

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:) Case No. 07-11337
) (Jointly Administered)
)
THE SCO GROUP, INC.) Chapter 11
Et al.)
) Courtroom 3
) 824 Market Street
Debtors.) Wilmington, Delaware
)
) July 27, 2009
) 9:38 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE KEVIN GROSS
UNITED STATES BANKRUPTCY JUDGE

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1 WILMINGTON, DELAWARE, MONDAY, JULY 27, 2009, 9:38 AM.

2 THE COURT: Good morning, everyone. Thank you
3 and please be seated.

4 ALL: Good morning, Your Honor.

5 THE COURT: Good morning. Well we are here for
6 the Motion to Dismiss and Motion to Approve a Sale. And I
7 am ready having reviewed all of the documents. And how
8 shall we proceed, Mr. Spector? Good morning.

9 MR. SPECTOR: Good morning, Your Honor. I
10 suppose appearances would be helpful.

11 THE COURT: Yes.

12 MR. SPECTOR: My name is Arthur Spector. I'm
13 here with my partner, Frank Caplan over there.

14 THE COURT: All right.

15 MR. SPECTOR: Representing SCO Group,
16 Incorporated, SCO Operations, Incorporated both of whom are
17 Debtors in Possession in this case. With me also is our
18 paralegal, Carmen Cruz who's going to try to keep things in
19 order for us.

20 THE COURT: Okay, welcome.

21 MR. SPECTOR: And I'll let the other counsel --
22 of course, Mr. Tibbitts, general counsel to the Debtor is
23 here as well.

24 THE COURT: Yes, of course. Good morning, Mr.
25 Tibbitts. Any other introductions? Good morning.

1
2 MR. GREECHER: Good morning, Your Honor, Sean
3 Greecher from Young, Conaway.

4 THE COURT: Yes, sir.

5 MR. GREECHER: On behalf of Novell here with Adam
6 Lewis who you know.

7 THE COURT: Absolutely, Mr. Lewis.

8 MR. GREECHER: And I believe you've met Michael
9 Jacobs --

10 THE COURT: Yes, good to see you. Ms.
11 Silverstein, good morning.

12 MS. SILVERSTEIN: Good morning, Your Honor.
13 Laurie Silverstein for IBM here with Richard Levin.

14 THE COURT: Of course, Mr. Levin.

15 MR. LEVIN: Good morning, Your Honor.

16 THE COURT: Good to see you again.

17 MS. SILVERSTEIN: Also David Marriott.

18 MR. MARRIOTT: Good morning, Your Honor.

19 THE COURT: Mr. Marriott, yes, sir.

20 MS. SILVERSTEIN: And Michael Reynolds will be
21 addressing the Court.

22 MR. REYNOLDS: Good morning, Your Honor.

23 THE COURT: All right, thank you, Mr. Reynolds,
24 welcome.

25 MS. SILVERSTEIN: Thank you.

MR. O'NEILL: Good morning, Your Honor.

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THE COURT: Good morning, Mr. O'Neill.

MR. O'NEILL: I just wanted to say good morning.
I'm here with Mr. Spector.

THE COURT: All right.

MR. O'NEILL: On behalf of the Debtors.

THE COURT: Thank you, thank you. Now I know
that I had --

MR. SPECTOR: We have counsel --

MR. NORMAND: Good morning, Your Honor. It's Ted
Normand from Boies Schiller for the Debtor.

THE COURT: Good morning. Anyone else? Well I
know we talked about two and a half hours a side. That is,
you know, I'm not inflexible on that of course depending
upon how things are moving along. I'll just be even handed
with the amount of time. And if it looks like despite your
best efforts it's taking a little bit longer, obviously I'm
not going to cut people off just because you've hit the
magic amount of time, but we will -- I'll try and, you know,
keep mind of the time, keep track of the time, and see how
we go. Mr. Spector?

MR. SPECTOR: Good morning, again, Your Honor.
Am I on the clock yet?

THE COURT: Not yet.

MR. SPECTOR: Okay. I'm prepared to --

1 THE COURT: Because there may be some preliminary
2 matters. Is that --

3 MR. SPECTOR: Well I was just going into my
4 opening.

5 THE COURT: Okay.

6 MR. SPECTOR: Okay.

7 THE COURT: All right.

8 MR. SPECTOR: We are here today on two matters
9 SCO's Motion to Sell substantially all of their assets under
10 363 and IBM's, Novell's, and the U.S. Trustee's Motion to
11 Convert the cases.

