IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

SCO GROUP, Plaintiffs, vs. NOVELL, INC., Defendant.	Case No. 2:04-CV-139 DAK

BEFORE THE HONORABLE DALE A. KIMBALL

DATE: JULY 17, 2006

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

Reporter: REBECCA JANKE, CSR, RMR

A P P E A R A N C E S

FOR THE PLAINTIFF:	HATCH, JAMES & DODGE	
	BY:	BRENT O. HATCH, ESQ.
		10 WEST BROADWAY, SUITE 400
		SALT LAKE CITY, UTAH 84101
	BOIES, SCHILLER & FLEXNER	
	BY:	WILLIAM T. DZURILLA, ESQ.
		STUART H. SINGER, ESQ.
		401 EAST LAS OLAS BOULEVARD
		FORT LAUDERDALE, FLORIDA 33301
FOR THE DEFENDANT:	ANDERSON & KARRENBERG	
	BY:	THOMAS R. KARRENBERG, ESQ.
		50 WEST BROADWAY, SUITE 700
		SALT LAKE CITY, UTAH 84101
	MORRISON & FOERSTER	
	BY:	MICHAEL A. JACOBS, ESQ.
		425 MARKET STREET
		SAN FRANCISCO, CALIFORNIA 94105

JULY 17, 2006 SALT LAKE CITY, UTAH

P R O C E E D I N G S

* * *

THE COURT: We're here this morning in the matter of SCO Group vs. Novell, Inc., 2:04-CV-139. For plaintiff, Mr. Brent Hatch. There you are. Mr. Brent Hatch. Mr. William Dzurilla -- did I say that right -- and Mr. Stuart Singer.

MR. SINGER: Good morning, Your Honor.

THE COURT: For defendant, Mr. Thomas Karrenberg and Mr. Mike Jacobs, correct?

MR. KARRENBERG: Good morning, Your Honor.

THE COURT: Let's see. These are your motions. Who's going to argue?

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

THE COURT: Who is going to argue for you folks?

MR. SINGER: I will, Your Honor.

THE COURT: Mr. Singer?

MR. SINGER: Yes.

THE COURT: Go ahead, Mr. Jacobs.

MR. JACOBS: Your Honor, I've been informed by Mr. Singer that SCO will be amending its pleading and will be specifying that the unfair competition claim arises out of Utah law, so I think that the motion for a

more definite statement should be susceptible of resolution without need for an opinion. Mr. Singer can --

THE COURT: All right. Is that right, Mr. Singer?

MR. SINGER: That's correct.

THE COURT: So, we assume for now that the motion for more definite statement is moot. All right. So argue the arbitration motion.

MR. JACOBS: First let me update Your Honor on the status of the arbitration. Both sides have appointed arbitrators. There is a procedural step in the ICC arbitrations where the ICC decides to set the arbitration in motion, and that has occurred. The party-appointed arbitrators are now conferring about the appointment of a -- of a third arbitrator. All three arbitrators will then be neutral and the arbitration will be underway.

Some of the issues that SCO is raising here will be raised in the arbitration based on the pleadings they have filed. The arbitration, of course, takes place under Swiss law, and the arbitration clause in the relevant agreements is governed by Swiss law. So, in terms of what this Court should be doing in view of the fact that an arbitration is underway, I think it's important to note that the arbitration is, indeed, as we

represented, getting underway.

Could the arbitration conceivably result in a threshold determination that might cause this Court to revisit a grant of a stay? I suppose that's right, and so one of the things we would be contemplating is -- one side or the other would -- if the stay were granted as we've requested, if there were an outcome in the arbitration that led the stay to be no longer relevant, one side or the other would come to the Court and advise the Court, but I think our basic argument to you, Your Honor, is that with that arbitration underway and with the parties broadly in agreement that there is overlap between many of the issues between SCO and Novell --

THE COURT: Not all.

MR. JACOBS: Not all. That's correct. And let me distinguish -- let me go to that, Your Honor, because I think it is appropriate to distinguish the claims that are the subject of the motion to stay, put them into two baskets. Basket one are the claims that SCO newly added in its Amended Complaint at the turn of the year. And those are the claims that specifically cited SUSE and SUSE LINUX as infringing and were the claims that gave rise to the united Linux arbitration. So I would put those claims into basket one. I don't think there could be any credible argument whatsoever of delay or waiver --

or, actually, as it arises under Section 3, I realize after rereading the statute, the term is "default" under Section 3.

