended Complaint, to which

22 they did not make any motion to stay back then and to

23 which they believe now that there were arbitrable claims

24 because they believe our slander of title claim, going

25 back to the very beginning of this suit was, according to

1 their papers, an arbitrable claim.

2   So, notwithstanding that, they didn't move to
3 compel arbitration on that claim. Instead, they went
4 ahead with the lawsuit here. We have had two rounds of
5 briefing and arguments and decisions on motions to
6 dismiss, one of which they sought to convert to a motion
7 for summary judgement. We have had litigation on a
8 motion to remand, and we have had Counterclaims brought
9 on six or seven different fronts, as recently as 2005.

10   And we think the right test the Court should
11 use to analyze the issue of waiver is Metts vs. Merrill
12 Lynch, a Tenth Circuit case, 396 -- excuse me -- at 39
13 F.3d 1482. And it sets forth six factors which we think
14 all point here in favor of finding a wiaver so that even
15 if one of these claims, like the copyright claim, is
16 found to be arbitrable or the slander claim is found to
17 be arbitrable, which we don't think is true, you still
18 have to look under the language of Section 3 as to
19 whether or not there has been a waiver. And here the
20 six-factor test we think points toward a waiver.

21   The first is whether or not the actions are
22 inconsistent with the right to arbitrate. We think
23 litigating in Court for two years and bringing six
24 Counterclaims is inconsistent.

25   The second factor is whether the litigation

1 machinery has been substantially invoked. They have

2 invoked it through their motions to dismiss, requesting a

3 jury trial, filing of pleadings, discovery, all of that.

4   The third factor is the length of delay. And

5 we cite four cases at pages 13 of our brief which found

6 waiver on seven to ten months of delay, and here you have

7 over two years of delay after the first allegedly

8 arbitrable claim, the slander claim, was brought before

9 they have now brought this motion. They could have filed

10 their own motion to compell arbitration of that either

11 from SUSE Linux or through Novell if they believed they

12 were a third-party beneficiary of those agreements, but

13 they chose not to do so. They waited to see how they

14 would do on two substantive motions to dismiss, and now

15 they have taken this approach.

16   The fourth issue is the fact that they filed a

17 Counterclaim without seeking a stay. They did that in

18 July of 2005.

19   The fifth issue is whether or not there's been

20 substantial discovery. They have requested, and we have

21 produced virtually all of the documents we have relevant

22 to this. They have even asked us to agree to use those

23 in the arbitration. And even after filing this motion to

24 stay, they have subpoenaed third parties for discovery.

25 That is trying to have, we suggest, your cake and eat it,

1 too, to use the discovery tools in Federal Court while,

2 on the other hand, litigating this arbitration.

3   And the prejudice to SCO is there. We have

4 spent two years litigating these motions. We shouldn't

5 have to wait -- we're the plaintiff here -- to go back to

6 square one to see what's going to happen in a Swiss

7 proceeding.

8   Your Honor, I would like to briefly deal with

9 our third argument, which is that even if the Court finds

10 there is an arbitrable claim, and even if it finds that

11 that claim -- there has not been a waiver, should the

12 Court exercise its discretion to stay other parts of the

13 case? Clearly, if there is no arbitrable claim at all,

14 as we contend and we have argued, then you don't even

15 have to reach a decision. There is simply no stay.

16   If the Court were to find, let's say, one claim

17 or two claims were arbitrable, the issue of then staying

18 the case or allowing the case to proceed on the other

19 claims arises. We think this Court should follow Justice

20 White's concurring opinion in the Bird case which says

21 that there is a heavy presumption in these circumstances

22 against the stay. That concurring opinion has been

23 adopted expressly by two U.S. Court of Appeals, the

24 Second and Third Circuit, and a number of District Courts

25 which we cite on page 23 of our brief.

1   The Tenth Circuit has not expressly addressed

2 whether it's going to adopt that but in both the Coors

3 Beverages vs. Molson case and in the Riley Manufacturing

4 case, it indicated that if the parties intended, by not

5 having an arbitration agreement that covered everything,

6 to litigate in piecemeal fashion, then the Courts need to

7 respect that.

8   Here you have certainly an agreement in the APA

9 which had no arbitration provision, and then you have the

10 SUSE Linux Company which has an arbitration provision of

11 a narrow scope. It falls within the meaning of those

12 cases. Now, if the Court gets to the issue of, what are

13 the discretionary factors it should look at and whether

14 or not to order a stay, we think those point against a

15 stay. All the arguments I have made with respect to

16 waiver are also arguments against giving a party a stay

17 that has invoked the judicial machinery on all these

18 claims which we've been litigating for the last two

19 years. The Court is familiar with these issues. It

20 would not resolve the whole case.

