

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In the Matter of: : Bankruptcy Action # 07-11337
 : :
THE SCO GROUP, INC., : Wilmington, Delaware
 : June 15, 2009
 : :
 : Debtors. :

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE KEVIN GROSS
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For Debtors:

JAMES E. O'NEILL, ESQ.
Pachulski, Stang, Ziehl & Jones LLP
919 North Market Street
Wilmington, Delaware 19899

ARTHUR J. SPECTOR, ESQ.
Berger Singerman, PA
200 South Biscayne Boulevard
Suite 1000
Miami, Florida 33131

STUART SINGER, ESQ.
THEODORE NORMAN, ESQ.
Boies, Schiller & Flexner
401 East Las Olas Boulevard
Suite 1200
Fort Lauderdale, Fla 33301

For Novell:

ADAM A. LEWIS, ESQ.
Morrison & Foerster
425 Market Street
San Francisco, California 94105

SEAN GREECHER, ESQ.
Young, Conaway, Stargatt & Taylor, LLP
1000 West Street
Wilmington, Delaware 19899

APPEARANCES: (Continued)

For IBM: RICHARD B. LEVIN, ESQ.
Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, New York 10019

For U.S. Trustee: JOSEPH McMAHON, ESQ.
Office of the United States Trustee
844 King Street
Suite 2207
Wilmington, Delaware 19801

Audio Operator: Jennifer Pasierb

Transcribed by: DIANA DOMAN TRANSCRIBING
P.O. Box 129
Gibbsboro, New Jersey 08026-0129
(856) 435-7172
FAX: (856) 435-7124
EMAIL: dianadoman@comcast.net

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1 THE CLERK: Please rise.

2 THE COURT: Good afternoon. Thank you and please be
3 seated. Welcome. Mr. O'Neill, good afternoon.

4 MR. O'NEILL: Your Honor, James O'Neill, Pachulski,
5 Stang, Ziehl & Jones appearing today on behalf of debtors.
6 With me today, as the Court knows, my co-counsel, Mr. Arthur
7 Spector, and also appearing today at counsel table are special
8 counsel in this case, Stuart Singer and Ted Norman from the
9 Boise Schiller firm.

10 THE COURT: Yes. Welcome, gentlemen.

11 MR. O'NEILL: Mr. Singer has appeared before Your
12 Honor before in this case.

13 THE COURT: Yes.

14 MR. O'NEILL: Both of these gentlemen are good
15 members of the bar in good standing, and the Courts where they
16 hail from, Mr. Norman from New York, Mr. Singer is admitted in
17 the Federal Courts in Florida. So we would ask that they be
18 permitted to appear pro hac vice today for today's
19 proceedings.

20 THE COURT: Yes.

21 MR. O'NEILL: We'll follow-up with motions.

22 THE COURT: You certainly are admitted for this
23 hearing, gentlemen, and welcome to you.

24 MR. O'NEILL: Thank you, Your Honor. May I turn the

1 podium over to Mr. Spector, Your Honor.

2 THE COURT: All right. I guess it's not your
3 motion, but you may as well make the introduction.

4 I was thinking, if I may just express it, I see that
5 we have a number of witnesses. And certainly I think the
6 briefs that I've reviewed constitute very ample opening
7 statements, if not more. And I was thinking if it's all right
8 with everyone, we would just proceed right to the testimony.

9 MR. SPECTOR: Your Honor, of course this is your
10 courtroom. We would introduce our worthy adversaries first --

11 THE COURT: Of course.

12 MR. SPECTOR: -- because it is their burden.
13 However, on the point you just raised, there are things that
14 have happened since the response and the reply.

15 THE COURT: Okay.

16 MR. SPECTOR: Things that have happened literally
17 minutes ago.

18 THE COURT: Okay.

19 MR. SPECTOR: This is SCO, Judge.

20 THE COURT: Absolutely.

21 MR. SPECTOR: And I think it would be helpful for
22 you to know what else is out there that you didn't read.

23 THE COURT: I did not mean to foreclose anything
24 such as you're suggesting.

25 MR. SPECTOR: Okay. So I mean normally it's --

1 MR. LEVIN: Your Honor.

2 THE COURT: Mr. Levin.

3 MR. LEVIN: Excuse me for interrupting.

4 THE COURT: Yes.

5 MR. LEVIN: Richard Levin from Cravath, Swain &
6 Moore for IBM.

7 THE COURT: Welcome to you.

8 MR. LEVIN: Good afternoon, Your Honor.

9 THE COURT: Good afternoon.

10 MR. LEVIN: You suggest that we dispense with
11 opening statements. If we are going to do that, and we
12 haven't been heard from that on subject yet, what Mr. Spector
13 was about to propose was an opening statement --

14 THE COURT: Yes.

15 MR. LEVIN: -- on things that were not previously in
16 the papers. If we are going to dispense with them and he has
17 evidence about that, we suggest that he put it on the witness
18 stand. And perhaps we can have a moment to confer on whether
19 -- of course as Mr. Spector said, this is your courtroom and
20 we will follow your dictates. But if you are asking for our
21 view on that, I would like just a moment, Your Honor.

22 MR. SPECTOR: Your Honor, there was a little debate
23 in-house. Whether I just do it in the cross -- in the direct
24 examination of one of our witnesses and say I show you exhibit
25 so and so and then spring it on everybody as a big surprise,

1 or give it in the opening statement so you know what in the
2 opening statement is, Your Honor, you will hear testimony from
3 so and so about so and so.

4 And so, I'm thinking that it's a good idea in this
5 case that we do it that way. That's why I say that.

6 THE COURT: Well, I guess I'll ask our friends for
7 IBM and for Novell and from the United States Trustee's
8 Office, do you want it sprung on you or would you like a
9 little bit of an opening argument?

10 MR. LEVIN: Well, interesting, Your Honor. If we
11 say we want it sprung, then you'll say we can't complain that
12 it was sprung on us.

13 THE COURT: That's right.

14 MR. LEVIN: May we have just a moment to confer?

15 THE COURT: Sure.

16 (Pause)

17 MR. LEVIN: Your Honor, we think it would be
18 appropriate if Mr. Spector were going to produce a document
19 for the witness to authenticate or identify, that we don't
20 need his opening statement, we need to see the document. And
21 perhaps we can look at that before we -- before the witnesses
22 are called.

23 MR. SPECTOR: Not a problem. The document isn't in
24 the courtroom yet. It's still being photocopied, it's
25 enormous, and we're making five copies of it, so we can give

1 three and two to Your Honor. So that's why -- after they look
2 at it they're going to say you dropped this on us now? Well,
3 the truth of the matter is it was just signed as of ten to
4 two.

5 THE COURT: Well, let me make a suggestion, because
6 we shouldn't proceed obviously by confusion. Would you like
7 five or ten minutes to take a look at what it is, and then
8 when I come back, I could come back in and you could at least
9 have a better sense of what position you want to take, Mr.
10 Levin?

11 MR. LEVIN: Yes. Especially since Mr. Spector
12 represents that it's enormous.

13 I was going to say, Your Honor, that -- I appreciate
14 his comment about this being sprung on us at the last moment
15 and a surprise and this is so huge and how can you deal with
16 this. The statute requires the Court to decide this matter
17 within 15 days after the hearing.

18 THE COURT: Yes.

19 MR. LEVIN: You've already given additional time,
20 only three days at SCO's request but some additional time
21 because of the Court's calendar. If this is going to go into
22 a trial about a new document that just was created this
23 afternoon, I don't know how we're going to stay within the 15-
24 day limit, but we'll take a look and let you know what we
25 think.

1 THE COURT: Well, rather than speculate, why don't
2 we -- why don't you share that document and then I will return
3 in five or ten minutes, if that's --

4 MR. LEVIN: We look forward to the sharing.

5 THE COURT: Yes.

6 MR. SPECTOR: Let me just tell Your Honor so you
7 don't have to just listen in on us. This is a purchase and
8 sale agreement that was just executed a few minutes ago. It's
9 in the works forever.

10 THE COURT: Okay.

11 MR. SPECTOR: But everything is now signed, sealed
12 and delivered. All the schedules, all the exhibits, all
13 that's together. It only just happened as I was walking over
14 to Court.

15 THE COURT: All right.

16 MR. SPECTOR: And so I will give this -- this is the
17 only copy in the courtroom. One of the counsel in the back
18 handed it up to me, it's her copy.

19 THE COURT: Oh, fine.

20 MR. SPECTOR: The rest of them are still being
21 marked for exhibits. So I'll give this to Mr. Levin and the
22 rest of them can share it, I guess.

23 THE COURT: Mr. Levin.

24 MR. LEVIN: Well, okay, then we'll need a little
25 more time since there are three parties here, and we have only

1 one copy. When can we expect the other copies to arrive?

2 MR. SPECTOR: Minutes, I mean.

3 THE COURT: In minutes.

4 MR. SPECTOR: Your Honor, I know there's a 15-day
5 limit. We can do this. Now, if they say they're prejudiced
6 by the late delivery, well, so are we. I didn't know I had it
7 or I didn't have it when I prepared this case for trial. So I
8 have two different cases to try today.

9 THE COURT: Right.

10 MR. SPECTOR: So it's tough, this is bankruptcy.
11 Everything is done in an accelerated basis --

12 THE COURT: Understood.

13 MR. SPECTOR: -- and we do the best we can. The
14 suggestion I have is, they can -- we'll put it into evidence
15 through Mr. McBride's testimony, they'll have their copies.
16 If they are not prepared to cross-examine on it, not a
17 problem, we still have 15 days. We can come back on another
18 date to Your Honor's suiting, and they can then do it then. I
19 don't think we should stop the presses for this.

20 THE COURT: No, I understand. And let me ask, how
21 many witnesses on the movant's side will you be presenting?

22 MR. LEVIN: We are relying on the record and the
23 Court, Your Honor.

24 THE COURT: Okay. Yes?

25 MR. SPECTOR: I'll tell you the names, except to the

1 extent of any cross-examination.

2 THE COURT: I have a list, I think it's eight it
3 looks like.

4 MR. SPECTOR: Well, you know better than me. I can
5 tell you the names but I never did count them. Eight might be
6 right.

7 THE COURT: Yes, I have a list of eight. Give me a
8 sense how much time we're talking about for your -- for the
9 presentations.

10 MR. SPECTOR: I think this can be done today.

11 THE COURT: Okay.

12 MR. SPECTOR: Your Honor, I'm not saying by six
13 o'clock.

14 THE COURT: Right.

15 MR. SPECTOR: If you give us some allowances, we
16 might have it done today. If not, one more day.

17 THE COURT: All right, and I know that everyone is
18 here and we would like to finish it today, and I am certainly
19 prepared and willing to exceed our normal time limits so let's
20 see how we do. But I just wanted a general sense.

21 So why don't we give a little bit of time to the
22 movants to review the document. Hopefully additional copies
23 will be here soon enough, and you'll have an opportunity at
24 least to not be surprised.

25 MR. LEVIN: You mean to be less surprised.

1 THE COURT: To be less surprised. Or at least --
2 well, I won't comment any further, but at least, we'll stand
3 in recess then for maybe 10 or 15 minutes, hopefully. Thank
4 you.

5 MR. LEVIN: Thank you, Your Honor.

6 (Off the record at 2:15 p.m.)

7 (On the record at 2:54 p.m.)

8 THE CLERK: Please rise.

9 THE COURT: Thank you, please be seated.

10 Mr. Levin.

11 MR. LEVIN: Your Honor, thank you for accommodating
12 us with a few extra minutes. Now I note it's almost 2:55.
13 We've had about 40 minutes to look at the document.

14 THE COURT: Yes.

15 MR. LEVIN: And it confirmed what we suspected
16 before we took the recess which is, this is too complicated to
17 understand in 40 minutes, or even an hour and 40 minutes.

18 We understand how bankruptcy works. But we also
19 understand how Courts work and how judicial procedures work.

20 I think I speak on behalf of Novell and the U.S.
21 Trustee as well when I say that our proposal, Your Honor, is
22 that we proceed with the motion as it existed when this
23 hearing started, not as it changed after the hearing started.
24 If the debtors wish to bring a motion to approve a bidding
25 procedures and a sale, they are certainly able to do that. But

1 for us to try to get into -- to take a motion on a conversion
2 and convert it into the question of the approval of the sale
3 itself, on the theory -- and the reason I say that is because
4 if SCO proceeds now and says this shouldn't be converted
5 because we have this sale, we've in effect validated the sale
6 or the sale process in the face of a motion to convert. We
7 think that's a bit improper way to bring a sale before this
8 Court.

9 And we would be entitled to notice, in the absence
10 of an extreme emergency, to have a bid procedures motion or a
11 sale hearing on before this Court. This is not the way to do
12 it.

13 We propose that the Court proceed with the motion to
14 dismiss on the record as it existed. We will object to
15 witnesses addressing the sale and the apparent agreement that
16 we have in front of us as irrelevant to that motion and
17 procedurally improper. And we would ask Mr. Spector before we
18 start this hearing in light of that, to describe the topic of
19 each of the eight witnesses, the topic that each of the eight
20 witnesses will speak on. Not to describe their testimony,
21 that's an opening statement and we've already concluded to
22 dispense with opening statements, but we simply don't know who
23 the witnesses are or what the topic is that they'll be talking
24 about. And that's how we would propose to proceed, Your
25 Honor.

1 THE COURT: Thank you, Mr. Levin. Anyone else?

2 MR. LEVIN: Thank you, Your Honor.

3 THE COURT: Yes, Mr. Spector?

4 MR. SPECTOR: Your Honor, let me tell you what we're
5 not asking for. We're not asking for approval of the sale
6 today.

7 THE COURT: Right.

8 MR. SPECTOR: We have to file a motion for that.

9 Before you file a motion, I think the Court
10 encourages us to actually have the sale. We've gone down the
11 route before. So we have the documents that we can really now
12 file a motion for sale.

13 We don't intend to ask for bid procedures. We
14 intend to do a sale to this party without any further ado, and
15 when the sale closes, get out of bankruptcy, pay the creditors
16 in full -- it's part of my opening statement, okay. I'm going
17 to be doing that -- it's like we're talking about talking
18 about it. I'd like to actually say it and not just you know,
19 pretend to say it.

20 We have -- the purpose of this, Judge, is to show
21 one of the many unusual circumstances, many cases, and now I
22 am going into an opening, many cases address if there's a
23 legitimate proposal to pay the creditors in full, that's an
24 unusual circumstance that even if there were cause, would
25 counsel the Court to deny the motion.