But as to those claims, those are all new in this litigation, and there is really -- I don't think there is any colorable argument that Novell has in some way or SUSE has in some way acted so as to defeat Novell's motion under Section 3 of the FAA.

Then there is the motion -- the part of the motion that addresses the overlap between the slander of title claim SCO has brought and the ownership in Linux issue that is in the arbitration. Just to make clear exactly what that argument is, in the arbitration, SUSE will be -- is contending that by operation of the United Linux agreements, if SCO owned UNIX and if there was UNIX code in Linux that SCO otherwise would have had a claim to, it gave up that claim, if you will, by operation of those agreements.

So it's a pretty heavily conditional argument even in the arbitration. It would, nonetheless, have a substantial impact on the slander of title claim were SUSE to prevail on that contention because what SCO would then -- SCO's argument here on slander of title is that Novell has slandered its title to UNIX, especially insofar as SCO has asserted that there is UNIX in Linux.

And the arbitration would address that.

There is, of course, the different chronology. That claim was filed. We have had a fair amount of motion practice under it, and so one could differentiate the slander of title claim from the copyright claims and the claims that are derivative of the copyright claims that SCO has brought here. And I emphasize that, as to those copyright claims, SCO has specifically cited SUSE and SUSE Linux. Its Exhibit B to the Complaint says, "This function is implemented in SUSE Linux. This function as implemented in SUSE Linux."

I mention that because after rereading the Section 3 cases in preparation for the argument, I actually don't think that our fact pattern is very well explicated or revealed in the case law in Section 3. What this case presents is the case where -- let's just use the parties here. SCO has an intellectual property agreement with SUSE. SUSE is a licensor of Novell, and Novell distributes the code that SUSE licenses to Novell. SCO then sues Novell based on the code that Novell distributes from SUSE. And there's an agreement between SUSE and SCO, that intellectual property agreement, and that intellectual property agreement has an arbitration clause.

The meaning of that agreement, the impact of

that agreement, therefore, should, I think -- maybe I should say must be arbitrated, and it would not be appropriate, given the deference to arbitration, particularly in the international context, for the Court to have to construe that agreement when Novell would interpose that agreement and its impact on SCO. And so, having -- SCO having made this choice, at the highest level, the choice SCO has made is to change business direction.

During the period of United Linux, it was a pro-Linux company. It was an advocate of Linux. It was a supporter of Linux. And, hence, it signed the United Linux agreement and it signed up to an arbitration clause with SUSE.

That's the next level of the decision-making it made. It agreed to arbitrate with SUSE its disputes arising out of the United Linux agreements. What we're really doing in Section 3 -- in our Section 3 motion here is saying -- is saying to the Court: Defer to that arbitration. Let that arbitration proceed so that the arbitrators can confirm that we're correct, we hope, as to the meaning of that agreement and its impact on SCO's copyright claims.

The other aspect of this, the more formal aspect of this motion, that very few of the cases treat,

is the fact that the arbitration is underway, and there is no -- usually the cases come up where there is a Section 3 and a Section 4 motion, and one reads the decisions, and it appears the Courts conflate the Section 3 analysis with the section 4 analysis. Our case before you requires teasing out a little bit the distinction between Section 3 and Section 4, and, hence, the focus in our brief on the "issues" language of Section 3.

And at the end of the day, after we have parsed -- I think perhaps the most useful part of our reply brief is that section where we parsed the two sides' competing views of what impact the arbitration would have on the claims here. And while there is disagreement, I would say, at the margins about how significant the arbitration would be for the claims SCO has brought here, the copyright basket of claims in particular, there is agreement that it will have an impact. And, hence, we think that agreement confirms that relying on the "issues" language of Section 3, Novell is entitled to a stay.

THE COURT: Thank you, Mr. Jacobs.

Mr. Singer.

MR. SINGER: Thank you, Your Honor. Your Honor, this is the first time I've had the opportunity to appear before this Court, before Your Honor,

specifically, in these cases, and I appreciate that opportunity.

On this motion to stay, I'd like to start with what is the second argument in our brief, what we believe is the logical starting point here, which is that no stay under 9 USC Section 3 is authorized or appropriate here because the issues and claims in the lawsuit we have brought against Novell are not shown to be arbitrable.