12 Putting aside the U.S. Trustee's Motion for the
13 time being, these motions by IBM and Novell to convert the
14 cases to Chapter 7 and even more so their objections to the
15 sale to Unxis are baseless. Moreover, their reasons for
16 filing the motions have nothing to do with their interest as
17 alleged creditors hoping to be paid for their claims. Their
18 active in these cases for one reason only and that is to put
19 SCO out of business in order to kill SCO's lawsuits against
20 them. These parties who call themselves creditors are
21 subverting the purpose of Chapter 11, namely to keep a
22 business in business in order to pay the just debts,
23 preserve jobs, provide a return to stockholders if we're
24 fortunate enough to have a solvent case. IBM and Novell
25 want to kill SCO's business and they care not a whip that

1 they and the creditors, the legitimate creditors will
2 receive little or nothing in the process. Why in heaven's
3 name does IBM care whether SCO sells its Unix business to
4 Unxis and that's how that name is pronounced we learned.

5 THE COURT: Thank you.

6 MR. SPECTOR: Why did IBM unleash its hordes of
7 high powered attorneys coast to coast to depose anyone who
8 might dare to testify for SCO? What possible reason does
9 IBM have to oppose the sale? The only reason is that by the
10 sale SCO would survive. And survive with the potent claims
11 against IBM intact. IBM and Novell want to crush SCO and
12 soon before the Court of Appeals can vindicate it. They
13 know that once that happens, they will have to face juries
14 to answer for what they have done to SCO.

15 The sale to Unxis is complex technically, but
16 simple in bankruptcy terms. It's complex because as you
17 will hear and probably already know, the circumstances of
18 this case make sale of the Unix business an extremely
19 difficult proposition. It is nevertheless quite simple from
20 a bankruptcy perspective. If there's a buyer willing and
21 able, virtually unconditionally to pay enough within a
22 matter of days or permit SCO to pay all of their allowed
23 claims in full, there is no more due diligence, there is
24 nothing else for the SCO Debtors or the sellers to do other
25 than to satisfy the closing, other than to obtain an order

1 from this Court.

2 The evidence will demonstrate the nearly non-stop
3 efforts the Debtor has made to market these assets to ensure
4 that the estate would be getting a fair deal. The Court
5 already knows simply by instructs the position with these
6 Motions to Convert alleging continuing losses, there is a
7 good business reason to sell these assets under Section 363
8 without a plan.

9 The sale requires that the Debtors assume and
10 assign to the purchaser a large number of executory
11 contracts. You will hear testimony about the factual
12 reasons why these contracts may be assumed properly under
13 Section 365 of the Code and the legal authority to support
14 it. To the extent any of these contracts is in default and
15 virtually none of them is, the defaults will be cured
16 promptly on or immediately after closing.

17 Mr. Steven Norris will testify about how you
18 Unxis will provide adequate assurance of future performance
19 on these contracts. All routine, but Novell and IBM will
20 try to divert the Court's attention from the real Section
21 363 issues and try to focus on all sorts of red herrings.
22 We urge the Court to keep an eye on the ball here and
23 remember that the purpose of Court oversight of a sale in
24 bankruptcy is the protection of the estate as a whole.

25 And as a result of the proposed sale, all claims

1 will be paid in full and the remaining stakeholders of the
2 estate, the shareholders will get to keep the company's most
3 valuable asset, the claims. No one with a legitimate
4 creditor interest in these cases loses by Your Honor's
5 authorizing the Debtors to close the transaction. The only
6 potential losers are Novell and IBM, but not as creditors,
7 but as competitors. The interests of competitors of course
8 have no real weight in these matters.

9
10 As I noted, the sale is only part of the hearing
11 today. We submit that the Court, if the Court authorizes
12 the sale, our hearing -- our business here should be over.
13 However, the Court has expressed its view that we should put
14 it all in together so let's speak about Conversion Motions.

15 Timing and discretion are the two key things to
16 keep in mind. At the outset of the cases, these Debtors
17 candidly stated that they would continue to lose money
18 during the pendency of these cases. They have expected that
19 their stay would be much briefer. As a result, their losses
20 would be less intense. They also said that from the outset
21 they would pay all of the claims in full and the Debtors
22 still have the means and intent to do so. The means of
23 course is the sale.

24 SCO is a chapter -- is in Chapter 11 because it's
25 business was destroyed by IBM with the help of Novell. SCO
has sued for the damages that these companies caused, but it

1 has been continuously drained of life at an accelerated rate
2 by its much larger and better capitalized adversaries. It
3 finally reached the point that if it had not filed Chapter
4 11 when it did, it might have had all of its assets placed
5 into a constructive trust thereby immediately putting it out
6 of business and thwarting their efforts to take an appeal of
7 the judgment that we find erroneous.