21   Even if -- and this is the point of our chart

22 on page 25. Even if the claims in the SUSE arbitration

23 are first of all found to be arbitrable -- and we're

24 challenging that in front of the arbitration panel in

25 Switzerland -- and, second, even if we lost all of those

1 claims, and, third, even if all those findings by an

2 arbitration panel were given collateral estoppel effect

3 in this Court, which is a real question because that's

4 under Swiss law and there's different issues, even then

5 that would not resolve all the claims in this case; the

6 claims under the APA with respect to slander of title,

7 issues of infringement that deal with the 2.6 version of

8 Linux that is the 2.41 distributed by United Linux, and

9 other issues.

10   On the other hand, if this suit were to go

11 forward and Novell were to win its contention that we

12 never got any UNIX copyrights to begin with, then that

13 would essentially be the end of the day, and there

14 wouldn't be anything worth arbitrating over in

15 Switzerland.

16   Now, one final point I would like to make, Your

17 Honor. If the Court is considering a stay of any type,

18 we submit the proper time to consider that would be

19 before trial, which is set in June of 2007, but certainly

20 to allow discovery to proceed on these issues. They have

21 wanted to make use of discovery. There is no reason the

22 case should be slowed down with respect to discovery.

23 Their argument is really a question, we submit, of

24 whether or not that proceeding in deciding certain issues

25 should go ahead of the trial in this case. We disagree

1 on that, but there is no good reason why the most that
2 the Court should do in this discretionary area is say --
3 allow the discovery to go forward and revisit the issue
4 before the trial in the spring.

5   Thank you very much.

6   THE COURT: Thank you, Mr. Singer.

7   Mr. Jacobs, what do you say to Mr. Singer's
8 arguments about the Cummings case and its effect here?

9   MR. JACOBS: I don't think it has the effect
10 that Mr. Singer proposes. It's a Section 4 case, Your
11 Honor. It's a motion to compel arbitration, and that is
12 precisely the distinction we were drawing in our papers
13 and in my arguments, so I think we're not -- I don't
14 think our arguments before you today have yet really
15 converged. If you decide that Section 3 and Section 4,
16 notwithstanding their difference in wording and
17 notwithstanding the -- some differences in the juris
18 prudence are the same, then his argument has a lot of
19 force.

20   We are not contending that they have brought
21 arbitrable claims. We are contending that they have
22 brought claims raising arbitrable issues. And we have
23 flagged -- and at the very least, we wanted to be sure we
24 flagged those for you so you could see the intersection
25 between the arbitration and the case that you're

1 presiding over, but, moreover, we think Section 3 calls

2 for a mandatory stay where they have brought claims that

3 raise arbitrable issues.

4   There is an interesting question in the case

5 law, even if you're in Section 4 territory, about how you

6 treat affirmative defenses. And we cover that in our

7 brief, but I'd like to flag a passage for you in the

8 Coors case, which is also a Tenth Circuit case, and we

9 are looking for strands of reasoning, Your Honor, because

10 there really aren't crisp holdings on point. This is 51

11 F.3d 1511. At 1516, the Tenth Circuit is describing the

12 First Circuit's inquiry of the Mitsubishi case which

13 ultimately made it into the Supreme Court.

14   And without in any way suggesting that the

15 First Circuit had it wrong, it cites the First Circuit

16 as: Quotes, having, quote, phrased its initial inquiry

17 as, internal quotes, whether the factual allegations

18 underlying Solar's Counterclaims and Mitsubishi's

19 bonafide defenses to those Counterclaims are within the

20 scope of the arbitration clause, end internal quote, and

21 end of quote.

22   So, there's at least a -- something one could

23 cite to say that, in doing this analysis, one looks to

24 the facts that are at issue rather than the form of the

25 pleading, whether it's in the form of their affirmative

1 pleading or a potential affirmative defense.

2   THE COURT: Is this a narrow or broad
3 arbitration clause? You heard his argument on that.

4   MR. JACOBS: I did, Your Honor. It's
5 actually a little tricky here because it's a Swiss law
6 arbitration clause and so I think to prove the breadth of
7 the arbitration clause, one would have to go to what
8 Swiss law says about arbitration clauses. And I say that
9 for two reasons.

10   One. I would urge the Court not to make a
11 determination on that without -- that might have an
12 impact on a Swiss law arbitration which will be
13 considering the scope of its arbitrable jurisdiction.
14 The ICC rules make it clear, by the way -- the ICC rules
15 make it clear that the arbitral panel is to determine the
16 scope of its jurisdiction.