1 We have a sale that can close in 30 days. If Your
2 Honor grants a motion for a 363 sale on June 30th, 15 days
3 from now, we have a proposal to close it before July 15th. We
4 will have testimony to show that we won't be losing money in
5 those next 30 days and why. We have backup ideas. There are
6 other -- we have lots of other causes.

7 For example, and I'm doing this without the
8 preparation that I ought to be doing it. We have a
9 stockholder standing up ready to underwrite any losses in the
10 next 30 days, with money. Real money, in case there are
11 losses. In case the deal goes sideways again, which has
12 happened before. But now we have the whole document, the
13 whole deal done, finally.

14 So, we have a case to make, Judge. They may not,
15 but we do. And I object to having somebody asking the Court
16 to say no, you can't present it this way, you have to present
17 it that way. This is a terminal event in the life of these --
18 life of these companies, and the ramifications Your Honor
19 knows about, or at least has some idea about from our
20 response. This is not something we think we should be
21 circumscribed about. We have an opening statement. We didn't
22 agree -- if Your Honor says we don't do it, we don't do it.

23 But we think, because as you have just heard, I've
24 already told you two things you didn't know. That's part of
25 our opening statement. And in the opening statement, I will

1 highlight what it is the witnesses will testify about.

2 One of the things Mr. McBride will testify about,
3 he's one of our witnesses, of course is the sale. He'll tell
4 Your Honor and the parties in interest the highlights, the
5 purpose, the deal -- of the deal.

6 Mr. McBride is also going to testify about the
7 backstop. Mr. McBride will help the Court to understand Mr.
8 Nielsen's testimony which will precede it, about the financial
9 situation of SCO up to now and for the foreseeable next 30
10 days. And he'll -- the two of them will present that case to
11 show why, even if there were losses before, Your Honor can
12 take the risk with us that the creditors will be protected in
13 the next several days.

14 And of course, we're going to ask Mr. Singer in our
15 opening statement -- we're going to ask Your Honor if we can
16 have Mr. Singer reserve his opening statement to the beginning
17 of our defense proofs because we think that makes the most
18 sense. It will be more understandable that way than
19 bifurcating it in the middle of the opening statement that I
20 make.

21 I would like to handle all of the matters that don't
22 involve the litigation. We have somebody who knows it a lot
23 better than I ever could.

24 So we have a game plan for the presentation of our
25 proofs. You've heard the movants say that they don't have any

1 pages. That has to be delivered too as part of the contract.

2 So we'd like to begin, make our opening statement,
3 call our witnesses, do as much as we can today. And inasmuch
4 as it's likely that they'll want to have a chance to review
5 the most important piece of evidence, we come back when Your
6 Honor says we can, within the 15 days. We're not looking for
7 any extraordinary relief.

8 THE COURT: Understood.

9 MR. SPECTOR: Thank you.

10 THE COURT: Mr. Lewis.

11 MR. LEWIS: Thank you, Your Honor.

12 THE COURT: Good afternoon, sir. Welcome back.
13 It's always a pleasure to have you here.

14 MR. LEWIS: Thank you.

15 Your Honor, I want to start with the comment that
16 somehow this being a terminal event is the signal fact.

17 It being a terminal event, if it is, and I don't
18 think it is, we're just talking about conversion to Chapter 7.
19 It's the debtor that wanted to have the case dismissed rather
20 than having it converted to a 7. But just talking about
21 putting this whole process into someone else's hands for
22 awhile.

23 But more importantly than that, Your Honor, the fact
24 that it's allegedly a terminal event doesn't change the Rules
25 of Procedure and the notions of due process and fairness. And

1 this is not the first time in this case, this is not the only
2 time that we've been faced with some last minute thing to beat
3 a deadline that came in after the door had closed and we were
4 trying to deal with it.

5 And the Court may remember another time that
6 happened and we heard from the debtor that "oh, yeah, I guess
7 we're kind of not quite ready yet and let's continue this and
8 we'll come back" and of course then they withdrew it.

9 Now we have this long agreement here, and yes, I
10 suppose we could come back and cross-examine the witness about
11 it. But Your Honor, it's much more effective to be able to
12 cross-examine a witness when he's there, right after he's
13 given his testimony, rather than waiting until a week or two
14 or three weeks later, but we can't possibly cross-examine, for
15 example, a witness on the so-called agreement because we can't
16 possibly understand it in the time we have available today.

17 THE COURT: I appreciate that.

18 MR. LEWIS: And it's just for the debtor to say
19 they're not trying to prejudice us and they admit all that,
20 it's just -- it is prejudicial.

21 And furthermore, in terms of scheduling, Your Honor,
22 this was originally set for the 12th, and the debtor asked to
23 have it continued because someone wasn't available that day.
24 And I advised the debtor in response that I had a very bad
25 schedule the rest of the month but I could do it today. And

1 so we scheduled it for today.

2 Your Honor, I have -- I'm going back tomorrow on
3 this matter one way or another, not today. I'm in
4 Minneapolis, Saint Paul the rest of the week starting
5 Wednesday, I'm in the central valley of California as they
6 knew most of the following week. I'm in Honolulu for
7 depositions the beginning of the following week, so it's like
8 July.

9 And what this all amounts to, Your Honor, is the
10 debtor buying time, which is in its interest because it wants
11 to get to the end of the appeal, because it thinks that that's
12 the end all and be all of this case, and this just works in
13 its favor. It's already had some extra time on this
14 proceeding, and there's no reason why we shouldn't go ahead
15 today on the record that was available by the deadlines.

16 I think the debtor is going to advise the Court that
17 it's withdrawing its motion to file certain IBM documents
18 under seal. I would not have objected on the grounds that IBM
19 was going to object, because I'm not a party to that
20 confidentiality agreement. I was going to object on the
21 grounds that it's too late. We can't keep doing this at the
22 last moment.

23 And I understand bankruptcy, I've been doing it 30
24 years. And I understand there are some, you have to be
25 flexible and somewhat nimble. But this is really taking it to

1 an extreme, and it's not the first time in this case. The
2 debtor has already had accommodations again and again from
3 this Court and from the parties.

4 And I just today we should go ahead on the record
5 which we have. And which was prepared and the parties
6 responded to and came prepared for. We shouldn't be going
7 ahead on a record that no one is prepared for. Except the
8 debtor who's been apparently working on this, maybe we'll find
9 out some day, been working on this a long time and could have
10 done this sooner. No way to test that today.

11 So I ask the Court to proceed with the hearing as
12 originally scheduled on the original record to which parties
13 referred in their papers, and if as counsel for IBM suggested,
14 if they want to do something else in terms of a motion to
15 sell, they're free to do that. Although --

16 THE COURT: But I would have to take that into
17 account. Let's assume that today we close this record, and
18 tomorrow they came in and said Your Honor, we have a totally
19 new development in this case, we have a sale. Wouldn't the
20 Court have to take that into consideration?

21 MR. LEWIS: Your Honor --

22 THE COURT: Reopen this record? So how is that
23 different? How is this different?

24 MR. LEWIS: First of all, Your Honor, there are
25 deadlines the Court has to use in order to render a decision

1 on this matter.

2 THE COURT: Understood.

3 MR. LEWIS: And if we're going to have something on
4 a so-called sale, we should at least have it on some organized
5 basis, not this basis.

6 THE COURT: I agree with that.

7 MR. LEWIS: And the problem there, Your Honor, is my
8 schedule, as the debtor has known since asking me to reset
9 this thing, for the rest of the month is pretty well tied up.
10 And so, we are now in effect giving the debtor an extension
11 because of this last minute development. And there has to be
12 at some point with fairness to the other parties who's also in
13 Court.

14 There's just way much to go into with respect to
15 this so-called sale to make it even rational to try to put on
16 evidence and ask questions about it today. Debtor will get
17 up, we are told, and testify what's in the agreement. That
18 may be the debtor's interpretation of what's in the agreement.
19 There may be other things in the agreement that are equally
20 important to creditors, to my client. How am I going to
21 cross-examine on that, and why should we separate cross-
22 examination from direct testimony where you have a witness
23 who's still up there and doesn't have a whole lot of time as a
24 consequence to prepare his testimony, to fit his testimony
25 when he's finally cross-examined. That's the whole point of a

1 live trial and live cross-examination.

2 THE COURT: Well, it isn't easy for the Court in
3 this certain situation, but I certainly cannot close my eyes
4 to what is potentially, and none of us know really for certain
5 at this moment, I haven't even seen the agreement that you've
6 looked at, what is potentially a very, very significant
7 development in this case.

8 MR. LEWIS: Your Honor, I don't disagree it might be
9 a significant development.

10 THE COURT: And not only a significant development,
11 would have substantial bearing upon a motion to convert. If
12 they have a very solid agreement of sale that is in the best
13 interest of these debtor estates.

14 MR. LEWIS: I guess the problem, Your Honor, is how
15 to fit that opportunity into what's available now and
16 unfortunately, the way things have panned out, as the debtor
17 knows, trying to fit that in on the current schedule is going
18 to be a very, very difficult thing for me, and I've been
19 involved in this case from the beginning for my client. I
20 can't just send someone else to do this.

21 THE COURT: I understand.

22 MR. LEWIS: But, you know, to meet the 15-day
23 requirement for the Court to rule on this matter, I'm not sure
24 what the answer is, except I'm sure that the answer is not to
25 turn this into a mini hearing on the sale motion when nobody

1 could possibly address it in any rational fashion today.

2 I mean, they've just finished it. Now there may
3 other testimony that we could dispense with today, and we'll
4 see about that, but I guess that's my concern, is it's just
5 really unfair. And this thing may turn out to be a complete
6 nothing of a sale. It may or may not be, I don't know. I
7 can't say that it is. I haven't really had a chance to study
8 it in any useful fashion.

9 THE COURT: Mr. Levin.

10 MR. LEVIN: Just to amplify on Mr. Lewis's points,
11 Your Honor.

12 Two things. Number one, we haven't learned much
13 about this agreement in the hour that we had or the 40 minutes
14 we had to look at it. But the one thing that we have learned
15 is that it's signed by Stephen Norris of Stephen Norris
16 Capital Partners.

17 That deal has been before this Court for 15 or 16
18 months. This is not something that just arose last week, and
19 all of a sudden it came up, it's a last minute development.
20 Those negotiations have been going on or off, I don't know, we
21 have no idea, for at least 16 months. This Court has
22 deadlines. The local rules have deadlines.

23 Had the debtor decided well, we're not going to file
24 our opposition by the June 5th, which was the deadline, we're
25 going to wait until June 12th to file our opposition, just

1 because, well, we couldn't quite get it ready. We've been
2 working on it and working on it but we couldn't quite get it
3 ready. At some point, this Court says there's a deadline, and
4 you must meet the deadlines.

5 I understand the inclination of a Bankruptcy Court
6 to take any last minute information into account. This is a
7 dynamic process. As Mr. Lewis said, I've been doing this for
8 a long time, and I understand it's a dynamic process, and
9 things change. But at some point, especially with somebody
10 who's been at the table for 16 months, this Court can and
11 should enforce deadlines. And this is past the deadline.

12 We think it should proceed as the record was set.

13 THE COURT: Well, let me make a suggestion, because
14 what I've got before me right now is in effect a motion -- an
15 evidentiary motion. And what I would like to do is to hear
16 evidence concerning the concerns that Mr. Levin has raised;
17 why it has now come -- why we have an agreement as of today.

18 MR. SPECTOR: That's part of the presentation I will
19 make, Your Honor.

20 THE COURT: Without the substance. But I think as a
21 preliminary matter, I would like to know where -- you know,
22 what the negotiations have been, why we are here today instead
23 of six months ago, you know, evidence to that effect. And
24 then, on that record, subject to cross-examination, not on the
25 merits, not on the substance, because I appreciate that the

1 movants have difficulty cross-examining on the merits of this
2 agreement, but I would just like to know, whether or not I
3 should in fact adjourn this hearing to take into consideration
4 the agreement of sale.

5 MR. SPECTOR: Your Honor, we do not request an
6 adjournment to the hearing.

7 THE COURT: I understand.

8 MR. SPECTOR: And I am sorry about the situation
9 we've put Mr. Lewis in. This is not the way I wanted to do it
10 either.

11 But, and this is -- I knew Mr. Lewis had a problem
12 this week. I didn't realize he was tied up for the whole
13 month. And maybe if he told me that, it didn't register. And
14 I wasn't planning on having to say they'll need more time. I
15 was planning to have this to them a few days ago.

16 But, we have no problem making the record Your Honor
17 asked for. It is part of our presentation of Mr. McBride's
18 testimony. And we also have the lawyers who negotiated this,
19 hundreds of thousands of dollars of legal fees just in the
20 last month probably, to get the very difficult issues
21 resolved.

22 Your Honor has appreciation of how difficult some of
23 these legal issues are, when we still don't have the clarity
24 of the Tenth Circuit ruling.

25 So, yes, we can make that record. But in the

1 interest of everybody's time, I would suggest that Your Honor
2 take the record in the ordinary manner and take it under
3 advisement that you can, if Your Honor thinks that there's
4 some reason why it shouldn't come in, this is a trial to a
5 Court, you can take that into account when you make your
6 ruling at the end.

7 But I think it's going to be very awkward to say
8 okay, we're going to have a record, we didn't prepare a record
9 for the lawyers to come and testify. I was out of the
10 picture, I can't even make a proffer of what all went on. My
11 head was on doing this.

12 So I think the easiest way to do that is to let Mr.
13 McBride tell you the highlights. I can in opening tell you
14 the highlights so you'll know what they know. It's just
15 service level of course. But Mr. McBride is prepared to
16 testify. And when asked, I can say well, isn't this the same
17 Mr. Norris. Well, yes, it is but it isn't really Mr. Norris
18 who we were negotiating with at the end, it was a different
19 cast of characters. These questions are valid questions, but
20 there are answers. And I shouldn't be getting up here trying
21 to tell you about them, I wasn't personally involved with
22 those.

23 So, again, I suggest, let's get to it. Let's, like
24 Nike says, just do it. Let's call our witnesses. Let them
25 make their case. I appreciate the difficulty with Mr. Lewis.

1 I don't know, I don't have a solution for that. All I can
2 suggest is -- and we are not looking to extend the time. We
3 can put -- if we started it on time, if we had this two days,
4 we could have possibly gotten this whole case in tonight. Not
5 now. It doesn't look like we'll have enough time now.