8 Once in Chapter 11 as predicted, the Debtors did
9 lose the money and this occurred in each of the first ten
10 months of the case. Then SCO received the answer of the
11 Utah District Court on the amount of Novell's claim with
12 interest, some of which is improper post petition interest
13 which we'll take up on another occasion, approximately \$3.5
14 million, without interest about \$2.5 million. Not between
15 the \$30 and \$40 million that Novell had originally tallied
16 in this case. When that sum is added to the then existing
17 universe of allowed claims, that is back in the Summer of
18 '08 of about \$1.8 million at that time, SCO was facing
19 liabilities of about \$5.3 million. But in July 2008 when
20 the judgment was rendered, the vendors had cash of no more
21 than \$4.3 million. Without a sale of some or all of its
22 assets or collection on its lawsuits, SCO would not as of
23 July 2008 or any month through now pay its claims in full.
24 So nothing material in that context has changed in the last
25 11 months. The Tenth Circuit -- except of course the sale

1 we're pending.

2 The Tenth Circuit has shown that its keenly aware
3 of timing issues and why it's crucial to the life of these
4 companies that it resolve the critical appeal promptly. we
5 have good reason to expect as the Court knows that we will
6 have a ruling before August 31 or by August 31 because the
7 imminent retirement of one of the three judges on the three
8 judge panel. That's only 34 days from today. You've heard
9 me say that over -- it's only -- in another few more days.
10 I have to do it because it's the truth. It is only 34 more
11 days and we will have a definitive ruling on the most
12 important issues on the case.

13 Losses during this 34 days period will not
14 materially affect the dividend that unsecured creditors
15 would receive. If on or before the 31st of August the Tenth
16 Circuit reverses the judgment in favor of Novell, the \$3.5
17 million judgment goes away. The \$625,000 we reserved on
18 that judgment becomes back into the coffers of the Debtor.
19 And of course if the sale is approved we pay the creditors
20 and we have 625 to start out the mobility business. And
21 fund litigation in full. And if the sale closes, we also
22 have the funds to do that. So either way that could work.

23 How can it be accomplished? When the sale
24 closes, we dismiss the case, pay our creditors or if there's
25 an appeal, the judgment is overturned, there is no longer a

1 reason (indiscernible) to be here and we would also ask to
2 appeal and pay our creditors in full. We'll have the
3 ability to do that.

4 With these facts in mind, we need to focus on the
5 Bankruptcy Code itself. Under 1124(b)(4)(a), the Movant has
6 to prove two things and I'm not going to tell the Court
7 because the Court well knows and I have to save my time.
8 There is no doubt there's been a continuing loss, but case
9 law suggests that such loss is a mere evidence of cause and
10 do not ipso facto establish cause and I've cited those cases
11 in my response. These decisions are keeping with the
12 general rule that a court must make -- must consider all
13 circumstances and make a full evaluation of the present
14 condition of the estate, not merely look at the Debtors'
15 financial statement. Looking at the present financial,
16 present condition as the Debtor is about to get \$2.4 million
17 to pay claims of about a million dollars and post petitions
18 of about I don't know \$340,000 or something of that range.

19 Even if the Movants prove the first half of cause
20 under Section 1124(b)(4)(a), the Debtors submit that the
21 Movants will not and cannot prove that there is absence of
22 reasonable likely rehabilitation. We submit that other than
23 casting aside assertions, the Movants will have no evidence
24 to show that the steps that the Debtors have taken both in
25 the early days in the case and even more recently and

1 especially more recently, have no reasonable likelihood of
2 rehabilitating the Debtors. The plan you will hear is we
3 pay our creditors, the reorganized SCO much slimmed down
4 will have a business, a mobility application business and
5 the litigation. People will still be working for the
6 company. It will be rehabilitated. Without benefit of
7 plan, but rehabilitated nonetheless.

8 With respect to 1124(b)(4)(b), the Movant has to
9 prove not just typical or ordinary mismanagement, but gross
10 mismanagement. Once again, the Debtors submit the Movants
11 will fail in their burden. Our response already explained
12 without subsequent contrary argument by the Movants that
13 Section 1124(b)(4)(j) just doesn't apply.

14 Although the burden of proof is on the Movants,
15 the Debtor will provide a thorough record of why cause does
16 not exist. The Debtors will present the testimony of Ken
17 Nielson, the company's CFO who will testify about the
18 Debtors' historical losses and about the two -- about the
19 short-term projected losses. His testimony will show that
20 the risk to the creditors holding allowed claims over the
21 next 34 days is insignificant. He will -- we will offer the
22 testimony of Ryan Tibbitts, the Debtors' general counsel who
23 will among other things, testify about the headway made in
24 reducing claims against the estate which makes the reduction
25 on the asset side of the ledger pale in comparison. He'll

1 also testify about how a favorable ruling from the Tenth
2 Circuit in any of a number of ways would help to
3 rehabilitate the Debtor.