17   Secondly, I'm informed -- and we could brief
18 this if you would like, Your Honor -- I am informed that
19 the way the Swiss law treats an arising-under arbitration
20 clause is somewhere in between the way U.S. law would
21 treat an arising-under versus an arising-under and
22 related-to arbitration clause. So it's a somewhat tricky
23 issue. Our contention here is that if it turns out that
24 we were incorrect, that the arbitrators decide that the
25 issues that we have identified as overlapping are not in

1 fact subject to arbitrable -- to arbitral jurisdiction,

2 then you will find out right away because SCO will let

3 you know and we'll be off and running.

4 You do have broad discretion -- notwithstanding

5 Section 3 and its provisions, you have broad discretion

6 to control your docket, and all the cases say that, and I

7 think we have told you -- both sides have told you what

8 we think you should do in that connection.

9 But on this waiver issue, I think the statute

10 is pretty clear. Section 3 says that the party moving

11 for the stay cannot be in default under the arbitration.

12 Now, they may argue -- it would be very surprising to me

13 if this argument would have any legs because they trigger

14 the arbitration with their very recent filing. They may

15 try to argue that there is some kind of waiver or default

16 in the arbitration that should somehow be imputed to

17 Novel, but that, too, is an arbitrable issue in the

18 context of this case.

19 So I think that -- you do, in a way, face a

20 kind of a fork in the road. If you decide that Section 3

21 and Section 4 have the same analysis, we are not

22 contending that they have pled arbitrable claims. We are

23 not -- we did not petition to compel arbitration. He is

24 absolutely right. And so, if you decide that they are

25 right and we are wrong on this statutory construction

1 issue, then you would be in the territory of your

2 jurisdiction to control your docket.

3   THE COURT: Discretionary.

4   MR. JACOBS: Discretionary. Exactly. If, on

5 the other hand, we are correct that Section 3, in

6 reference to issues, has considerable significance and

7 that the statute was deliberately worded to distinguish

8 between petition to compel claims being arbitrated versus

9 a stay, then I think they just haven't met the force of

10 that argument. They have maybe scored a few hits as to

11 the slander of title claim and our suggestion of overlap

12 there, but nothing that they have said has any bearing

13 whatsoever on the copyright claim and the claims that are

14 derivative of the copyright claim.

15   There is a priciple -- there is one -- there is

16 a policy point here that's probably important. In a

17 petition to compel arbitration, you're saying to the

18 Court: Send them off for the resolution of their claims

19 to an arbitrable panel -- to an arbitral panel.

20   And so the Court has to make the gateway

21 determination about arbitrability that the Supreme Court

22 cited in its recent Howsow case, I think it is, where the

23 Supreme Court articulated this gateway principle.

24 Precisely because we are not contending that their claims

25 are arbitrable, but rather only the issues in -- lurking

1 in their claims are arbitrable, Section -- it makes sense

2 that a motion to stay pending the arbitration would have

3 a different standard because we are not saying that, at

4 the end of the day, they don't get to come back to you

5 and litigate those claims.

6   We will argue, presumably, depending on how it

7 comes out, that the arbitration is preclusive on certain

8 issues, but their claims are not being sent forever into

9 arbitration, so it makes sense that Section 3 and Section

10 4 would be worded differently and be interpreted

11 differently.

12   THE COURT: I think you're talking now about an

13 order of decision question.

14   MR. JACOBS: I'm sorry?

15   THE COURT: An order of decision.

16   MR. JACOBS: Yes.

17   THE COURT: What makes sense to decide first

18 and what makes sense to decide after.

19   MR. JACOBS: That's exactly right, Your Honor.

20 We think that -- I guess another way of saying it, then,

21 is that Section 3 proposes or prescribes an order of

22 decision in this context.

23   THE COURT: Thank you.

24   MR. JACOBS: Thank you very much.

25   THE COURT: Thank you, all. I'll take the

1 motion under advisement and get a ruling out in due

2 course. We'll be in recess.

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24   (Whereupon the proceedings were concluded.)

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 2                    REPORTER'S CERTIFICATE

 3 STATE OF UTAH            )

 4                          ) ss.

 5 COUNTY OF SALT LAKE      )

 6

 7          I, REBECCA JANKE, do hereby certify that I am a

 8 Certified Court Reporter for the State of Utah;

 9          That as such Reporter I attended the hearing of

10 the foregoing matter on July 17, 2006, and thereat

11 reported in Stenotype all of the testimony and

12 proceedings had, and caused said notes to be transcribed

13 into typewriting, and the foregoing pages numbered 1

14 through 30 contain a full, true and correct record of the

15 proceedings transcribed.

16          That I am not of kin to any of the parties and

17 have no interets in the outcome of the matter;

18          And hereby set my hand and seal this 16th day

19 of October, 2006.

20

21

22

23

24                            _____

25                            REBECCA JANKE, CSR, RPR, RMR
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