6 But, it is in their hands. If they want to
7 accommodate Mr. Lewis, and I'm not asking for this, I have a
8 vacation planned also after that, but you know, I'll make
9 accommodations -- oh, I take that back, my vacation is in
10 August. July is open. So if they can't -- if we can't get
11 that 15 days in because Mr. Lewis has a difficult schedule,
12 it's in their hands, I don't have a problem going to July 1st,
13 July 2nd, July 7th, July, whenever it is that suits the
14 Court's calendar.

15 But, Your Honor is exactly right when you say this
16 is crucial. This is how we satisfy the Court that it should
17 not convert the case. That and a couple of other bells and
18 whistles of importance, but by no means there's anything as
19 nearly as important as the fact that we're going to get, and
20 this is in manner of opening statement, 2.4 million dollars.
21 The claims, you'll hear, are a million dollars or less.

22 What we plan to do with Your Honor's blessing, close
23 the sale, dismiss the case, pay the creditors in full, get no
24 discharge of any Novell claim. We have a bond set aside to
25 fully pay Novell. We're wondering if they may have missed

1 that. They should be in favor of that. We have a bond set
2 aside as part of this deal to pay Novell in full. IBM, we'll
3 meet them in Court, no discharge, get out of bankruptcy with a
4 dismissal, pay the creditors upon exit and go on our merry
5 way.

6 That is an elegant end to this case. All of that
7 depends upon doing what we propose. So again, in the nature
8 of opening, that's what our proposal would be.

9 THE COURT: All right.

10 MR. LEVIN: Your Honor, I'm not going to argue the
11 substance, as my learned colleague did. I want to just kind
12 of put a procedural framework about what the Court suggested.
13 And that is, as I hear the Court, you're saying we should
14 treat this as the debtor's motion for leave to file a late
15 opposition.

16 THE COURT: Or newly discovered evidence or however
17 we want to frame it, yes. That's really what I think, that's
18 where I think we are.

19 Now, it may make the order a little more unusual,
20 less workable, but I think that's -- that is how I would like
21 to proceed. I'd like to know why I should consider this
22 agreement of sale.

23 MR. LEVIN: And Your Honor, as I understand -- let
24 me go back to what I suggested a moment ago, and then what
25 you're going to consider.

1 But I suggested I think what fits with what the
2 Court has proposed is that, that the new evidence might be a
3 grounds for allowing them to file a late opposition. And
4 that's what they're going to show.

5 But, what I think I hear the Court saying is the
6 evidence in support of that motion to file a late opposition
7 is not going to go to the substance of why it's good evidence,
8 why it's a good deal or why it should be pursued, but rather
9 why it took them so long.

10 THE COURT: That's correct. But I want you all to
11 know that the practical result of my finding that they should
12 have leave to file this, and for the Court to consider this
13 would be either we proceed today on the merits --

14 MR. LEVIN: Yes.

15 THE COURT: -- or we adjourn.

16 MR. LEVIN: We understand that, Your Honor. But
17 we're first going to take whether they should be allowed to
18 file this late document.

19 THE COURT: Yes.

20 MR. LEVIN: Thank you, Your Honor.

21 THE COURT: I think that's the way we have to
22 proceed under these circumstances. And I do understand --
23 again, I'm very sensitive not only to a debtor being able to
24 maintain its case, but as well to what's in the best interest
25 of the creditors of these estates, of this estate, and that

1 may very well mean the sale.

2 So, but in the first instance, I need to know why I
3 should be considering the evidence.

4 MR. SPECTOR: So, Your Honor, you're asking me to
5 make a separate record or --

6 THE COURT: Yes.

7 MR. SPECTOR: -- to begin with an opening and call
8 my first witness and --

9 THE COURT: I think to make a separate record here
10 on the permissibility of my considering your evidence.

11 MR. SPECTOR: Well, that case, I will make my off
12 the cuff perfunctory opening on that point and then call a
13 witness.

14 THE COURT: All right.

15 MR. SPECTOR: The evidence will show, through Mr.
16 McBride and perhaps others, that after the debtor filed its
17 plan in January, 2009, that provided for a 363 sale of parts
18 of the business, and as a second alternative, a standalone
19 plan if the price was not sufficient to cover what we needed
20 to cover, that Mr. McBride received phone calls from a number
21 of different sources saying don't do that, fall in with us,
22 we'd like to be your sponsor, we'd like to buy the property
23 itself.

24 One of those calls was from the aforesaid Mr.
25 Norris, and frankly we had other calls. I think York also

1 called again, and others. And so talks started again. And
2 rather than proceed with a 363 sale, they warmed up those
3 ashes to see what they could do.

4 Skipping ahead to the current. In the meantime,
5 other parties in interest contacted the debtor for various and
6 sundry deals. As of the day I wrote this response, Your
7 Honor, we had four deals on the table that I didn't know which
8 one to address in my response. It was literally a horse race,
9 and we jokingly considered whose nose, who's in front and
10 who's catching up and so forth.

11 We had our deal team at Berger Singerman working on
12 four deals at one time. And Mr. McBride, who I was not
13 intending to ask about this, but given the new subject matter
14 I will have to go into this, we devoted a large part of our
15 time to other suitors that were until very recently out in
16 front. And we only -- and until we signed this deal, I had no
17 expectation for sure that we were going to get a GCP deal.

18 Mr. McBride will testify similarly. There were --
19 they were going back and forth while I was working on my
20 opening statement today, Mr. Caplan was in Pachulski's office,
21 sending drafts back and forth to the Bryan Cave folks for GCP,
22 Gulf Capital Partners, which is the investment banker for the
23 deal for the buyers.

24 And I've got to say, I was almost shocked when I got
25 the phone call walking over here that the deal was actually

1 signed.

2 So that's the very high viewpoint. If you're going
3 to want more details on that, I'm going to put Mr. McBride on
4 the stand --

5 THE COURT: Yes.

6 MR. SPECTOR: I may have to put Mr. Caplan, our deal
7 partner on the stand. They may even wind up calling Bryan
8 Cave's counsel who are here, because that's just that deal.
9 Mr. Caplan could tell you about all the other deals he was
10 working on, he and Dan Lampert of our office were working on.

11 And so it was unbelievably stressful and hectic, and
12 we didn't know what deal we were going to bring to this Court
13 or if any. But that's my proffer of my opening statement.
14 And with that I'll call Mr. McBride, who's my first witness.

15 THE COURT: Very well. Thank you, Mr. Spector.

16 Mr. McBride, good afternoon. If you'll remain
17 standing while you're sworn, sir.

18 DARL McBRIDE, SWORN

19 THE CLERK: State your full name and spell your last
20 name for the record.

21 THE WITNESS: Darl Charles McBride, last name is M-
22 C, capital B-R-I-D-E.

23 THE CLERK: Please be seated.

24 THE COURT: You may proceed whenever you're ready.

25 DIRECT EXAMINATION

1 BY MR. SPECTOR:

2 Q Your name, please for the record.

3 A Darl Charles McBride.

4 Q Thank you. I forgot, she already got that.

5 MR. SPECTOR: May I dispense with the pedigree for
6 this part of it?

7 THE COURT: Yes.

8 MR. SPECTOR: Thank you.

9 THE COURT: We had that on the record I think
10 previously.

11 MR. SPECTOR: I was going to do it in my regular,
12 but I'll pass on that.

13 THE COURT: All right.

14 BY MR. SPECTOR:

15 Q Mr. McBride, you've been in Court, you've heard what the
16 subject matter of this part of the trial is about?

17 A Yes.

18 Q Okay. Basically why is it that we showed up literally at
19 the last second with a contract of this sort? Right, that's
20 the issue?

21 A Right.

22 Q Please explain to the Court when -- oh, all right, we'll
23 do it the easy way.

24 Can you tell the Court why it took this long to get this
25 deal here now?

1 A Well, there are a lot of circumstances. If you want to
2 talk to the very beginning of when the case was filed or --

3 Q Answer it any way you choose.

4 A Okay.

5 MR. LEVIN: Objection, Your Honor. That last
6 comment from Mr. Spector confirmed what we feared over here.
7 This calls for a very long narrative. Counsel should ask
8 questions.

9 THE COURT: All right. I'll sustain that.

10 BY MR. SPECTOR:

11 Q When did you first meet Mr. Norris?

12 A I first met Mr. Norris about a year and a half ago?

13 Q What was the subject matter of that meeting?

14 A The subject matter was discussion about investing in our
15 company, SCO.

16 Q Okay. And tell us what those negotiations were about at
17 the first stage.

18 A The first stage, Mr. Norris represented that he had a
19 group of investors from the Middle East that were prepared to
20 come in and invest in our company.

21 Q How long did those talks last before we finally put
22 something before the Court, if you can remember?

23 A We were talking for, I would say several weeks before we
24 filed something with this Court.

25 MR. SPECTOR: Your Honor, I don't know if you want

1 me to go into what that deal was. It's all on the record.

2 THE COURT: It's not necessary.

3 MR. SPECTOR: Okay.

4 BY MR. SPECTOR:

5 Q Eventually, what happened with that proposal?

6 A Eventually the legal team from the Middle East investment
7 group that was doing due diligence had problems with the sale
8 -- or I'm sorry, the ruling that had come out of the Utah
9 courtroom which had been the reason that the York deal
10 previous to the Norris deal had not gone through and --

11 Q The ruling of 2007 you're speaking of?

12 A Correct, August of 2007.

13 Q They were unable to get their arms around this deal, was
14 that a problem?

15 A It was like how do you buy a house when you can't figure
16 out if you have the title to it here.

17 Q All right. Then skipping forward then to the end of
18 December of '08, January, beginning of January '09, do you
19 remember authorizing me to file a plan on behalf of the
20 companies?

21 A Yes.

22 Q All right. Can you describe that plan for the Court?

23 A Yes.

24 Q Just summarize it.

25 A The summary of that plan was that we would have a 363

1 asset sale of our products businesses, and we would either
2 come back to the Court with a conclusion to that sale, or in
3 the alternative, we would come back and say we were going to
4 revamp the company down into a smaller non-product development
5 kind of company that would be profitable.

6 MR. SPECTOR: Your Honor, it's just occurred to me,
7 talking about people's schedules.

8 I haven't spoken to Mr. Caplan about this
9 eventuality. But, I may want to ask Mr. McBride to step down
10 and get Mr. Caplan. He has to -- he has an uncle who died in
11 Philadelphia, and he's got to go to a Shiva, he's got to leave
12 at 4:30. So if I'm going to ask him any questions, it just
13 occurs to me it's almost 3:30 now. I'd like to put him on so
14 he can be gone before.

15 THE COURT: All right.

16 MR. SPECTOR: Okay? Is that a problem for anybody?

17 MR. LEVIN: Excuse me, Your Honor, what is the topic
18 of his testimony?

19 THE COURT: He will -- go on, I'm sorry.

20 MR. SPECTOR: The topic of his testimony is why it
21 took so long, and what the issues were that took us to this
22 very minute to get the deal done.

23 THE COURT: Yes.

24 MR. LEVIN: No objection, Your Honor.

25 THE COURT: I certainly understand that.

1 MR. SPECTOR: Step down, please.

2 I call Franklin Caplan to the stand.

3 THE COURT: Mr. Caplan, if you will just step in the
4 box. May we waive the swearing of an attorney, or would you
5 like him sworn?

6 MR. LEVIN: He's an attorney, Your Honor?

7 THE COURT: Yes.

8 MR. LEVIN: I think that's appropriate.

9 THE COURT: To waive? Okay. You may just be
10 seated. Thank you, Mr. Caplan, I lost an uncle myself and I
11 rushed down to a funeral today and rushed back, so I certainly
12 sympathize with you.

13 MR. CAPLAN: I wonder if we're related, Your Honor.

14 THE COURT: I don't know. Pineland, New Jersey, of
15 all places.

16 MR. CAPLAN: Different uncle.

17 FRANKLIN CAPLAN, NOT SWORN

18 DIRECT EXAMINATION

19 BY MR. SPECTOR:

20 Q Frank, would you please state your name and occupation
21 for the record?

22 A Franklin Caplan, I'm an attorney.

23 Q You were present during the colloquy with the Court and
24 counsel regarding the purpose of this testimony?

25 A Yes.

1 Q Okay. Can you explain -- when did you first come into
2 the picture with respect to dealing with Mr. Norris or his
3 various interests relative to SCO?

4 A On one prior occasion prior to this transaction, roughly
5 the beginning I believe of 2009, I'm not certain, 2008, I'm
6 not certain about the date, it was quite awhile ago. And it
7 pertained to a deal that didn't occur.

8 Q Did you partake in the negotiations and drafting of the
9 deal that's before the Court now?

10 A Yes.

11 Q Tell the Court what difficulties you encountered in
12 getting this deal done.

13 A I became involved in this episode approximately between
14 three and four weeks ago. At that time, I came in to assist
15 another colleague of mine who was projecting to go on a
16 holiday. The timing within which we were thinking that this
17 deal had a chance to be reduced to a contract overlapped with
18 his vacation plan. So I became involved, and jumped into a
19 deal that had moved to a fairly evolved state but which was
20 substantially affected by, I wouldn't say so much disagreement
21 about, but the need to explain precisely what it was that was
22 being sold, what it was that was not being sold, and how
23 within the realm of assets not being sold, intellectual
24 property that supported the litigation that's been I'm sure
25 discussed in these proceedings from the beginning could

1 proceed. Such that SCO, in prosecuting those cases, wouldn't
2 be compromised in its standing and would have the full array
3 of rights that it intended to argue about in that proceeding.

4 Q And so that issue about how SCO can sell intellectual
5 property and retain sufficient rights in that property to
6 maintain lawsuits against IBM, Novell and perhaps others was
7 the sticking point?

8 A That was the major sticking point.

9 On top of that, the predictable array of buttoning up
10 points to make a document internally consistent took some
11 time, but that was the sticking point.

12 Q Well, did the bucket of assets change at any time during
13 your negotiation and drafting of this deal?

14 A The bucket of assets changed materially and frequently
15 during our drafting of this deal. In one respect, pertaining
16 to certain products that might or might not be included in the
17 sale, but more importantly, and more difficult to manage from
18 the draftsman's perspective, what exactly SCO needed to retain
19 so as to be able to maintain the standing and prosecute the
20 litigation.

21 Q Were there any other issues of difficulty that you had to
22 get around?

23 A There were conforming representations and warranties -- I
24 view that and suggest that one should view that in the context
25 of just making the document work.