4 We will introduce the testimony of Darl McBride,
5 the Debtors' Chief Executive Officer who will testify to
6 among other things the ramification to SCO's business from
7 the events that led to the litigation. I guess we're not
8 going to be discussing that. That was something we thought
9 we were going to be discussing. Instead, he'll testify
10 about management's heroic efforts during the case to save
11 this company and managed to keep SCO alive despite
12 impossible odds to this day. Mr. McBride, as well as, Jeff
13 Hunsaker, the President and Chief Operating Officer of SCO
14 Operations and by his deposition, Renee Beltran, a third
15 party distributor of SCO products will testify about the
16 very unusual circumstances in these cases that justify
17 denial of the motions, even if a prima facie case were made.

18 The unusual circumstances justifying denial of
19 the motions even if the Movants were able to establish cause
20 are numerous. They include the temporal proximity of a
21 definitive ruling by the Tenth Circuit on whether or not the
22 Debtor owns legacy software around which its business is
23 built. Furthermore, the determination if it goes as the
24 Debtors anticipate and desire, would unlock the door to
25 perhaps enormous damages and will reconfigure the

1 marketplace for operating system software. This is a battle
2 that began six years ago and has consumed tens of millions
3 of dollars in legal fees.

4 Another unusual circumstance is that the Debtors
5 not only propose to pay all of their legitimate debts in
6 full including Novell's claim should it be allowed, it has
7 the present ability to do so within the next 34 days. Case
8 law will -- is allegiant about it and the Debtor can show at
9 a conversion hearing that it can pay its debts in full, that
10 is an unusual circumstance.

11 Mr. McBride will testify not only about the
12 various negotiations concerning a variety of proposed
13 transactions that would have previously supported a plan to
14 pay the debts in full. He will also testify about the sale
15 to Unxis which but for this Court's imprimatur is ready to
16 close within the next month. Mr. McBride will testify that
17 the cash consideration for the Debtors is sufficient to pay
18 the creditors in full and that the purchaser will post a
19 letter of credit sufficient when added to the \$625,000 that
20 SCO holds in escrow for Novell to satisfy the Novell
21 judgment should it survive. The purchaser will get the Unix
22 business and the mobility server while SCO gets to keep its
23 litigation claims and the mobility applications business.

24 As intimated earlier, a most unusual circumstance
25 is that the Debtors have insurance against any potential

1 loss from now until August 31. And most certainly through
2 the date of the anticipated closing of the Unxis sale in a
3 couple of weeks in the form of a personal guarantee from the
4 Debtors largest stockholder, Ralph Yarrow [ph]. Mr. Yarrow
5 is committed to underwrite up to \$200,000 of losses should
6 they occur. So that the Debtors' cash is not eroded when
7 the Court grants the Debtors' extended life. There's no
8 reason if we're worried about true creditors not to extend
9 the life to August 31 when the losses are being
10 underwritten.

11 Mr. Hunsaker, SCO's operations COO and Mr.
12 Beltran an independent distributor of SCO products will
13 testify in the latter case by deposition about the public
14 interest in SCO's survival. Most important, public interest
15 is one of the other unusual circumstances that cases have
16 indicated. Most important to the decision is the discretion
17 the Court advised, timing and discretion. This Court -- as
18 the Court's in the cases that I cited in the response and I
19 won't cite them now have held, the Bankruptcy Court still
20 has wide discretion to determine if cause exists and how to
21 ultimately adjudicate the case and that's a quote.

22 The Debtors submit that the cases that advise
23 that a Court considering a motion under 1112(b) must view
24 the totality of the circumstances are saying much the same
25 thing. Court's must weigh the evidence and use their

1 judgment in deciding whether cause exists. This is the
2 essence of discretion. And that's only on the issue of
3 cause. The statute is peppered with discretionary calls of
4 get even after Bapseepo [ph]. Right at the top the Court is
5 given the discretion to deny a motion even if cause is shown
6 if in the Court's mind the Court finds unusual circumstances
7 to justify denial. Then even if cause is established an
8 unusual circumstances are not, the Court has discretion to
9 order four different forms of relief as I discussed in my
10 response.

11 For a Court to properly exercise such broad areas
12 of discretion, it must be provided a full record. Today you
13 will get such a record from the Debtors even if not from the
14 Movants. For the Debtors, their corporate existence in the
15 livelihood of their employees, the resellers, and the public
16 interest of its many important customers lie in the balance.
17 Failure on the part of the Movants today carries no such
18 lethal consequences.

19 In summary, the Debtors believe that the record
20 will support, indeed mandate the Court's exercise of its
21 discretion to deny those motions.