Now, the language of Section 3 says that the Federal Arbitration Act requires a stay if a suit is, quote, brought in any of the Courts of the United States, quote, upon any issue referable to arbitration. So we disagree with Novell on the idea that somehow the Court can impose a stay, under Section 3, without considering the issue of whether or not the claims in this suit, the issues in this suit as framed by those claims are arbitrable. We think the Court has to do that, and the cases support that, and that because they have brought a motion to stay in this Court, it is this Court, and not the Swiss arbitration, that decides whether the claims brought here in this action are in fact arbitrable. And you cannot separate that and put it aside from the issue of whether a stay should be granted.

Now the focus under the case law on whether or not claims are arbitrable are on the plaintiff's case.

The statute itself we think addresses that. 9 USC Section 3 talks about a suit brought upon an issue referable to arbitration. And the Tenth Circuit, we think, indicates that it's the issue of whether claims are referable to arbitration. It's to be determined by a three-part test that really the Court adopted from the Second Circuit. And I'm referring to the Tenth Circuit case of Cummings vs. Federal Express, which is found at 404 F3d 1250, a 2005 case.

And the Court expressly said that to determine whether a particular dispute falls within the cope of an agreement of arbitration clause, the first part of that test is to examine whether it is a narrow clause or a broad clause. And then, if it's a narrow clause --

THE COURT: The arbitration clause.

MR. SINGER: The arbitration clause, exactly, Your Honor. If the arbitration clause is narrow, then it has to be -- it says the dispute should be determined as to whether its over an issue that is, on its face, within the purview of the clause and that, generally -- and this seems to be the third part of the test -- that the collateral matters will in that case be beyond the purview of arbitration.

Now, the Cummings case also has two other holdings we think are very important. First of all, they

said that while generally there is a presumption in favor of arbitration, a policy in favor of arbitration, that isn't the same if you have a narrow arbitration clause. The Court noted that arbitration is a matter of contract, and a party cannot be required to submit to arbitration in any dispute which he has not agreed so to submit, and when an arbitration clause is narrowly drawn, the policy in favor of arbitration does not have the strong effect here it would have if we were construing a broad arbitration clause.

The second point I would make about Cummings is that it seems to indicate that it is not enough that there is a defense that the defendant would seek to raise which may involve interpretation of an agreement that is subject to arbitration. In the Cummings case itself -- it was a Federal Express contractor who said there were various oral representations. You had a narrow arbitration agreement that dealt with the written document. The Court said these were not within -- the oral representation claims were not within the scope of the arbitration clause.

And then they dealt with Federal Express' argument saying that, well, but, there is a merger clause, and that merger clause would give us a defense of a written agreement that would prevent you having a valid

oral representation claim. And the Court, at page 1263, said that this argument is only relevant to the question of whether Fed Ex has defenses, not to the question of whether the claims are subject to arbitration.

And we think that is consistent with how other Courts have looked at the issue of arbitrability. For example, cited in our brief is the Tracer Research Corp. case in the Ninth Circuit, 42 F3d 1292, where you had a misappropriation-of-trade-secrets claim that the Court found did not arise from a licensing agreement that had an arbitration claim, even though there was some relationship between the two.

So we think it's important, then, to turn to the arbitration clause in this case and whether it is narrow or broad. And we have briefed this issue, and there doesn't seem to be a defense of the breadth of the clause in the reply, so I'm not going to spend a lot of time here, but I do want to note the language of those clauses. There are two. One is in the master transaction agreement, and the other is in what's called the joint development contact. Both of these were entered into between SCO and SUSE back in 2002.

And the language is almost identical. In the master transaction agreement, Section 9.2 -- and these are in the exhibits before the Court -- it says that any

differences or disputes arising from this MTA, this master transaction agreement, or from contracts regarding its performance shall be -- and it says settled by an amicable effort, and if the parties couldn't settle it, then it goes to arbitration. In Section 12.2 of the joint development contract, it provides that any differences or disputes arising from this JDC or for contracts regarding its performance shall be settled by amicable efforts and, if necessary, arbitration.

There is no relating-to language. There is nothing which is, in a broad form, saying any disputes arising from or relating to these agreements are subject to arbitration. It is simply disputes basically over the interpretation arising from this development agreement where it is a contract that implements it.

THE COURT: How would you define the boundaries between arising from and relating to?