1 But I think it's fair to say, and it would be accurate,
2 that all of those, I'll call them housekeeping issues
3 pertaining to this purchase and sale agreement, revolved
4 mostly and materially around the issue of the retained
5 litigation rights.

6 Q Other than the commonality of Mr. Norris and SCO, were
7 these the same cast of characters that were purchasing, that
8 you were dealing with the year before?

9 A No. The principal businessman who I'd spoken to on the
10 telephone once I believe but only met by email otherwise, is
11 not someone that I met previously.

12 Q Are you familiar with -- strike that.

13 Where is this person that you are referring to located?

14 A London.

15 Q So the principal of the buying group then is in London,
16 and Mr. Norris is not part of that buying group, he's part of
17 the -- well, let me strike that.

18 What is Mr. Norris's role?

19 A I'm not certain. Mr. Norris signed the document today.
20 I met Mr. Norris for the first time this afternoon. I've not
21 been aware of Mr. Norris weighing in on any of the
22 negotiations, although I believe he was copied on emails.

23 Q When did you first actually have a law firm to deal with
24 on the other side of the deal?

25 A I believe I met Mr. Pearce who's in the courtroom from

1 Bryan Cave probably -- well, again, between three and a half
2 weeks ago or a month ago.

3 Q And before that there were no lawyers for the buyers, is
4 that right?

5 A That's correct. At least to my knowledge.

6 Q So did this new group of individuals behind the buying --
7 behind the purchaser I should say, did they engage in new due
8 diligence or use the old due diligence or was it a
9 combination?

10 A I believe it was a combination although I wasn't
11 primarily involved with the due diligence. There were a great
12 many, very elaborate disclosure schedules that had been
13 developed from the York deal that were delivered to Bryan
14 Cave's team and were updated and swapped out as information
15 changed.

16 Q How about schedules to this deal? How difficult was it
17 to put together schedules for this deal?

18 A I perceived the scheduling was extremely difficult,
19 although I wasn't working on it directly.

20 Q Did you have help on that?

21 A Yes. We had a team at our law firm, Bryan Cave had an
22 extensive team of people, and SCO group had an entire team
23 dedicated only to responding to scheduling questions and
24 missing information and the like.

25 Q What were you doing about noon today?

1 A I was in the Pachulski conference room in Wilmington. I
2 drove here this morning from Philadelphia, to hopefully close
3 or sign rather, finalize and sign on this purchase agreement.

4 At around noon today, I was engaged in electronic
5 communication with Bryan Cave, a team of lawyers, exchanging
6 comments, principally on the subject of the, what we call the
7 retained litigation rights.

8 While that was occurring, there was shifting of
9 disclosure information from one schedule to another, to
10 describe assets that were to be sold as opposed to assets that
11 were to be retained.

12 Q What were you doing at one o'clock this afternoon?

13 A At one o'clock this afternoon, I was taking an Advil. I
14 was emailing with I think increasing interest Bryan Cave as to
15 whether we were actually going to see a contract. We were
16 aware of the Court start time of two o'clock today. We were
17 aware of the need to read it once it was delivered. And at
18 about one o'clock today it hadn't yet come, so we were anxious
19 about that.

20 Q When did you finally see the contract?

21 A I think the contract hit at about 1:15. It might have
22 been 1:10 or approximately. We received a black line. It was
23 not black lined against a draft that we had circulated as a
24 suggestion draft last evening. So it took a few minutes to
25 create that opportunity to read what Bryan Cave was coming

1 back to by way of final proposals against that which we had
2 suggested last evening.

3 At about 1:30 we had finished that review, and about
4 quarter to two we decided we were ready to sign.

5 Q Where did you do the signing?

6 A The signing took place in the lobby at the Hotel Dupont.

7 Q Around quarter to two or ten to two or something?

8 A It finished at about two o'clock.

9 Q Two o'clock.

10 A I went back to Pachulski to create duplicate sets of the
11 original document. I didn't pause to make photocopies because
12 I believed the Court hearing was going to commence at two
13 o'clock.

14 Q Now let's go back now. And three and a half weeks ago
15 when you came in to help out, and I think the partner's name
16 you helped was Dan Lampert, right?

17 A That's correct.

18 Q Were there any --

19 MR. LEVIN: Dan?

20 MR. SPECTOR: Dan Lampert.

21 THE COURT: He's been here before.

22 Q Were there any other deals that you were working on while
23 you were working on this Gulf Coast Partners deal?

24 A Yes.

25 Q Tell the Court about those deals.

1 A There were three other deals. One deal involved a plan
2 sponsor whose name was LSC Holdings, I believe. That deal was
3 proceeding -- it accelerated shortly after this deal, the deal
4 that's presented today, became rather fast and furious. As it
5 accelerated, it became apparent that what it was looking like
6 was a plan and a DIP loan. I believe it was -- the
7 negotiations were between five and six and a half million
8 dollars of DIP loan and a plan that would result in the
9 acquisition of a range of equity in SCO post-confirmation,
10 post-bankruptcy I guess.

11 Q Was there a time that it was the belief of the Berger,
12 Singerman and SCO team that that was the leading horse in the
13 race for the deal?

14 A Yeah, it was about a week, it was about a week's time,
15 five day, maybe into Saturday of the week before last, that
16 that deal received the bulk of our attention.

17 Q Now tell the Court about the other deals that we were
18 working on.

19 A At the same time, there was a third deal that was
20 proposed by a gentleman named Hank Beinstein. This deal
21 involved a subscription for warrants in SCO and a funding into
22 SCO of approximately -- to be determined but the range was I
23 think between two and a half million dollars and up.

24 And the consideration for that, in addition to warrants,
25 would be a share of litigation proceeds if there are any.

1 Q By the way, who was your counterpart on the DIP loan plan
2 sponsor deal, who were the attorneys on the other side of
3 that?

4 A The attorneys were Proskauer, Rose; the lead lawyer in
5 the deal was Peter, and I'm afraid I can't pronounce his --

6 Q I'll help you. Was it Antoszyk?

7 A That's it.

8 Q A-N-T-O-S-Z-Y-K?

9 A That's right.

10 Q Okay.

11 A We spent -- the same time we were working on this deal
12 with the Bryan Cave attorneys, we were working, at various
13 times more, probably never less, simultaneously with the
14 Proskauer lawyers.

15 Q Did the Hank deal have any face-to-face meetings between
16 the parties, to your knowledge?

17 A I believe the parties -- I believe the principals met on
18 at least three occasions that I'm aware of.

19 Q Weren't they in New York over this past weekend maybe?

20 A I don't know that. I was on the telephone myself with
21 Mr. Beinstein this weekend.

22 Q So as of this weekend, that deal was still very much
23 alive?

24 A My Saturday morning was spent on that deal.

25 Q Saturday morning was on the Hank deal?

1 A Yes.

2 Q Tell the judge about the fourth deal.

3 A The fourth deal was a bit of a hybrid. It involved the
4 investment on the part of one of the directors of SCO, of new
5 monies. It asked for a simultaneous commitment on the part of
6 other directors, shareholders for others who might be
7 interested in making a commitment to invest a sum of money,
8 the sum of which was minimum a million dollars.

9 The consideration for that investment or those
10 investments would be the issuance of warrants; again, with
11 conversion rights similar to the Hank deal that would depend
12 on various factors. And also, a share of the litigation
13 proceeds if there were any.

14 Q With whom did you work on the other side trying to
15 document that deal?

16 A I confess, a lack of memory. It was happening
17 simultaneously.

18 Q Well, let me ask you if this, if I got the right person.
19 Was it David Marx?

20 A David Marx was assisting -- my view of David Marx is that
21 he was assisting me in identifying corporate formality needs
22 that SCO would need to accomplish, to put SCO in a position to
23 do the deal. David Marx is a lawyer at Dorsey.

24 Q When were you last in conversation with him on the fourth
25 deal?

1 A Saturday.

2 Q So all of these deals were alive as of this weekend?

3 A As of this weekend, my personal psychology was that it
4 was more likely that we were going to perform either the Hank
5 deal or the so-called Ralph deal, the fourth deal, or a
6 combination of the two of them.

7 It was yesterday around 11 o'clock in the morning when I
8 realized that we were gonna be working on this deal.

9 Q Was my analogy in my opening statement about the horse
10 race, is that something that was actually used?

11 A Well, yes, but it came about on Belmont Saturday so I
12 wouldn't take too much credit for it.

13 Q All right, so this Saturday was June 13th. Our response
14 deadline was, I'll submit to the Court is June 5th. So would
15 it have been possible -- this is a rhetorical question -- for
16 us to have highlighted in our response that we had a deal with
17 Gulf Capital Partners on June 5th?

18 A Not in my opinion.

19 Q Okay.

20 MR. SPECTOR: That's all I have for the witness.

21 Thank you.

22 THE COURT: All right.

23 MR. SPECTOR: By the way, one more -- like Columbo,
24 one more question.

25 BY MR. SPECTOR:

1 Q When was the last time you were in a courtroom?

2 A I guess this morning, in speaking to some of the Bryan
3 Cave attorneys that it was 1987.

4 Q Okay, thank you.

5 THE COURT: Thank you, Mr. Spector.

6 MR. LEVIN: Your Honor, since this is unplanned
7 testimony, and unplanned cross-examination --

8 THE COURT: Yes.

9 MR. LEVIN: -- it would be helpful to know from Mr.
10 Spector which other witnesses he will have on this narrow
11 issue, other than Mr. McBride of course. We know that.

12 MR. SPECTOR: Depending on how it goes, I may be
13 calling someone from Bryan Cave. I don't even know the names
14 of the people. They're in the courtroom, and I may want to
15 call them to get the other side of the deal, but I'm reserving
16 on that. I'm just giving the best I can tell you right now.

17 THE COURT: All right. Go ahead.

18 MR. SPECTOR: One more. Mr. Tibbitts reminds me
19 that there were people in our shop doing massive due diligence
20 all this time, and we may be calling Bill Broderick to testify
21 about that, and we'll see. I hadn't considered it because I
22 hadn't considered this whole thing yet.

23 CROSS-EXAMINATION

24 BY MR. LEWIS:

25 Q Good afternoon.

1 A Good afternoon, sir.

2 Q How are you?

3 A Fine, thank you.

4 Q Good. I am Adam Lewis. I represent Novell in this
5 matter. I just have a very few questions for you.

6 You gave some testimony about how you were dealing with
7 someone in London. Do you recall that testimony?

8 A Yes, sir.

9 Q Do you know who is affiliated with that person in London?

10 A Who is?

11 Q Who is affiliated with that person in London?

12 A You know, I'd be -- I don't. I know his name is Eric le
13 Blan. I don't know anything about him really.

14 Q And so you don't know whether -- who else might have been
15 behind whatever group he might be representing or anything
16 like that?

17 A I've assumed that Mr. Norris was.

18 Q But you don't know?

19 A I don't know how they're related in business or
20 otherwise. It never really came up.

21 Q Okay. Now the bucket of assets and transfer of the
22 litigation issue that you testified to as being really the --
23 the key issue I think you said in terms of the negotiations;
24 is that a fair statement?

25 A Yes.

1 Q Had that issue ever come up before for SCO in prior
2 contemplated transactions?

3 A Insofar as I've been involved, my major involvement was
4 in the York, attempted York deal from, I think it was
5 Christmas '07 approximately. And I don't -- the litigation
6 was important but the parsing of holding back intellectual
7 property insofar as I can remember was much less important
8 than was -- there was a certain class of mobility products
9 that was not to be sold, and trying to describe that so it was
10 clear what was and what wasn't being conveyed was more at
11 issue in York.

12 Q But it was an issue with York as well, whether larger or
13 smaller?

14 A It was relevant. I don't actually recall -- I don't
15 recall that anything like the type of negotiation that we went
16 through with respect to this deal was pertinent to that York
17 transaction.

18 Q And in the prior SNCP deal, the Stephen Norris, the plan
19 that was filed I think in the spring of last year, do you
20 recall whether that issue came up in that?

21 A I had very little involvement with that. I read a term
22 sheet and I didn't participate further.

23 Q When you decided to sign the agreement today, were you
24 satisfied that the agreement was in final form?

25 A Yes.

1 Q You don't anticipate any amendments, changes, cleanups,
2 fixes, issues that might have been overlooked?

3 A It's conceivable that a type of product that is intended
4 not to be sold -- this is not pertinent to the litigation
5 issues -- that a type of product that was not to be sold was
6 accurately reflected as excluded in one place but not another
7 place.

8 My clients are aware of that. I believe the Bryan Cave
9 team is aware of that. And the decision was there was no time
10 to fix it, but there was an understanding that this Me Inc.
11 class of assets is not to be sold.

12 Q Do you believe that there may be other issues that will
13 need some cleanup later on because of the rushed nature of the
14 negotiations?

15 A I'm not aware of any.

16 Q Do you think there might be, given your experience in
17 trying to document deals?

18 A I mean just in general, this type of work, this was an
19 extraordinarily fast process on a complicated document. At
20 the same time, we collaborated very well, especially yesterday
21 and this morning. It's possible, it wouldn't shock anybody
22 who's ever been around a transaction, but as I sit here, I
23 think we did a pretty good job in getting this right.

24 Q I have no further questions. Thank you, sir.

25 THE COURT: Thank you, Mr. Lewis. Anyone else? Mr.

1 Levin?

2 MR. LEVIN: Thank you, Your Honor.

3 CROSS-EXAMINATION

4 BY MR. LEVIN:

5 Q Good afternoon, Mr. Caplan. My name is Richard Levin, I
6 represent IBM.

7 A Good afternoon.

8 Q First, condolences on your loss. I'm sorry you have to
9 be here under these circumstances.

10 A Thank you.

11 Q I apologize if I didn't hear earlier, but what law firm
12 are you with?

13 A Berger, Singerman.

14 Q You are with Berger. You said that Mr. Lambert --
15 Lampert was handling the deal before you got involved?

16 A Yes.

17 Q Do you know how long he had been working at it?

18 A Not specifically. I believe that Dan is generally the
19 principal lawyer on our transactional team that's involved
20 with SCO. So, I'm surmising that whenever this latest round
21 of possible transactions occurred, he would have been involved
22 at the beginning.