22 Finally, I'm compelled to address certain points
23 raised in Novell's and IBM's replies very briefly. First,
24 that if SCO wins in the Tenth Circuit, it must means we'll
25 go to trial years from now and it will be on and on forever.

1 It doesn't matter. The sale is consummated. The real --
2 the creditors in the case will be paid. And if in Novell's
3 judgment if it's overturned which is the premise, it won't
4 be there anymore, it will be a regular company, small
5 company suing a big company just like it happened beforehand
6 and just like with afterwards. That's not a negative.

7 Secondly, say the Debtors will be asking for
8 similar deferrals of the Chapter 11 cases while the lawsuits
9 proceed. Well, no we won't, we're telling you we'd like to
10 just get out. If the Novell judgment is overturned, we're
11 out. If the sale is approved, we're out. So it's not like
12 this case will linger any longer than it has.

13 Lastly, they say the Debtors insult the integrity
14 of Chapter 7 Trustees by suggesting that they would settle
15 the litigation for a pittance to pay creditors -- that would
16 pay creditors a few cents on the dollar rather than to hold
17 out for trial and get a big pay day that will pay something
18 to the equity. And it's just reality, Judge. There's --
19 that's this Court's experience and I'll argue that when we
20 get to the end.

21 There's one other thing and that is the Trustee
22 could sell this business, the Unix's business. Well you'll
23 hear testimony that says no, they can't. If this Court
24 converted to seven, the cadre of engineers working there for
25 20 years or more as a group coming from AT&T labs and other

1 predecessors that developed this, they're going to scatter
2 to the winds. And when that happens, an operating system
3 business has very little value when the knowhow is gone, the
4 people that develop this stuff is gone. And so the Chapter
5 7 Trustee is going to have an empty hull to sell if this
6 case converts. The best way to sell, the only real way to
7 sell this kind of a business is as an operating company
8 which we're doing now. A Chapter 7 Trustee is very unlikely
9 in this Court's experience to run a company that's losing a
10 couple hundred thousand dollars a month or more the way the
11 Movants argue.

12 The Debtors submit that because the evidence will
13 not support a finding of cause, the Court will never even be
14 required to make that decision. Moreover, even if the Court
15 finds cause, the evidence will support findings of unusual
16 circumstances. We ask the Court to do just that and that is
17 to deny the Motions to Convert and grant the Debtors' motion
18 for authority to sell the assets of Unxis. Thank you, Your
19 Honor.

20 THE COURT: Thank you, Mr. Spector. By the way,
21 I failed to acknowledge Mr. Harrington's appearance for the
22 Office of the United States Trustee. Good morning, Mr.
23 Harrington.

24 MR. HARRINGTON: Good morning, Your Honor.

25 MR. SPECTOR: Your Honor, do you have a clock

1 timer?

2 THE COURT: I'm keeping track.

3 MR. SPECTOR: Can you share it?

4 THE COURT: Oh, that was 15 minutes.

5 MR. SPECTOR: Oh, I'm in business.

6 THE COURT: Mr. Levin, good morning.

7 MR. LEVIN: Good morning, Your Honor, Richard
8 Levin for Cravath, Swaine and Moore for International
9 Business Machines Corporation. Your Honor, it was not IBM's
10 original intention to oppose the sale of the assets
11 proposed. There were just a few things in the Sale
12 Agreement that concerned us when we read it. One was what
13 we called the vanishing, I'm sorry, the poison pill. The
14 second was the vanishing letter of credit sun. We call that
15 the solar eclipse.

16 (Laughter)

17 MR. LEVIN: And the third was the need to for the
18 Debtors to make a record to support the sale. But what we
19 found out in discovery surprised us. And you see some of
20 that reflected in our opposition paper.

21 THE COURT: Yes, yes.

22 MR. LEVIN: We found out that there were secret
23 payments from the Debtor and its CEO to Mr. Norris. There
24 was a reduction in the purchase price for the -- for an
25 asset that is currently generating no revenue, no material

1 revenue. There is the as I said the solar eclipse. We
2 learned that there's no committed financing for this
3 transaction. And that the agreement is largely an open for
4 which the Debtors have received a payment of \$250,000. We
5 believe that we needed to call these matters to the Court's
6 attention and with them we found it hard not to oppose the
7 sale. What we found out we believe also supports the
8 Conversion Motion and we'll get into that in the evidence.
9

10 Since then, there's been a new development. This
11 case is full of new developments. Last Thursday, Your
12 Honor, we received and by copy of -- we saw a copy of an
13 email to the Debtor, the Debtor received a proposal from LNS
14 Acquisition, LLC which is an affiliate of DMEP Corporation,
15 d/b/a Hale Global to acquire all of the assets of the
16 Debtor. We haven't had time since Thursday afternoon when
17 this came in to evaluate whether it is a higher and better
18 offer or whether it is not. But what it does tell us is
19 that the idea in addition to all of the other problems that
20 we have with the sale, it does tell us that the idea of a
21 private sale is not a good idea in this case.