MR. SINGER: That's a question I think certainly the Courts have struggled with, but I think that the Courts have said relating to is broader, that arising from, meaning that it's the source of the claim, that the claim arises from, say, a contract. If you have a dispute over whether an interpretation of an agreement is right, that that dispute arises from it; whereas, a collateral dispute, like whether or not it might create a

defense, might relate to those agreements, but the dispute does not arise from those agreements.

This is, therefore, a narrow clause, not a broad clause. And I would submit, Your Honor, that an analysis of the claims in our Second Amended Complaint show that they do not arise from this joint development agreement that SCO entered into with SUSE in 2002, but rather they arise from the asset purchase agreement entered into seven years later -- or excuse me -- seven years earlier, in 1995, between SCO and Novell.

And one item of support for that -- not only do our own pleadings say that, but, interestingly, if one were to turn to the other motion that was before the Court today, the motion by Novell for a more definite statement, on page 1 how they characterize this case, they say the following quote: "As the Court is aware, this case arises from an asset purchase agreement entered into on September 19, 1995, between Novell and the Santa Cruise operation," our predecessor in interest, under which we allegedly acquired all rights under the APA through a subsequent acquisition of Santa Cruise's assets.

And we think that's right. The first cause of action we have is a slander of title action that has been pending from the beginning of this case. And it's the

issue of whether we are the owner by virtue of that asset purchase agreement to all UNIX and UnixWare copyrights and whether Novell has slandered our title by -- in various forms, not all related to SUSE Linux activities, but simply going public and saying, no, we don't have those copyrights and other activities spelled out in the Complaint. That does not arise within the scope of the SUSE Linux agreement and, therefore, is not arbitrable.

Similarly, the argument for breach of that agreement, the non-compete provision, which says that Novell should not compete by using the technology which is being licensed under that agreement -- that is Section 1.6 of the asset purchase agreement -- that issue arises from that agreement. It is a question of whether that contract has been broken. Now, maybe there is a defense that Novell wants to argue that under some later agreement that has been changed. And they can raise that on the merits in this Court, but it doesn't mean that our claim for breach of the APA suddenly becomes arbitrable.

There is no arbitration provision in the APA. The parties had an opportunity to agree on how they would resolve disputes arising under that agreement, and they didn't put an arbitration agreement in there. Even Novell agrees, I believe, that the third claim, one for specific performance as an alternative, if these

contracts had not conveyed this intellectual property, in the sense that all the documents were signed, that the transfers effectuated, we are entitled to specific performance of that. Even Novell is not claiming that is arbitrable.

The fourth claim is the one that they focus on, which is added in our Second Amended Complaint, and that is a claim for copyright infringement. But, again, we made our case for copyright infringement by virtue of Novell's distribution and use of technology infringes our copyrights. Whether they have a defense related to the fact -- which we dispute, of course, on the merits -- that SUSE Linux and the United Linux Consortium gained rights to certain intellectual property that Novell can now use, that may be a defense, but it does not make the copyright infringement claim arbitrable.

And the unfair competition claim goes back to a variety of issues, including the effect on our business by Novell publicly saying that we do not own the copyrights which we believe we acquired back in 1995 under the asset purchase agreement.

So, a stay under Section 3 requires arbitrable claims, and it's interesting, Novell has not sought to compel arbitration of these claims. If they really believed these were arbitrable claims, they should have

filed a motion to compel action. Instead, they haven't. And, instead, they have brought their own Counterclaims, seven Counterclaims, which they are curiously silent about what is to happen with those. But those also have invoked the Court's judicial authority.

Now, the second issue --

THE COURT: Maybe they want me to stay your case and let them proceed on the Counterclaim.

MR. SINGER: Well, I can understand why if that was what they intended, they hesitate to articulate that. We think that -- we assume, at least, that when they are calling for a stay, they are not suggesting that it be a one-sided stay.

THE COURT: I assume that's so.

MR. SINGER: But we think that bringing of those Counterclaims is still significant because it is, to use the language of the Courts when they are talking about waiver, the next issue I wanted to address, it is a clear invocation of the judicial machinery to bring Counterclaims. And they brought Counterclaims in 2005, with respect to the first Amended Complaint, to which they did not make any motion to stay back then and to which they believe now that there were arbitrable claims because they believe our slander of title claim, going back to the very beginning of this suit was, according to

their papers, an arbitrable claim.