23 Q But you don't know when that was?

24 A I don't.

25 Q What is your specialty?

1 A Business transactions, real estate transactions.

2 Q Real estate primarily?

3 A 50/50.

4 Q What is the other 50?

5 A Corporate and business transactions.

6 Q No particular focuses on IP?

7 A No.

8 Q Does Mr. Lampert focus on IP?

9 A No. Both of us have probably similar level of experience
10 with IP in the sense of deal lawyers who get involved in deals
11 that involve IP, but he and I, I think have both been
12 practicing around the same time, which is about 23 years. And
13 in that time, we confront copyrights and trademarks
14 occasionally. I've never been around a patent, and wouldn't
15 know what it looked like. But I have, I think a working
16 knowledge of copyrights and trademarks and intellectual
17 property issues.

18 Q You testified earlier that there was extensive discussion
19 on the -- on getting the assets in form, if I can say this
20 right, what SCO needed to maintain its ability to continue to
21 prosecute the litigation, approximately your words. How did
22 that issue come up? Rather than just we're transferring all
23 the rights to you.

24 A The deal structure, if I could put it in that term, was
25 to sell the business quote unquote, possibly with some hold

1 backs of certain types of products. The one that I mentioned
2 earlier, Me Inc. was an example of that carve-out.

3 But in any event, whatever the carve-out, to really
4 carve-out the litigation and whatever proceeds were derived
5 from being successful with the litigation. And that involved
6 considerations of standing and considerations of what happens
7 if they're successful and prosecuting claims that derive from
8 that success, and trying to describe all that was what I was
9 trying to allude to is that most difficult issue in terms of
10 documentation and structure.

11 Q And of course Mr. Lambert had been -- Lampert, I
12 apologize for mispronouncing his name continually, let me try
13 that again -- Mr. Lampert had been involved in that very issue
14 before you got involved, right?

15 A I don't know for sure. Let me -- someone will correct me
16 if I'm wrong on this point.

17 I believe the first draft of the asset purchase
18 agreement, the evolution of which is presented today, didn't
19 have this issue articulated in any way. I think this came
20 about in discussing you know, how this deal was actually going
21 to work and taking what struck me as not a generic asset
22 purchase agreement, certainly SCO tailored, but one that
23 didn't really drill down in any kind of precise way this
24 distinction between selling what I called the business a
25 moment ago, and retaining the litigation.

1 I think that altogether arose and happened on my watch.
2 Now when I say my watch, my colleague, Dan and others were
3 involved in this negotiation and the documentation as well.

4 Q You said you took it over from him about four weeks ago
5 when he was going on vacation. Has he come back from vacation
6 yet?

7 A He's back from vacation.

8 Q How long was his vacation?

9 A Six days, I believe. Six bloody days.

10 We worked together during I think two weeks before he
11 left. This was more about ramping up and being fluent on what
12 was supposed to be happening. He was around for -- if I was
13 involved in it a month, I would say he was around for all but
14 six days.

15 Q And did the Berger, Singerman legal team believe that
16 this issue about what you characterized as standing was
17 critically important to be able to maintain the litigation
18 pending in Utah?

19 A I used the word standing. I'm not sure that SCO and the
20 litigation team put it in quite precisely the same way. It
21 was a convenient way for me to describe what I was trying to
22 preserve.

23 Personally I think probably standing in the precise
24 technical sense of what that means is affected by this, but I
25 used that more as a convenient expression than as a litigation

1 necessity or strategy.

2 Q Let me phrase this in a more general term. Did you --
3 did the Berger, Singerman legal team believe that this issue
4 of the ability of SCO to continue to prosecute the litigation,
5 describing it in the particular way that you did in the asset
6 purchase agreement, was critical to SCO's ability to continue
7 to process -- prosecute the litigation?

8 MR. SPECTOR: I'm going to object. He's asking the
9 Berger, Singerman team. I think he's qualified to answer what
10 he believed but not as a team. There were multiple people on
11 that team.

12 BY MR. LEVIN:

13 Q Then I'll ask the same question with what you -- with
14 respect to what you believe, Mr. Caplan.

15 A Yeah. I believed and believe that it was important to be
16 able to maintain the litigation and to be successful at it,
17 that we describe this thing that I'm trying to articulate
18 correctly.

19 Q You mentioned the initial draft of the purchase
20 agreement. When was that initial draft?

21 A It preceded -- there was a draft that I inherited on a
22 particular Sunday, whenever it was, I'll say a month ago
23 roughly, and I believe that it came out of our office. And
24 when I received it, it was accompanied by a revision draft
25 that was prepared by Bryan Cave.

1 So my first review was to compare what Bryan Cave had
2 done to our starting document.

3 Q You've described three other deals. Do you know when
4 those deals -- when discussion over those deals began?

5 A With respect to what I call the Ralph deal, deal number
6 four, roughly two and a half weeks ago.

7 With respect to what I called the Hank deal, deal number
8 three, roughly the same time.

9 And with respect to the Proskauer deal, LSC, a little bit
10 prior to the time of the other two, possibly the prior week.

11 I think it's likely that I became aware of those deals
12 approximately when they first arose because we were so active
13 during that time and trying to figure out what we were going
14 to be doing.

15 Q And you also testified that you got a revised document at
16 1:15 this afternoon?

17 A 1:10, 1:15.

18 Q And that you were able to review all those revisions and
19 come to a decision within 15 to 20 minutes, you and the
20 client?

21 A I think we came to a decision at the hotel, so I'm
22 thinking that it was probably close to two o'clock. I came to
23 the hotel last because I stayed to print the document out, and
24 I think that others were reading it while I was reading it
25 too, and I had a conversation with our clients at the hotel,

1 and that was the point in time that we decided to go with it.

2 Q So it's fair to say that you accepted all of the
3 revisions that Bryan Cave proposed at that point?

4 A We talked about one possible alternative wording on a
5 point, and decided not to press the issue. And that was it.

6 Q Thank you, Mr. Caplan.

7 MR. LEVIN: I have no further questions, Your Honor.

8 THE COURT: Thank you, Mr. Levin. Mr. McMahon?

9 MR. McMAHON: Nothing, Your Honor.

10 THE COURT: No questions, all right, sir. Anything
11 further?

12 MR. SPECTOR: No. Thank you very much, Frank.

13 THE WITNESS: Thank you. Thank you, Your Honor.

14 THE COURT: You may step down and you are excused.

15 THE WITNESS: Thank you, sir.

16 THE COURT: Back to Mr. McBride?

17 MR. SPECTOR: If I might have a minute to find out
18 who here is from Bryan Cave and whether they have anything to
19 add.

20 THE COURT: Absolutely.

21 MR. SPECTOR: Thank you.

22

23 MR. LEVIN: Your Honor, while that's going on, may
24 we take a very short recess?

25 THE COURT: Of course we may, at anyone's request.

1 Five to ten minutes.

2 (Off the record at 4:03 p.m.)

3 (On the record at 4:16 p.m.)

4 THE CLERK: Please rise.

5 THE COURT: Thank you, everyone. Please be seated.

6 MR. SPECTOR: Your Honor, we'll recall Mr. McBride
7 for the rest of his testimony.

8 THE COURT: Thank you. Mr. McBride, you've already
9 been sworn. You may just resume.

10 DARL McBRIDE, PREVIOUSLY SWORN

11 DIRECT EXAMINATION

12 BY MR. SPECTOR:

13 Q Mr. McBride, was there any significant change in the
14 landscape between when the York deal was being negotiated and
15 the first SNCP deal was negotiating on the -- being negotiated
16 on the one hand versus when you were dealing with Gulf Capital
17 Partners now, any significant change in the legal landscape?

18 A Yes, there was a significant change.

19 Q What was that?

20 A In the summer of 2008, we had a bench trial in the Utah
21 case regarding the 40 million dollar judgment that we had
22 hanging over our heads when we first showed up in this
23 courtroom. And during that bench trial, that amount was
24 reduced from nearly 40 million down to two and a half million
25 dollars plus interest.

1 Q Besides the judgment amount, were there any intellectual
2 property issues that made things easier or harder in your
3 negotiations the second time around?

4 A Yes, there were a couple of things that helped in that
5 regard.

6 First of all, Judge Kimball recognized the sale of the
7 UNIX business, that it was proper for us to be selling the
8 UNIX products.

9 Secondly, he recognized that post-1996 development work
10 that had gone on, those copyrights did belong to SCO.

11 And the general validation -- then there was the
12 recognition that we were able to do our SCO source licensing,
13 which was an important piece of our litigation recovery.

14 And then finally, he gave a general blessing of the fact
15 that we did have the rights to run the UNIX business -- maybe
16 that's back to point one.

17 Q So did that make it any different when you went to
18 negotiate the deal the second time around with Mr. Norris and
19 his different cast of characters?

20 A Yes. As we went into -- I wouldn't call them cast of
21 characters, because they're actually a pretty solid investment
22 firm, but the group that we're working with, going back to
23 Steve and his group on the second round, were -- let's say
24 that it opened the door that had previously been shut by the
25 other ruling.

1 Q We -- where we stopped, we were asking what happened
2 after you put up for public notice the sale of the assets
3 through the 363 process, and the potential standalone plan in
4 the beginning of 2009.

5 A Right.

6 Q And you said you started getting -- maybe you didn't get
7 this testimony. Did you say whether you got interest from
8 people to not do a 363 sale and do a stand -- do a separate
9 deal with these people?

10 A We did receive interest. When we published in early
11 January that we were going to go out and do a sale, we did get
12 approached by various parties to try and consummate some kind
13 of a plan more than a deal.

14 Q I recognize that we weren't prepared for this, and your
15 memory may not be a hundred percent, but can you tell the
16 Court who, in addition to Mr. Norris which we know about, who
17 else contacted you to do a deal?

18 A Yes. There was a group out of Los Angeles, Platinum
19 Equity, buys a lot of software companies, they were a
20 contender. We received a call from Charles Hale from the York
21 deal, who was the principal involved in the early York deal.
22 He came back and we spent, I would say a good 60 days
23 negotiating with him.

24 THE COURT: What time period are you in?

25 THE WITNESS: This is the February through April

1 time frame.

2 A Now, we -- during this period of time, importantly, Steve
3 Norris and his partners had come forward with a new investment
4 group that was London based. Eric le Blan who works with
5 Basil Al-Rahim out of London and runs an investment group
6 called MerchantBridge International, came forward, and this
7 was the second investment group who worked with Steve.

8 And from the period of early 2009 up until current day,
9 they have put a substantial amount of energy into due
10 diligence, into going through and drafting documents, getting
11 attorneys involved to get us to a point where we are right
12 now.

13 Q Talking about getting attorneys involved, was that an
14 easy thing to do?

15 A No. Actually it was a process just to get attorneys
16 involved. One of the problems we have in our cases, and we've
17 seen it not just in this case but in various ones, is other
18 law firms typically get conflicted out because our arch enemy
19 as it were, IBM, seems to have a lot of relationships with
20 attorneys.

21 And so, we went through a series of attorneys where they
22 would get engaged -- I think the first one was Latham &
23 Watkins, and they were ready to go and then they got
24 conflicted out. And there was -- I think there was another
25 group along the way there.

1 But eventually we did get an attorney group here. So
2 that also caused some of the delay from the Norris team's
3 standpoint.

4 Q Was there any purpose on SCO's part to delay getting this
5 deal done?

6 A Our goal from the beginning has never been to delay; it's
7 been to try and get things accelerated, to get things finished
8 and completed.

9 Q How hard has SCO been working to put a deal together
10 finally?

11 A Well, I've done 35 deals, let's say in my career, and
12 this is by far been the hardest one. It's been the smallest
13 one and it's been the hardest one, which is a little bit
14 weird.

15 The problem point always keeps coming down to this ruling
16 of what do we own and what do we not own. And it's compounded
17 in the deal we're talking about with MerchantBridge
18 International and with Gulf Capital Partners because we're
19 talking about taking what's already a rough foundation of a
20 house if you will, and talking about splitting that up. You
21 know, how do we -- and so the general deal with Gulf Capital
22 Partners is the UNIX business that we've been in this
23 courtroom many months now talking about how critical the
24 customers are, the core operating systems they run are, how do
25 we take our customers, our partners, our products, our

1 resellers, that whole ecosystem of UNIX and hand it off to
2 somebody that will take that forward.

3 And an important part of the Gulf Capital Partners deal
4 isn't just the money we get in going forward, but they're
5 committed to fund it going forward, that they will take it and
6 move it forward.

7 Now, that's not our concern from here forward once the
8 deal is done.

9 Q Whose benefit would that be?

10 A Well, that would be to the benefit of our customers, and
11 employees and partners and resellers, many of whom are in the
12 room here today.

13 So that was -- one of the things that we tried to do from
14 the beginning of these cases is to, to not prejudice our key
15 partners, whether it was --

16 THE COURT: Whose phone is that?

17 Q That was your phone.

18 A That was mine. Sorry about that. That was weird. I
19 just leaned up against it and it hit a speed dial. I'm going
20 to take that out. That's dangerous. Sorry about that, Your
21 Honor.

22 We've been trying to get a deal that takes care --
23 doesn't prejudice employees, does not prejudice customers, but
24 at the same time we respect that we may owe Novell some money.
25 Originally it was we thought we owed them 40 million, now it's

1 down to two and a half, and that may be zero before the summer
2 is over. But if we owe them money, then we're committed to
3 pay them and this deal accounts for that.

4 We're committed to taking care of employees, taking care
5 of customers, creditors, and also shareholders are an
6 important piece of the pie.

7 Q And so I guess your answer to my question were you trying
8 to slow things down, your answer to that is?

9 A No. We were trying to get it done. I guess the whole
10 point of that diatribe was to let you know that we're doing
11 something that's very complicated. And the whole idea of
12 splitting this up and taking care of this group of people over
13 here and getting a contract that works for MerchantBridge and
14 Gulf Capital Partners and still works for the estate has not
15 been a short cut.

16 Q When did you get the board's approval to sign a deal with
17 Gulf Capital Partners?

18 A That came about just a couple of days ago.

19 Q That was after the response deadline, wasn't it?

20 A Yes.

21 Q And when I was preparing the response on behalf of your
22 company, did I know -- did you know what deal, if any, we
23 would have to present to the Court today?

24 A No. And I know that there was one point in time you
25 mentioned to me that your -- you were dizzy, which I think

1 related to the deals but I'm not sure.

2 MR. SPECTOR: That's all I have for this witness on
3 this topic.

4 THE COURT: Thank you.

5 MR. SPECTOR: You don't get to leave.

6 THE WITNESS: Can I make more one comment? I guess
7 not.

8 MR. SPECTOR: No, you don't get to leave.

9 THE COURT: No, you're about to be cross-examined.

10 MR. LEWIS: Your Honor, Mr. Levin, who tried to
11 recruit me many years ago as I was coming out of law school --

12 MR. LEVIN: Darn, missed that one.

13 MR. LEWIS: -- always sends me up first.

14 THE COURT: I see.

15 CROSS-EXAMINATION

16 BY MR. LEWIS:

17 Q Mr. McBride, do you recall a hearing in this Court,
18 sometime a year ago this past spring in which SCO wanted to
19 assume its -- a lease with its landlord, do you recall that
20 hearing?