22 If you look at the structure of the Sale
23 Agreement itself, there is no urgency to closing the sale.
24 There's time to conduct an auction. We have a competing
25 bidder. And I also might mention that the principal of LNS
Acquisition is present in Court today as is his counsel who

1 can represent to the Court that they are willing to
2 participate in an auction. Obviously, they're not ready to
3 bid. It's a little early for that, but they've reviewed,
4 they'll represent that reviewed the Unxis agreement and even
5 in the face of that are willing to bid which suggests they
6 would come up with something higher and better, otherwise
7 why bother.

8 So we believe that there should be an auction.
9 That this should not go by private sale. And because of the
10 dynamics of this case, Your Honor, and all of the other
11 things that we will show during this case, we believe that
12 this Court should exercise its discretion under 1104(a)(3)
13 to order the appointment of a trustee to conduct that
14 auction rather than allowing SCO to conduct it itself since
15 it is so closely allied with the current bidder. There
16 can't be a mutual party, a disinterested Board of Directors
17 in effect to conduct an auction process, unless some
18 independent directors were appointed at this point.

19 So we believe that the fastest and easiest way to
20 get there would be the prompt appointment of a Chapter 11
21 Trustee to conduct that auction. Your Honor, on the other
22 hand if the Court determines not to order an auction for
23 this case, then for the reasons we stated in our opposition
24 and as the evidence will show, we believe the sale should
25 not be approved and the case should be converted to Chapter

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2 7.

3 THE COURT: All right, thank you, Mr. Levin. Mr.
4 Lewis, good morning.

5 MR. LEWIS: Good morning, Your Honor. I don't
6 have very much here as an opening. I think I just want to
7 follow on a few points.

8 THE COURT: Okay.

9 MR. LEWIS: If you listen especially to the
10 beginning of the Debtors' opening, what you heard, I think
11 very clearly was this case is all about the litigation.
12 That's what this is about. And so if that's what this is
13 about, then in a sense part of what's confronting the Court
14 today is who should decide what to do with that litigation?
15 The Debtor has said repeatedly that we want to squash the
16 Debtor and crush the litigation. We've not asked for any
17 such thing. We've asked for conversion to a Chapter 7 for
18 the appointment of a neutral to assess that litigation given
19 management's obvious commitment to it, pretty much come what
20 may. And I think that's still a really good idea here.

21 So the sale should be disapproved among other
22 reasons because a neutral needs to evaluate this whole
23 approach to this case and we have not had a neutral since
24 the beginning of this case to do that. And you heard it
25 again this morning. But they won't concede that point, but
that's what you heard. And I think that you heard it very,

1 very clearly and I want to reiterate again that we have not
2 tried to end the litigation through this case, we have tried
3 to get the litigation in the hands of someone who can
4 approach it rationally. Maybe that someone will decide that
5 the litigations are worth billions of dollars and we will
6 not see an end to it. Maybe that person will decide it's
7 worth a whole lot less and there's a lot of risks to the
8 creditors, a lot of uncertainties, a lot of maybes, and a
9 long way down the road even if the case gets reversed in the
10 Tenth Circuit and what's in the best interest of creditors
11 is some other approach than litigation, perhaps a
12 settlement. But that should be in the hands of someone
13 who's judgment now can be trusted and I don't think the
14 Court or the creditors can trust the management of the
15 Debtor right now. That's just the way it is.

16 The idea that we're not are real creditor is
17 ridiculous. We are a real creditor. Your Honor, even if we
18 didn't have a \$3.5 million judgment, we'd be a real
19 creditor. When a bankruptcy is filed, continued creditors
20 are creditors and liquidated creditors are creditors. We're
21 as entitled to how some provision for our wellbeing out of
22 the bankruptcy case as anyone else. The same would be true
23 for IBM, even though it doesn't have a judgment at all. It
24 has claims. It's filed a proof of claim. It's a creditor.
25 The notion that we've heard again and again is because they

1 think we're wrong, we're not real creditors. That's not how
2 the Bankruptcy Code works.

3 And that's the -- another one of the problems
4 here with this case which is what the Debtor is proposing
5 here is some sort of inchoate resolution of this case
6 without a plan of reorganization. We don't have a Motion to
7 Dismiss in front of you. There's nothing specific about how
8 this all will be accomplished that they're going to tell you
9 it's going to be done. There's just a lot of talk about it.
10 And the idea that we're provided for doesn't hold water.