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

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

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

The second factor is whether the litigation

machinery has been substantially invoked. They have invoked it through their motions to dismiss, requesting a jury trial, filing of pleadings, discovery, all of that.

The third factor is the length of delay. And we cite four cases at pages 13 of our brief which found waiver on seven to ten months of delay, and here you have over two years of delay after the first allegedly arbitrable claim, the slander claim, was brought before they have now brought this motion. They could have filed their own motion to compell arbitration of that either from SUSE Linux or through Novell if they believed they were a third-party beneficiary of those agreements, but they chose not to do so. They waited to see how they would do on two substantive motions to dismiss, and now they have taken this approach.

The fourth issue is the fact that they filed a Counterclaim without seeking a stay. They did that in July of 2005.

The fifth issue is whether or not there's been substantial discovery. They have requested, and we have produced virtually all of the documents we have relevant to this. They have even asked us to agree to use those in the arbitration. And even after filing this motion to stay, they have subpoenaed third parties for discovery. That is trying to have, we suggest, your cake and eat it,

too, to use the discovery tools in Federal Court while, on the other hand, litigating this arbitration.

And the prejudice to SCO is there. We have spent two years litigating these motions. We shouldn't have to wait -- we're the plaintiff here -- to go back to square one to see what's going to happen in a Swiss proceeding.

Your Honor, I would like to briefly deal with our third argument, which is that even if the Court finds there is an arbitrable claim, and even if it finds that that claim -- there has not been a waiver, should the Court exercise its discretion to stay other parts of the case? Clearly, if there is no arbitrable claim at all, as we contend and we have argued, then you don't even have to reach a decision. There is simply no stay.

If the Court were to find, let's say, one claim or two claims were arbitrable, the issue of then staying the case or allowing the case to proceed on the other claims arises. We think this Court should follow Justice White's concurring opinion in the Bird case which says that there is a heavy presumption in these circumstances against the stay. That concurring opinion has been adopted expressly by two U.S. Court of Appeals, the Second and Third Circuit, and a number of District Courts which we cite on page 23 of our brief.

The Tenth Circuit has not expressly addressed whether it's going to adopt that but in both the Coors Beverages vs. Molson case and in the Riley Manufacturing case, it indicated that if the parties intended, by not having an arbitration agreement that covered everything, to litigate in piecemeal fashion, then the Courts need to respect that.

Here you have certainly an agreement in the APA which had no arbitration provision, and then you have the SUSE Linux Company which has an arbitration provision of a narrow scope. It falls within the meaning of those cases. Now, if the Court gets to the issue of, what are the discretionary factors it should look at and whether or not to order a stay, we think those point against a stay. All the arguments I have made with respect to waiver are also arguments against giving a party a stay that has invoked the judicial machinery on all these claims which we've been litigating for the last two years. The Court is familiar with these issues. It would not resolve the whole case.

Even if -- and this is the point of our chart on page 25. Even if the claims in the SUSE arbitration are first of all found to be arbitrable -- and we're challenging that in front of the arbitration panel in Switzerland -- and, second, even if we lost all of those

claims, and, third, even if all those findings by an arbitration panel were given collateral estoppel effect in this Court, which is a real question because that's under Swiss law and there's different issues, even then that would not resolve all the claims in this case; the claims under the APA with respect to slander of title, issues of infringement that deal with the 2.6 version of Linux that is the 2.41 distributed by United Linux, and other issues.

On the other hand, if this suit were to go forward and Novell were to win its contention that we never got any UNIX copyrights to begin with, then that would essentially be the end of the day, and there wouldn't be anything worth arbitrating over in Switzerland.

Now, one final point I would like to make, Your Honor. If the Court is considering a stay of any type, we submit the proper time to consider that would be before trial, which is set in June of 2007, but certainly to allow discovery to proceed on these issues. They have wanted to make use of discovery. There is no reason the case should be slowed down with respect to discovery. Their argument is really a question, we submit, of whether or not that proceeding in deciding certain issues should go ahead of the trial in this case. We disagree

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

Thank you very much.

THE COURT: Thank you, Mr. Singer.

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

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

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

presiding over, but, moreover, we think Section 3 calls for a mandatory stay where they have brought claims that raise arbitrable issues.