21 A Generally, yes. I don't remember the details but I
22 remember the point in time, yes.

23 Q Right. You remember the event?

24 A Yes.

25 Q And do you recall testifying at that hearing?

1 A I don't remember. I know I've been up here a time or two
2 but I don't remember exactly.

3 Q Do you recall testimony in which you were explaining that
4 SCO had left off trying to find a transaction for awhile and
5 had just resumed its efforts and that explained why the case
6 had gotten so far without any resolution, and that now you
7 were starting to work again with SNCP. Do you remember that
8 testimony at all, a year ago last spring?

9 A I don't remember what I testified at that time.

10 Q Okay. Is it true that at some point in the perhaps early
11 spring of last year, SCO stopped trying to find a deal for
12 awhile?

13 A I would say that we -- there was a period of time where
14 after the original SNCP deal did not, so we tried the York
15 deal, we tried SNCP. As I recall at the end of the SNCP deal,
16 there was a lot of discussion about let's just see what
17 happens in this trial because if we owe 40 million dollars,
18 that's one cap we'll need to solve, if it's less than that,
19 then that's a different one. So there was probably that
20 period of time where we took a breather.

21 Q Isn't it also true that you resumed your efforts before
22 the trial results?

23 A I know that -- I've been for the last year and a half
24 practically nonstop in trying to get a deal in place. I know
25 that during that period of time there hasn't been a month go

1 by that I haven't had some discussion with Steve Norris or
2 other potential partners.

3 Q Do you recall a hearing at which the SNCP deal of last
4 spring, a year ago last spring was on the calendar, do you
5 recall that hearing? The SNCP plan?

6 Again, I'm not asking for -- please remember that --

7 A I remember that --

8 Q -- a year ago last April there was a hearing on the SNCP
9 plan.

10 A Yes. Yes.

11 Q Do you recall that at that time the debtor elected to not
12 go forward with that plan that day, do you recall that?

13 A Yes.

14 Q And do you recall that your counsel explained to the
15 Court that the reason that it happened was that SNCP had
16 wanted to restructure the deal, that you -- that SCO and SNCP
17 had begun to consider a different way to do the same deal?

18 A Yes.

19 Q Okay. Now, has the question of how to handle the
20 existing litigation in terms of what rights could or could not
21 be transferred come up before the negotiations in this deal
22 that you signed today?

23 A I'm sorry, could you repeat that?

24 Q You heard Mr. Caplan's testimony?

25 A Yes.

1 Q And in his testimony, Mr. Caplan indicated that it was
2 crucial to be sure that the debtor kept certain assets --

3 A Right.

4 Q -- because of concerns about being able to prosecute the
5 litigation. Do you recall that?

6 A Yes.

7 Q Had that issue come up ever before in the year and some
8 odd almost 20 months that SCO has been in bankruptcy?

9 A Yes.

10 Q When did it first come up?

11 A It first came up as an issue in the York deal. I think
12 Frank was accurate in his assessment. It wasn't as prominent
13 as it is now, but it was -- I think what happened in the York
14 deal was when the ruling came from this Court that it was hard
15 to move forward with the current ruling, that made it
16 difficult.

17 And then at various steps along the way there were
18 discussions of that issue.

19 Q And did it come up in the SNCP transaction of a year ago
20 last April?

21 A I don't remember, I don't recall specifically on that.

22 Q What to do with those assets, you were going to hold onto
23 the litigation --

24 A Yes.

25 Q -- in that deal, is that right?

1 A Yes.

2 Q Just as you are, I think from what we can see in your
3 current plan?

4 A One of the differential -- yes.

5 It was with a different group of people that we were
6 talking then than we are now though.

7 Q I understand. I'm focusing on the issue, not the people.

8 A Okay.

9 Q Now, in June of last year there was a hearing, do you
10 recall on the debtor's motion for an extension of an
11 exclusivity, do you recall that hearing generally?

12 A I don't remember specifics. I've been here a few times.
13 I don't remember what that one was. I remember --

14 Q Do you recall in connection with that motion the debtor -
15 - I think this is the third motion to extend exclusivity -- I
16 can't remember, I think it was, but it was in I think of June
17 of last year. And the debtor was arguing that the trial had
18 just taken place in the District Court of the balance of the
19 issues and really the debtor needs to know what the outcome of
20 the trial was before it could proceed. Do you recall that?

21 A Yes, I do remember that now.

22 Q And do you recall then in connection with the motion in
23 September of last year to extend exclusivity yet again, the
24 debtor argued that it really needed to get the appeal on file
25 before people would be willing to consider some kind of

1 transaction for the resolution of this case; do you recall
2 that?

3 A I remember the hearing and generally talking. I don't
4 remember specifically what my testimony was at that point.

5 Q Do you recall the argument though?

6 A Yes.

7 Q And do you recall that that was the debtor's position in
8 part, was that it needed to get -- that people who might be
9 interested in the debtor needed to know the appeal was on file
10 before they would come out of the woodwork; do you recall
11 that?

12 A I think that was an issue.

13 Q You mentioned your board approval as being within the
14 last couple of days?

15 A Yes.

16 Q Do you recall when the board was asked to consider the
17 transaction?

18 A Over the last few weeks we briefed the board continually
19 on this horse race that we've been in with the various horses
20 on the track.

21 Q Could you have submitted the transaction to the board
22 before the last couple of days?

23 A We did submit to them in substance. We submitted to them
24 generally what we were talking about. But again, they were
25 one of three other horses that we were evaluating.

1 Q So the board chose not to act on that for awhile, is that
2 right?

3 A We didn't have -- we had a material change in the Gulf
4 Capital Partners deal that came up this last week, at the end
5 of last week which was they posted a deposit of \$250,000. And
6 so that was a material change that came up just last week.

7 Q But no one knew that was going to come up before it did,
8 is that right?

9 A No. One of the -- no, that's correct.

10 Q Okay. So the board might have acted before that
11 happened?

12 A Well, they didn't have anything to act on before that. I
13 mean you can only act on something if the other side's ready
14 to sign a deal, which we didn't have.

15 Q Was the other side ready to sign the deal two days ago?

16 A They were ready pending some changes that we wanted to
17 make. Before it was changes they wanted to make.

18 Q I think I have no further questions. Thank you.

19 A Okay.

20 THE COURT: Mr. Levin.

21 MR. LEVIN: Thank you, Your Honor.

22 CROSS-EXAMINATION

23 BY MR. LEVIN:

24 Q Good afternoon, Mr. McBride.

25 A Hello, Mr. Levin.

1 Q I want to make sure I understood what your testimony was
2 earlier when you first were on the stand and now.

3 You said that the Middle Eastern legal team that Stephen
4 Norris Capital Partners was representing in early 2008 had
5 problems with the litigation in Utah Court and that was one of
6 the reasons they withdrew their offer?

7 A Correct.

8 Q And also that York had withdrawn for the same reason?

9 A Correct.

10 Q And you said that Mr. Norris came forward with a new
11 investor group early in 2009, early this year, is that
12 correct?

13 A Yes. I actually first met them in the latter part of
14 2008 but they became seriously engaged in the early part of
15 this year.

16 Q And from then until now they've put a substantial amount
17 of time into this transaction?

18 A Yes.

19 Q You also said that the board approval came a few days
20 ago, is that right?

21 A Yes, that's correct.

22 Q So the board hasn't approved the final agreement that Mr.
23 Caplan was describing there were still ongoing negotiations in
24 even as late as this afternoon, is that right?

25 A No, it's not right.

1 Q The board approved the agreement this afternoon or a few
2 days ago?

3 A They approved it a few days ago.

4 Q But they didn't --

5 A They approved us to sign off what was within the realm of
6 what we signed off on.

7 Q But they didn't approve this particular --

8 A Yes, they did.

9 Q I'm not sure --

10 A What happens with the board is they give you latitude to
11 sign within a certain range of things. And if you get the
12 deal there --

13 Q I didn't ask you --

14 A -- then you sign and that's what we got to.

15 Q I didn't ask whether this agreement was within the
16 latitude of what the board gave you. I asked whether the
17 board approved this particular agreement.

18 A Yes, they did.

19 Q This particular one that didn't exist when they had the
20 board meeting?

21 A They approved this deal.

22 MR. SPECTOR: Objection. I think they're
23 argumentative. I think the facts are on the record and we can
24 just make our own conclusions from it. I object.

25 MR. LEVIN: I'll withdraw the question, Your Honor.

1 THE COURT: All right.

2 BY MR. LEVIN:

3 Q You also testified, I think you said that the ruling from
4 this Court, I guess although you didn't date it but I recall
5 it was in November of 2007, made it hard to move forward with
6 the York deal?

7 A I don't remember the time frame. It was sometime between
8 -- well, it was sometime in that general time range.

9 Q But did I get it right that you said that the ruling from
10 this Court made it hard to move forward with the York deal?

11 MR. SPECTOR: Your Honor, my recollection is
12 different. The record --

13 MR. LEVIN: I'm asking the witness to confirm what I
14 thought I wrote down and heard during the testimony.

15 THE COURT: Overruled.

16 A I recall that the York principal, Charlie Hale came back
17 to me and there was a writing that came from this Court. I
18 don't remember exactly when it came from, but I believe Your
19 Honor made a written statement that you weren't -- didn't
20 understand yourself how a deal could get done when so many
21 issues were in issue in the District Court out in Utah. And
22 that's the statement that I was referring to, that came up in
23 the York deal.

24 That was the statement that made it difficult for them to
25 complete a deal with us.

1 Q Thank you, Mr. McBride.

2 MR. LEVIN: Your Honor, I have no further questions.

3 THE COURT: All right. Anything further?

4 MR. SPECTOR: I have no redirect, Your Honor.

5 THE COURT: All right. Mr. McBride, you may step
6 down.

7 (Pause)

8 MR. SPECTOR: Your Honor, I think we have other
9 witnesses but I don't want to belabor -- I don't think we wish
10 to call any more witnesses on this point.

11 THE COURT: On this point?

12 MR. SPECTOR: Yes.

13 THE COURT: I think they're resting on the issue of
14 the introduction of the agreement of sale into the record.

15 MR. LEVIN: Your Honor, as you can imagine, we would
16 not have any witnesses on that motion.

17 THE COURT: Understood.

18 MR. LEVIN: And since it is their motion to excuse a
19 late filing, I believe Mr. Spector would have the honor of
20 arguing the motion.

21 THE COURT: All right.

22 MR. SPECTOR: Not until he tells me he doesn't have
23 any witnesses. Then I can argue.

24 THE COURT: Of course.

25 MR. SPECTOR: All right, so now that the record I

1 guess is closed evidentiary --

2 THE COURT: Yes.

3 MR. LEVIN: You know, Your Honor, there is a
4 complete record in this Court of all the proceedings over the
5 last 21 months. We are assuming that that is part of the
6 record on what we're proceeding.

7 THE COURT: Of course.

8 MR. LEVIN: Thank you.

9 MR. SPECTOR: And I wouldn't assume otherwise. The
10 Court can always take notice of what occurred in its own
11 Court.

12 THE COURT: Absolutely.

13 MR. SPECTOR: But having said that, you know, when
14 you're on the bench, things come before, but you can
15 appreciate, you see a slice of the case. You don't see how
16 the sausage is made.

17 This is the first time I believe that I can recall
18 anyway, that we've actually showed how the sausage was made.
19 And it's not a pretty sight in any case, and it wasn't pretty
20 in this case. All the different chefs and all the different
21 ingredients that were going in, we had -- well, I don't have
22 to make a dramatic or poetic explanation about it. Your Honor
23 heard the testimony, I'm not going to reiterate it. We didn't
24 know -- we didn't know until this Court commenced today that
25 we had a deal.

1 It's not like we've been sandbagging. We've been
2 working our rear ends off for a long time. Even if Mr. Norris
3 was a principal a year and a half ago, things happened in that
4 time. Different people came to the table than the original
5 ones. The Court ruled in Utah that the 40 million dollars that
6 we were looking at is now two and a half plus interest. The
7 Court ruled that we owned the business we thought we owned,
8 with of course there are other issues that are still before
9 the Tenth Circuit, but we still did have a business to sell.

10 We had people coming to us as recently as this
11 weekend who were better situated to take this deal -- not this
12 deal, a different deal, than the folks who came to the table
13 today.

14 I don't know what else we could have done. We could
15 have -- we could have sprung it in the middle of Mr. McBride's
16 testimony. You know, that's one way we could have done it.
17 We could have said all right, Mr. McBride, have you got
18 anything interesting to say that happened today on the way to
19 Court. Oh, yeah, we signed a deal. I didn't think -- the
20 only other alternative to that was to do what we just did.
21 And I apologize. It's not the way I want to do it, and I
22 don't think anybody wants to do it that way.

23 But the fact of the matter, the evidence is plain.
24 You heard Mr. Caplan testify about what was going on. If you
25 want to call it newly discovered evidence, I'm not really sure

1 that's the appropriate, it's really newly discovered facts,
2 events, they were evolving.

3 And I think Your Honor hit the nail on the head
4 before. If we were halfway through a trial and something
5 happened, that was material, that would change it, you
6 wouldn't say I'm sorry, you didn't tell us about it two weeks
7 ago.

8 Life doesn't play that way. You have to take what
9 comes. And this is what came. And it's material. A material
10 issue for the life of this case, and which way the Court will
11 go.

12 There's no sandbagging, there's no gamesmanship.
13 It's unfortunate that it came as late as it did. If I had my
14 druthers, we would have had it in time for me to write about
15 it in response. That was one of the deadlines that was called
16 a soft deadline by everybody. I wanted to be able to say it
17 in the response. Here's an unusual circumstance. We've got a
18 buyer who's going to pay two and a half times the amount of
19 debt, and will do it now, before you could ever get it done
20 with a Chapter 7 trustee and a 341 and a due diligence the
21 trustee has to do and starting all over. We've got the deal
22 done.