11 Even with the amendments, Your Honor, our protection
12 goes away at some point, this letter of credit that
13 supposedly is protecting us. And so does the \$650,000. And
14 where would that \$650,000 go? It will disappear down the
15 maw of the Debtors continuing the litigation and running the
16 mobility business which is losing money. And if the Debtors
17 own board minutes which is one of their exhibits say on June
18 11 in their liquidity report section that the Debtor is
19 losing \$650,000 a month, that's its cash burn and they will
20 be out of money by the end of July.

21 So let's suppose that the case gets reversed in
22 some fashion in the Tenth Circuit. Gets remanded. There is
23 a new trial and we win again in a year, two years, whatever
24 it is. Who's going to be there to pass? How is that going
25 to happen? Why are we now at the end of this bankruptcy

1 case only to be told we amongst all creditors are at the
2 beginning of the bankruptcy case in essence. Everybody else
3 gets paid and we get left to our devices and our chances
4 down the road. That's not the way bankruptcies should work.
5 There should be a much better, much more certain, much more
6 secure plan for dealing with all creditors within the
7 meaning of the Bankruptcy Code. And that is not here before
8 this Court today and I don't see how the Court can approve
9 the sale without some sort of definitive plan in front of it
10 that we can all attest because that's where are in this
11 case.

12
13 Finally, Your Honor, on the sale among the other
14 problems including those we mentioned in our opposition to
15 the Sale Motion per se and of course in our Motion to
16 Dismiss, our Motion to Convert is that the sale doesn't take
17 in account, into account the asset -- the Purchase Agreement
18 which we believe has to be assumed in order to be able to
19 sign the SVRX contracts and that hasn't happened. And
20 frankly, I don't think it can happen. And that's a problem.
21 Maybe we'll hear some testimony about that this morning
22 about how that can happen, at least factual testimony. But
23 I don't see how it can happen on the present plan. And for
24 that reason alone I think the sale has to be denied. Thank
25 you, Your Honor.

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

1 wish to be heard?

2 MR. DOSHI: Your Honor?

3 THE COURT: Yes.

4 MR. DOSHI: If I may interrupt on the phone for a
5 second.

6 THE COURT: Who is this?

7 MR. DOSHI: This is Amish Doshi with Day Pitney
8 on behalf of Oracle USA, Inc.

9 THE COURT: Yes, Mr. Doshi.

10 MR. DOSHI: Well good morning, Your Honor. I
11 just want to note my appearance for the record and also note
12 that we do not take any position with respect to this Motion
13 to Convert issue, but at some appropriate time when Your
14 Honor is ready with respect to the Sale Motion and the
15 assumption and assignment or attempt of assumption and
16 assignment of any Oracle agreement, at that point, I would
17 like to be heard. We have filed a limited objection and I
18 just wanted to note for the record that at some appropriate
19 time I want an opportunity to be heard on that limited
20 issue. Once again, we take absolutely no position with
21 respect to this motion and I don't want to interrupt the
22 proceedings that are going on with respect to that.

23 THE COURT: Thank you, Mr. Doshi. I certainly
24 will give you an opportunity to be heard at the right time.

25 MR. DOSHI: Thank you.

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THE COURT: Mr. Levin?

MR. LEVIN: Your Honor, Mr. Levin. We have a procedural question.

THE COURT: Okay.

MR. LEVIN: At approximately 11:30 last night, we received a proposed amendment to the Purchase Agreement.

THE COURT: Yes.

MR. LEVIN: We're at a loss as to how to deal with that. It seems only appropriate that we be given time to look at that. If this Court determines to order an auction process, a standard Section 363 auction process, it will not be an issue. On the other hand, if this Court doesn't go that way, we -- I think we cannot get through the sale hearing without having to look at that, having some time to look at that amendment. It was handed to me this morning, a hard copy after the hearing started. It's a little difficult to read on a blackberry last night.

THE COURT: Yes.

MR. LEVIN: So I would ask for the Court's guidance on how we want to handle that.

THE COURT: Well why don't I ask Mr. Spector to assist us a little bit on what he would propose. In other words, what you're proposing is that the Court consider the terms of the sale as amended?

MR. SPECTOR: Yes. There were objections that

1 raised issues. This poison pill nonsense. It isn't a
2 poison pill. We can argue as a matter of law and we will
3 later, I'm sure that there are certain things that they
4 pointed out that were unclear in the prior one or created
5 problems. They said well chronology doesn't work. What
6 happens -- they pointed some of those things out and we
7 said, you know, they have a point and we'd try to fix that.
8 The principals of Unxis are located -- well one of the
9 principals, one of the primary principals is located in
10 Europe. And to get the things done, we had to have Mr.
11 Norris fly in yesterday. He didn't get here till last --
12 late last night and he couldn't sign it till then. So we
13 couldn't -- we had it drafted, we just couldn't execute it
14 and file till last night.