There is an interesting question in the case law, even if you're in Section 4 territory, about how you treat affirmative defenses. And we cover that in our brief, but I'd like to flag a passage for you in the Coors case, which is also a Tenth Circuit case, and we are looking for strands of reasoning, Your Honor, because there really aren't crisp holdings on point. This is 51 F.3d 1511. At 1516, the Tenth Circuit is describing the First Circuit's inquiry of the Mitsubishi case which ultimately made it into the Supreme Court.

And without in any way suggesting that the First Circuit had it wrong, it cites the First Circuit as: Quotes, having, quote, phrased its initial inquiry as, internal quotes, whether the factual allegations underlying Solar's Counterclaims and Mitsubishi's bonafide defenses to those Counterclaims are within the scope of the arbitration clause, end internal quote, and end of quote.

So, there's at least a -- something one could cite to say that, in doing this analysis, one looks to the facts that are at issue rather than the form of the pleading, whether it's in the form of their affirmative

pleading or a potential affirmative defense.

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

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

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

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

fact subject to arbitrable -- to arbitral jurisdiction, then you will find out right away because SCO will let you know and we'll be off and running.

You do have broad discretion -- notwithstanding Section 3 and its provisions, you have broad discretion to control your docket, and all the cases say that, and I think we have told you -- both sides have told you what we think you should do in that connection.

But on this waiver issue, I think the statute is pretty clear. Section 3 says that the party moving for the stay cannot be in default under the arbitration. Now, they may argue -- it would be very surprising to me if this argument would have any legs because they trigger the arbitration with their very recent filing. They may try to argue that there is some kind of waiver or default in the arbitration that should somehow be imputed to Novel, but that, too, is an arbitrable issue in the context of this case.

So I think that -- you do, in a way, face a kind of a fork in the road. If you decide that Section 3 and Section 4 have the same analysis, we are not contending that they have pled arbitrable claims. We are not -- we did not petition to compel arbitration. He is absolutely right. And so, if you decide that they are right and we are wrong on this statutory construction

issue, then you would be in the territory of your jurisdiction to control your docket.

THE COURT: Discretionary.

MR. JACOBS: Discretionary. Exactly. If, on the other hand, we are correct that Section 3, in reference to issues, has considerable significance and that the statute was deliberately worded to distinguish between petition to compel claims being arbitrated versus a stay, then I think they just haven't met the force of that argument. They have maybe scored a few hits as to the slander of title claim and our suggestion of overlap there, but nothing that they have said has any bearing whatsoever on the copyright claim and the claims that are derivative of the copyright claim.

There is a priciple -- there is one -- there is a policy point here that's probably important. In a petition to compel arbitration, you're saying to the Court: Send them off for the resolution of their claims to an arbitrable panel -- to an arbitral panel.

And so the Court has to make the gateway determination about arbitrability that the Supreme Court cited in its recent Howsow case, I think it is, where the Supreme Court articulated this gateway principle. Precisely because we are not contending that their claims are arbitrable, but rather only the issues in -- lurking

in their claims are arbitrable, Section -- it makes sense that a motion to stay pending the arbitration would have a different standard because we are not saying that, at the end of the day, they don't get to come back to you and litigate those claims.

We will argue, presumably, depending on how it comes out, that the arbitration is preclusive on certain issues, but their claims are not being sent forever into arbitration, so it makes sense that Section 3 and Section 4 would be worded differently and be interpreted differently.

THE COURT: I think you're talking now about an order of decision question.

MR. JACOBS: I'm sorry?

THE COURT: An order of decision.

MR. JACOBS: Yes.

THE COURT: What makes sense to decide first and what makes sense to decide after.

MR. JACOBS: That's exactly right, Your Honor. We think that -- I guess another way of saying it, then, is that Section 3 proposes or prescribes an order of decision in this context.

THE COURT: Thank you.

MR. JACOBS: Thank you very much.

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

motion under advisement and get a ruling out in due course. We'll be in recess.

(Whereupon the proceedings were concluded.)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, REBECCA JANKE, do hereby certify that I am a Certified Court Reporter for the State of Utah;

That as such Reporter I attended the hearing of the foregoing matter on July 17, 2006, and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting, and the foregoing pages numbered 1 through 30 contain a full, true and correct record of the proceedings transcribed.

That I am not of kin to any of the parties and have no interets in the outcome of the matter;

And hereby set my hand and seal this 16th day of October, 2006.

_____

REBECCA JANKE, CSR, RPR, RMR