23 If we're worried about creditors in the case, we've
24 got them covered. Novell is covered, they've got a judgment,
25 Novell is covered. I'm sorry if I'm deviating into the merits

1 of the deal but I'll cut it off pretty soon. The creditors
2 and Novell are covered. Everybody else under our scheme as I
3 suggested earlier will be taken care; that is IBM, Red Hat,
4 we'll deal with them in Court, there will be no discharge
5 and we'll be on our way.

6 I don't see why that isn't an acceptable deal to
7 everybody in the courtroom, number one. And number two, I
8 don't see why we should be faulted for bringing this to Your
9 Honor when we did. We couldn't have done it any sooner.

10 THE COURT: Thank you, Mr. Spector.

11 Oh, Mr. Lewis, I see you've drawn the straw again.

12 MR. LEVIN: Your Honor, Mr. Lewis does such a much
13 better job that I wanted him to go first this time.

14 THE COURT: All right.

15 MR. LEWIS: Your Honor, you're clearly on Mr.
16 Levin's side.

17 Your Honor, if you look at the picture here, not
18 just sort of the little bit of testimony you got today, what
19 you see, but certainly some of the testimony you got today was
20 important, what you see is a debtor that has not been able to
21 produce anything, struggles to produce something at the very
22 last moment, counsel apologizes that he doesn't like to do
23 things this way, and I'm sure he doesn't, but you know, Your
24 Honor, that's been the rule in this case, not the exception.
25 That's happened every time.

1 We saw this with the York deal. It wasn't complete
2 and counsel was up here saying gee, Your Honor, you know, it's
3 not the way I would do it but you know, it's the best we could
4 do. SNCP plan, the same thing. And now we're hearing it
5 again. And we're not even able to evaluate it like we did
6 with the SNCP or York deals because we don't have those papers
7 in front of us in a timely fashion.

8 And so, I would -- although I recall, it was in one
9 of those two, the papers were being brought as we spoke, as
10 has happened again this morning.

11 So I think you have to look at this in the big
12 picture, both in terms of the procedure in this that we've
13 lived with in this case. And also you have to look at it in
14 terms of the debtor's opportunity and what the debtor explains
15 was the problem.

16 We've heard one reason after another why the debtor
17 couldn't get something together. Needed the ruling in the
18 District Court. Needed the appeal to be on file. And
19 everybody would be come flooding out of the woodwork. Well,
20 that didn't happen, on any occasion.

21 And what you see today is apparently, if you look at
22 the timing, these deals all of a sudden started coming out of
23 the woodwork about the time the motions to convert got filed,
24 which is more than a coincidence, I suspect.

25 And what was the debtor doing in all this other time

1 that it was telling this Court that it was going to have a
2 deal? It told this Court that in June for the extension,
3 asked for that; it told this Court in September for the
4 extension and asked for it then; gave the Court reasons why
5 there was just one more little thing that had to be done and
6 everything would be on the table.

7 And now we have a sale agreement which counsel
8 represents does this, that and the other thing. Of course
9 we're not in a position to assess that today, because we don't
10 really know what's in it. We don't know what the terms and
11 conditions are. We don't know what the outs are.

12 I recall with the SNCP deal, what we were able to
13 look at was, the questions were more of what doesn't it do, or
14 what are the king's x's than anything else. Maybe this has it
15 and maybe it doesn't, but once again, we're in a position
16 where, because of the way this case has proceeded, not on
17 occasion, but essentially as a matter of course, we're in
18 another position where we are being blind sided at the last
19 moment because the debtor wasn't doing its job, and only
20 really started pressing, and other people only really started
21 responding when the motions to convert were filed. That's
22 what it looks like to me, if you look at the timing. It's
23 uncanny.

24 And so, -- and in terms of the effect of all of
25 this, an unspoken premise of this whole dispute is well, if

1 the Court grants the motion to convert today, this all
2 disappears. We don't know that.

3 Once again, I want to emphasize, we didn't ask to
4 have this case dismissed. We simply have asked to have it
5 transferred to the judgment of a neutral who could consider
6 what to do in a more thoughtful fashion than we think has been
7 the case here, and who could at least shut down the monies --
8 losing operations in the business, we're told well, Novell's
9 covered because there's something in this deal. Well, if the
10 deal doesn't happen and we go on for another couple of months
11 or weeks -- one of the things I did see in this sale agreement
12 is the closing is 90 days, or longer if they want to extend.
13 And of course, we don't know what the outs are.

14 So, how are we covered? We're only covered because
15 the debtor wants you to conclude that what it says about the
16 deal is not only in the deal, but the deal will close. Those
17 two things are certainly not obvious today, when this Court
18 has to rule, or in the next 15 days when this Court has to
19 rule on the motions to convert. And I want to emphasize
20 again, we're not talking about a dismissal of this case.
21 We're talking about putting a neutral in charge who will be
22 able to make some considered judgments that we think the
23 record in this case -- and I want to go back to the motions to
24 convert and the whole record in the case, we think the debtor
25 has demonstrated it lacks. And it has always sort of waited

1 for the perfect opportunity to come along. And then when
2 somehow the opportunity doesn't come along, they file
3 something at the last moment and ask the Court for some
4 accommodation.

5 Well, I would ask the Court to look at the record in
6 this case, look at the facts, not the sort of semi-opinion
7 testimony we heard here. If you look at the facts, there's no
8 certainty this deal is really the deal. Mr. Caplan admitted
9 this was rushed, there might be changes. I'll bet we're going
10 to start hearing about all kinds of things that the sort of
11 whoops's and gee, we don't like to do it this way but we were
12 so rushed and now we have to change it again.

13 It's going to be the same story this Court has heard
14 again and again and again, not just intermittently. Thank
15 you, Your Honor.

16 THE COURT: Thank you, Mr. Lewis.

17 Mr. Levin, I read your articles on the case law with
18 great interest.

19 MR. LEVIN: Thank you, Your Honor.

20 THE COURT: I just have been wondering what happens
21 if I don't decide it in 15 days, do they take me out behind
22 the building and shoot me?

23 MR. LEVIN: You know, that's a little bit like that
24 45-day automatic dismissal for Chapter 7. Yes, Congress
25 wasn't so good at the drafting this last go-around, as I think

1 we all agree.

2 THE COURT: Absolutely.

3 MR. LEVIN: Your Honor, if the Court determines to
4 consider this asset purchase agreement in connection with the
5 motion to convert, I have a lot to say about it, in the few
6 minutes I've had to think about it, and if the hearing gets
7 adjourned or continued, I'll have perhaps some more thoughtful
8 things to say about it than I can say on the fly this
9 afternoon.

10 I want to discuss -- and I think there will be ample
11 reason, which we will be able to address in that context of
12 whether that document should constitute unusual circumstances
13 for the motion to dismiss -- convert, excuse me.

14 I want to talk about whether this Court should
15 consider it, and what's the hurry up -- what's the hurry up
16 rush here.

17 There are local rules that require oppositions to be
18 filed by a certain number of days before the hearing. In this
19 case, there was a stipulation with the other side that they
20 would file their opposition by June 5th, and that was in
21 exchange for our agreement to go not only just beyond the 30
22 days from when the motions were filed, but then a few days
23 more beyond that. That was the deadline.

24 And the question is whether this Court is going to
25 enforce its own deadlines. As Mr. Spector said just a moment

1 ago, and I think this is the key, oh, that was just a soft
2 deadline. We should would have liked to have had this
3 agreement in before the opposition but we didn't. Today was
4 the real deadline. That's not the agreement that we had with
5 the debtor, and that's not what this Court's rules say.

6 The testimony is clear that these negotiations have
7 been going on at least since December, maybe we can say since
8 January of this year, five to six months ago. Mr. McBride
9 testified that the Norris represented group, MerchantBridge
10 has been putting in substantial effort on this, at least for
11 the last five months.

12 Yes, it's not always easy to get to an agreement.
13 But if the parties understood that June 5th was really a
14 deadline and not just a soft deadline, the parties would have
15 found a way to get to an agreement, because deadlines do drive
16 agreements. And what Mr. Spector is telling you is that the
17 debtor does not respect this Court's deadlines, but it sets
18 its own. And it set the deadline at two o'clock this
19 afternoon, as Mr. Caplan's testimony showed; that the
20 agreement came in at 1:10, they debated whether they should
21 make any changes, they concluded that they shouldn't, we can
22 only surmise because it was ten till two and they knew they
23 had to have a signing. And that was what they considered the
24 real deadline.

25 Your Honor, we don't believe that the debtor should

1 be allowed to flout this Court's procedural rules in such a
2 way and have this considered as part of the motion to convert.
3 It's entirely appropriate to have it considered on a motion to
4 approve the sale. And we will take it up as a motion to
5 approve the sale.

6 But, it shouldn't be heard as part of the motion to
7 convert, and that's why we argued earlier that we were
8 prepared to proceed on the record as it existed before this
9 hearing started. Thank you, Your Honor.

10 THE COURT: Thank you. Anyone else?

11 Good afternoon, Mr. McMahon.

12 MR. McMAHON: Good afternoon, and very briefly. I
13 just want to refer to a point that's made in our papers, Your
14 Honor, with respect to the cause for relief that's been put
15 before the Court.

16 As Your Honor knows, our office's motion
17 specifically identifies one ground for relief, that's the
18 substantial loss continuing. The language is in the motion.
19 I don't feel a compelling need to recite the statute for the
20 Court, other than to point out that in the text of our papers
21 we do note that the exceptional -- I'm sorry, the unusual
22 circumstances exception is the way we read the statute after
23 the BAPCPA was enacted, does not apply to that particular
24 section of the statute.

25 And clearly whether this entire, I guess, proposal

1 by the debtors and the analysis by the Court should be taken
2 into account whether or not the motion can proceed on that
3 individual ground alone, meaning that whether or not this is
4 effectively a request by the debtors to defer a hearing on the
5 motion to convert for unusual circumstances.

6 And that -- that is an issue which I think that the
7 Court has to consider in ruling on the instant request by the
8 debtors.

9 THE COURT: All right, thank you, Mr. McMahon.

10 MR. SPECTOR: Taking the latter one first, Your
11 Honor. There's a -- not only does unusual circumstances cover
12 the grounds that were alleged, it also -- substantial unusual
13 circumstances that deal with the gross mismanagement, that
14 deal with the Subsection J issue, and all the other ones. So
15 it would come in for those anyway.

16 We have other evidence on the -- we haven't gotten
17 to the merits of our case but we have other evidence on those
18 other issues. It goes to the reasonable likelihood of
19 rehabilitation, for one thing. I mean, rehabilitation in the
20 pure form of art form that is in the case law that has been
21 cited by both sides, exists when a company can continue in
22 business, pay all its creditors and go out of -- and that will
23 happen with this sale. It has to be relevant to that anyway.

24 So, the -- I'd like to get more to the -- talk about
25 deadlines and rules. I was told by local counsel, and review

1 of the local rules confirms, there was no formal pretrial in
2 this case. You would think that Congress would have allowed
3 Courts to have pretrials on big matters like this,
4 appointments of trustees, so that you didn't have trials on
5 the fly like we do. But it's okay, we have to deal what we
6 have to deal with.

7 But, there's no local rule that says what has to be
8 in a response. So, they file a motion to convert. We say
9 they will not make the case, they've got the burden, here are
10 unusual circumstances. We may be able to show unusual
11 circumstances. We may not even say those, but all the
12 response has to do is put it in issue.

13 There's nothing in the local rules, there's nothing
14 in practice, there's nothing in the national rules or the
15 Magna Carta that says we have to say in our response "oh by
16 the way, here's what we're gonna argue when we get there". I
17 would have done it anyway, because I want to be persuasive.
18 But there isn't any local rule, there isn't any deadline we
19 violated. We gave a response, we gave it on the day of the
20 deadline. It was pretty fulsome as it was. Now we had some
21 new fact that just happened.

22 Now this isn't technically a Rule 60 motion, under
23 Federal Rule of Civil Procedure 60. It's not technically a
24 9023 motion under the Federal Rules of Bankruptcy Procedure.
25 But if you use that by analogy -- Your Honor asked, we want to

1 know if the debtors stalled, is this a gamesmanship. I think
2 the record is absolutely clear that we didn't stall, it's not
3 gamesmanship. They're not even arguing that it was. They're
4 just basically saying "there they go again".

5 Yes, I know, there we go again. But it isn't
6 gamesmanship, it isn't stalling, not sandbagging. It's how
7 life exists from time to time in the messy trenches.

8 And there just doesn't seem to be any reason why,
9 under the parameters that Your Honor set down for this mini
10 trial, why the Court should not take this into evidence and
11 let us make our case to show why this deal is good either way.
12 There's other deals as well.

13 Now, I'm intruding on our time. You have till six
14 o'clock. And the reason I'm doing that is, if Your Honor
15 allows us to bring this deal before Your Honor for the purpose
16 of proving our case, not to sell, not to approve the sale, to
17 prove that we have a likelihood of rehabilitation -- remember,
18 it's got to be a reasonable likelihood of rehabilitation,
19 we've got that. We've also got an unusual circumstance. And
20 that's just this. I have other -- I never did get to my
21 opening -- all the other unusual circumstances that we would
22 bring to bear, Your Honor.

23 But, we have a trial to start, and we haven't
24 started now. So if Your Honor allows us to bring the deal
25 before Your Honor as evidence, we are never going to get the

1 trial done today anyway, and I'm intruding on my time just to
2 say Mr. Singer has a suggestion. He's got a witness here
3 who's an expert. She's come from somewhere else. Perhaps if
4 Your Honor then says okay, we'll let it in but we'll give you
5 time to cross-examine, we'll adjourn this to another date, and
6 we'll come back and we'll have Mr. McBride testify about the
7 contract and you can cross-examine to your heart's content on
8 that date, can we use the remaining time -- and I know I'm
9 being presumptuous to let's get some witnesses on Mr. Singer's
10 case out of the way so that when we come back it will be
11 strictly on the bankruptcy issues that we haven't really
12 gotten to today?

13 THE COURT: Well, we're mixing up issues. Let me
14 take one at a time on this, because the first one is difficult
15 enough. And you know, I think that Mr. Lewis stated it well
16 when he said the Court has to look at the big picture. And I
17 do, when I look at the record in this case. The big picture
18 is what is in the debtor's best interests, the debtor's
19 estate's best interest. That always has to be a Bankruptcy
20 Court's concern, and that is my concern here. And I don't
21 think that anyone could take issue with that.

22 I have not heard evidence which suggests that this
23 deal that may hopefully -- that will hopefully happen was
24 somehow manufactured simply to stall today's hearing. I don't
25 believe that's the case. In any event, we can't stall it

1 because we've commenced the hearing today and it has to be
2 decided within 15 days. So I think that any delay will be
3 obviously of a minimal extent, and it really will I think turn
4 upon counsel's schedules even more than mine because I will
5 make myself as available as I can.

6 So under these circumstances, I just think that the
7 big picture requires a bankruptcy judge to take into account
8 all evidence which may relate in any way and bear upon what is
9 the bankruptcy estate's and its creditors' best interests, and
10 that certainly includes a potential sale of assets.

11 And for that reason, I am going to allow the
12 evidence to be presented relating to this agreement of sale,
13 and I think it's a critical issue for the Court to consider.
14 I do -- you know, whether this is contrary to deadlines or
15 not, or whether it's late or whether it's new, I'm not really
16 quite sure, but I know that it is evidence which this Court
17 ought to take into account in the big picture.

18 That then brings us to the issue of whether we
19 proceed now or if the movants would like to have some time to
20 investigate, take discovery, whatever into this agreement of
21 sale.

22 MR. LEVIN: Your Honor, may we have a few moments to
23 confer?

24 THE COURT: You may certainly. Take five or ten
25 minutes. Perhaps even talk a little bit about scheduling.

1 And talk with, if you will, with Mr. Spector about his
2 suggestion about testimony from the expert witness who is in
3 Court today.

4 MR. LEVIN: Thank you, Your Honor.

5 THE COURT: Thank you.

6 (Off the record at 5:04 p.m.)

7 (On the record at 5:40 p.m.)

8 THE CLERK: Please rise.

9 THE COURT: Thank you, please be seated.

10 Mr. Levin.

11 MR. LEVIN: Your Honor, thank you for accommodating
12 our procedural interlude.

13 THE COURT: Yes.

14 MR. LEVIN: We hope it was productive. Here's what
15 we have to propose, and I believe the debtors will agree with
16 this.

17 We believe there's a lot of common issues between
18 the motion to approve the sale which has not yet been filed
19 but which will be filed shortly, and the motion to convert.
20 I'm not saying they're all common issues, but there is some
21 overlap.

22 THE COURT: Sure.

23 MR. LEVIN: And in light of the develops today, on
24 our side, we would prefer to put everything off to a date
25 which would be the date for the hearing on the motion to

1 approve the sale, assuming it gets filed within the next few
2 days, and we'll talk about that in a moment; to have
3 everything heard all at once, a combined hearing on the sale
4 motion and the motion to convert approximately 30 days hence,
5 depending upon the Court's calendar.

6 We would need to agree on some interim dates as
7 well. For example, a deadline for filing the sale motion, a
8 deadline for any amendments to the asset purchase agreement,
9 and we will also talk about discovery schedules as well.

10 I think those matters we can take off line, with
11 just counsel, and come back to the Court for a telephonic
12 hearing if we cannot reach agreement on those, once we know
13 what the hearing date will be, and the hearing date I think we
14 agree, we would like to get a full day, either a morning and
15 an afternoon or an afternoon and the next morning, either way.

16 THE COURT: So we're talking sometime, sometime
17 roughly around the middle of July.

18 MR. LEVIN: Yes, Your Honor.

19 THE COURT: Is that right?

20 MR. LEVIN: One other point if I may make --

21 THE COURT: And Mr. Lewis's schedule is of
22 importance to the Court as well.

23 MR. LEVIN: Yes.

24 MR. LEWIS: Thank you, Your Honor.

25 MR. LEVIN: Mr. Lewis's schedule would make it most

1 convenient if the hearing were on July 16.

2 THE COURT: July 16?

3 MR. LEWIS: I have a hearing the next day in front
4 of Judge Sontchi, I'm going to be here already, and my
5 schedule is pretty tight until then. If that works for the
6 Court, if not, then we'll pick another day because there are
7 other people to consider as well as the Court here. But if
8 that works for the Court, that would be far the best for me.

9 THE COURT: Well, here's I'm going to do. I'm going
10 to try to -- I do have a number of things scheduled for the
11 16th. But if you will give me until tomorrow to check with
12 those parties, just to make sure that their matters are not
13 urgent and I can shift them a day or so, then we --

14 MR. LEWIS: That is very kind, thank you.

15 THE COURT: -- then we'll do that and we'll try and
16 schedule it for the 16th.

17 MR. LEVIN: That's very generous, Your Honor. Is it
18 -- should we put a backup date on right now in case that
19 doesn't work?

20 THE COURT: Yes. I see, from my calendar, I have a
21 lot of time either the 20th of July, which is a Monday, or the
22 24th which is a Friday, or the 27th which is a Monday. I mean
23 I'm --

24 MR. LEWIS: The 24th is -- the 20th doesn't work for
25 me because I'll be at the Ninth Circuit Judicial Conference,

1 I'm a lawyer rep there.

2 THE COURT: Okay.

3 MR. LEWIS: So the 24th or the 27th, either one is
4 okay with me.

5 THE COURT: Any preferences from other folks?

6 MR. SINGER: Your Honor, I have a conflict on the
7 24th. The 27th I think would work.

8 THE COURT: The 27th would work?

9 MR. LEWIS: That works for me as well.

10 THE COURT: All right, so --

11 MR. LEVIN: We'd like that as a backup, Your Honor.
12 It's a little longer than we'd like to go.

13 One other procedural point I'd like to make -- I
14 told you he was better, he reminded me -- that that would be
15 deemed to be the 15th day after the start of this hearing
16 today.

17 THE COURT: Okay.

18 MR. LEVIN: The date of that hearing would be deemed
19 to be the 15th day.

20 THE COURT: All right.

21 MR. SPECTOR: I did remember hearing that --

22 MR. LEVIN: Well, I will let Mr. Spector comment on
23 that. I mean, of course we're willing to make it the 12th or
24 13th day if Your Honor needs a couple of days to decide, but
25 we're not willing to let 15 more days run after that.

1 THE COURT: I understand.

2 MR. SPECTOR: Your Honor, that wasn't the subject of
3 our discussion. I told them, I said make your proffer and I'm
4 just going to nod yes, but I take that back now.

5 What I would say is let us not agree on anything,
6 let Your Honor make the decision. Because if you decide
7 you're going to decide it that date, decide it that date.

8 THE COURT: Let me give myself at least a day to
9 decide it.

10 MR. SPECTOR: Well --

11 THE COURT: And look, I think the parties are
12 accommodating one another, you're working hard. I don't want
13 to do anything that you know, in any way interferes with those
14 efforts. I think a day would be sufficient for my purposes,
15 frankly.

16 MR. LEWIS: Your Honor, we're more than content to
17 the Court taking two days, maybe three days. Part of the
18 point is we just want to know it's going to end, and it's
19 going to end quickly.

20 THE COURT: I agree. I agree. I'm just looking at
21 my schedule. All right, let's do two days.

22 MR. LEWIS: Okay.

23 THE COURT: Let's do two days, just to be --

24 MR. LEWIS: We certainly want the Court to have time
25 to do it, consider a decision --

1 THE COURT: Yes.

2 MR. LEWIS: -- and we don't want to create an
3 artificial rush on that.

4 THE COURT: Absolutely.

5 MR. SPECTOR: I don't understand. We're going to
6 try this for two days, Your Honor? Is that what --

7 THE COURT: No, no, no. We're going to have the
8 one-day hearing, and then I'll have two days to issue a
9 decision.

10 MR. LEWIS: Two days will be the 15th day.

11 THE COURT: Because I have only 15 days, you know,
12 under the Code, and I think that will be sufficient.

13 MR. SPECTOR: All I'm saying, Your Honor, and
14 suggesting --

15 THE COURT: Yes.

16 MR. SPECTOR: -- I know judges set their own
17 deadlines for themselves.

18 THE COURT: In this case, if it sort of helps things
19 along, I'm pleased to do it. And you know, I think it's best
20 sometimes to do -- to get right to something. So that's how
21 we'll handle that aspect.

22 MR. LEVIN: Thank you, Your Honor. And we will
23 spend a few minutes after the hearing among ourselves, trying
24 to talk about some of those interim dates --

25 THE COURT: All right.

1 MR. LEVIN: -- and we'll wait to hear from your
2 chambers on the July 16th.

3 THE COURT: Yes, or the 27th.

4 MR. SPECTOR: We should tell the judge what types of
5 deadlines we're going to set?

6 MR. LEVIN: I thought I did.

7 THE COURT: I think it was the sale itself, of
8 course, the asset purchase agreement, and the amendments to
9 that and discovery.

10 MR. LEVIN: Sale motion --

11 THE COURT: And I guess you ought to also talk about
12 perhaps any additional submissions.

13 MR. LEVIN: Yes. Okay, so let me reviewing the
14 bidding on that. The deadline for filing the motion to
15 approve the sale.

16 THE COURT: Right.

17 MR. LEVIN: The deadline for any amendments to the -
18 - any amendments to the asset purchase agreement.

19 THE COURT: Yes.

20 MR. LEVIN: A discovery schedule, and a deadline for
21 further written submissions to the Court.

22 THE COURT: Right.

23 MR. LEWIS: Your Honor, I was also thinking, maybe
24 the same deadline, a deadline for submission of a list of
25 direct witnesses and the scope of their testimony. Not the

1 detail but just something --

2 THE COURT: Right.

3 MR. LEWIS: -- which allows parties to prepare so
4 we're not all coming in here blind trying to figure out what
5 we're going to be doing.

6 THE COURT: Right.

7 MR. LEWIS: It would be a much more efficient
8 hearing for that reason, too.

9 THE COURT: I think that would be welcomed. A list
10 of witnesses and just a, at least an outline of what their
11 testimony will entail.

12 MR. SPECTOR: We've been happy to supply that all
13 day.

14 MR. LEVIN: And Your Honor, Mr. Spector advises me
15 that there may actually be bidding on this sale, not sure
16 yet --

17 MR. SPECTOR: No, no, sir.

18 MR. LEVIN: No? I misspoke.

19 MR. SPECTOR: Let's go -- when we were out in the
20 hallway, again, sausage, they proposed certain things to us.
21 And one of them was bid procedures motion and bidding and that
22 type of stuff. And I quickly said no, that wasn't what our
23 intention was, we were going to go with this deal, and that
24 was it.

25 But we don't know that parties in interest might

1 have -- if parties in interest took a different point of view,
2 we're not sure we can foreclose them. And if there such a
3 thing as that, that the U.S. Trustee or party in interest --

4 THE COURT: I was thinking that.

5 MR. SPECTOR: You were.

6 THE COURT: I was thinking that the United States
7 Trustee might have an issue with no bidding.

8 MR. SPECTOR: Right.

9 THE COURT: At an auction.

10 MR. SPECTOR: The rule which I had already marked
11 allows for this and I just read a case recently where the
12 Court went into that. And then again, we've been doing
13 nothing but testing the market for two years almost. So I
14 would be making -- if I were taking that position, I would be
15 making an argument about that.

16 However, we wanted to leave -- they wanted to leave
17 the door open for that as a potential deadline for bid
18 procedures. And I finally acquiesced because I didn't want to
19 be difficult and Mr. Levin had raised it.

20 THE COURT: Mr. McMahon.

21 MR. McMAHON: Your Honor, good evening. Joseph
22 McMahon.

23 I actually jumped in with respect to the marketing.
24 I don't think we need to get into scheduling a two-tiered
25 structured at this point bid procedures and a sale hearing.

1 My point in the hallway was simply that I trust that the
2 debtors would be serving their sale paper motions back on the
3 parties that were described in the testimony.

4 THE COURT: Certainly.

5 MR. McMAHON: I doubt that they're aware of the
6 terms of the finalized agreement, certainly we weren't walking
7 in the courtroom and -- I think that's where we start on that
8 point. In light of the, you know, Mr. -- I'm sorry, in light
9 of counsel's remarks regarding the length of these cases, we
10 know what the state of SCO is and has been for awhile. But I
11 think that there are certain things that have to be
12 demonstrated in order to show that the marketing effort was
13 complete.

14 THE COURT: Yes. And the last thing we need is one
15 of these parties who was in negotiations with the debtor
16 coming in at the sale hearing and saying you know, we were
17 prepared to do better or we never were consulted or whatever.

18 MR. LEVIN: Well, then if I can phrase the last
19 deadline that we should discuss, Your Honor, as follows.

20 THE COURT: Yes.

21 MR. LEVIN: We'll try to set a deadline for SCO, the
22 debtors, to change any of the process in the sale motion that
23 they will file in the coming days.

24 In other words, I expect --

25 THE COURT: Yes. Yes.

1 MR. LEVIN: Understood?

2 THE COURT: Understood.

3 MR. LEVIN: Thank you, Your Honor.

4 THE COURT: Yes, Mr. Levin, that finally sunk in.

5 MR. LEVIN: I didn't mean it that way.

6 THE COURT: Yes, well, I understand that.

7 All right.

8 MR. SPECTOR: We've got the date the 16th, and I'm
9 getting whispers that if we're going to have all this
10 discovery and all this process, it may be necessary to push it
11 back to the 27th because -- if we're really going to do -- if
12 they don't do discovery, the 16th is fine. But if we're going
13 to have a lot of discovery, it may be --

14 THE COURT: I'll tell you what. Why don't you talk
15 about that.

16 MR. SPECTOR: Okay.

17 THE COURT: Because you'll know better perhaps what
18 kind of discovery you're contemplating. I would hate to see
19 anyone here lock in a schedule only to regret it later, with
20 vacations and the like. So, if you want the 16th, if the
21 movants want the 16th, that's fine. I will do everything I
22 can to get the 16th. Otherwise, if you prefer the 27th, I
23 know that that is open.

24 MR. LEVIN: We'll talk about it, Your Honor.

25 THE COURT: All right. All right, counsel.

1 Anything further?

2 MR. LEVIN: No. We'll report back to chambers.

3 MR. SPECTOR: We'll report back to chambers.

4 THE COURT: Well, as usual, it was an interesting
5 hearing, and I'll look forward to the next one. So we'll
6 stand in recess. But really, if you need me, get me on the
7 phone tomorrow.

8 ALL COUNSEL: Thank you, Your Honor.

9 THE COURT: Thank you. Good evening everyone.

10 (Matter concluded at 5:52 p.m.)

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C E R T I F I C A T I O N

I, Sandra Carbonaro, court approved transcriber,
certify that the foregoing is a correct transcript from the
official electronic sound recording of the proceedings in the
above-entitled matter.

SANDRA CARBONARO

Doman Transcribing & Recording Svcs. _____

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