15 These are the things that address responses,
16 address the issues that are in the objections. I don't have
17 a problem with him looking at it during the day. I don't
18 think we're going to be talking about those issues the first
19 few hours of the hearing anyway. I should tell you that
20 everything has been fast and furious. I'm just standing
21 here basically alone. I got an update this morning when I
22 woke up on their exhibit list, two or three more exhibits
23 showed up. I'm not objecting to it. And frankly, until
24 maybe I don't know, in five minutes they will, but they
25 haven't objected to the fact that we were amending our

1 exhibit list yesterday as well. Given the time exigencies,
2 I'm sure even they recognize it's impossible sometimes. We
3 give it to them as soon as we get it and they give it to us
4 as soon as we get it.

5 For example, they objected to every single
6 exhibit that we put in as of a few days ago. Some of them
7 because they weren't signed. Well the minutes weren't
8 signed because the Board was still meeting. I gave it to
9 them as a draft and they said it wasn't signed, but we have
10 signed ones now, we'll replace it. They objected to the
11 sale, the Purchaser Sale Agreement because the one we put up
12 wasn't the signed version. I got the signed version. I've
13 been carrying it around since June 15.

14 So I don't know what we're going to do with those
15 things but, you know, we'll be substituting those things.
16 There are various other objections, I guess we'll deal with
17 those when they come up. My long winded speech is I don't
18 care if they take time to review it's fair for them to do.
19 I think they won't find anything in there other than largely
20 responses to their objections, making the deal a better deal
21 for everybody on our side of the table, the creditors and
22 the shareholders and the like.

23 While I'm up here and I've got the mike, you
24 know, you hate to lose the mike when you have it. The
25 notion about having an action.

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THE COURT: Yes.

MR. SPECTOR: You will hear testimony from one of our witnesses, I don't know who, maybe several that they consider hiring an IB, an investment banker to do the job. They don't have the money to do that. In lieu of that, you're going to hear experiential testimony. How many efforts we've done to market these assets before what the offers were and so forth. The record will be replete with testimony to show that the state is getting a fair price notwithstanding those red herrings I told you were going to be coming up on another deal. Mr. Hale is not new to this Court. Mr. Hale was the lead of York, remember York. Because of York --

THE COURT: Yes.

MR. SPECTOR: -- we're in the position we're in now. We spent tons of money to try to bring that York deal home early in the case. Mr. Hale -- you'll hear testimony. I'm not -- I'm doing an opening. No, don't put that on the clock, I'm responding to their argument. You're going to hear testimony --

MR. LEVIN: Your Honor, excuse me. I just asked a procedural question of how we were going to handle the amendments.

THE COURT: Yes.

MR. LEVIN: That's all I asked.

1
2 MR. SPECTOR: Well it invoked the idea of an
3 auction and says we can't do an auction without looking at
4 it. So while we're talking about the auction, Mr. Hale
5 through Global whatever it's Hale Global came back and
6 you'll hear Mr. McBride talk about it. He came back in the
7 last several months before the sale. He's one of those
8 people we considered this offer and rejected it. Now on
9 Thursday of last week while we're getting -- doing
10 everything, getting documents, we get this email from him
11 copy to IBM's lawyer and Novell's lawyer by the way saying
12 oh, by the way, here's what is. Well one of our deal
13 partners disassembled it and said here's what the deal
14 really is. We get to the merits of the deal, if we get to
15 the merits of the deal it stinks. It stinks and we don't
16 trust the person who's proposing it for experiential
17 reasons, for a lot of reasons. But we don't have to get to
18 that because we're doing like GM did. We're doing like
19 Chrysler did. We're doing like so many other companies have
20 done and warned -- I raised it earlier in the case that the
21 code allows a sale to -- a private sale without an auction.
22 And we've done the best thing for -- better than an auction,
23 we've marketed for two years. So this case can't support an
24 auction. And we've got enough money out of this to pay all
25 the creditors in full.

So I guess I'm going to repeat myself. I think

1 the idea of an auction is full hearted at this point.

2 THE COURT: Well thank you. In answer to Mr.
3 Levin's question though, let me get back to the question. I
4 think that in fairness changes in terms of various matters
5 is not unusual in a Bankruptcy Court. And I think what I
6 would propose to do is allow if necessary an adjournment,
7 you know, for a brief time, a half an hour, an hour,
8 whatever time you tell me you need to review the amendment
9 and to be prepared to proceed with it.

10 MR. SPECTOR: Your Honor, our first witness,
11 however, doesn't deal with that --

12 THE COURT: Mr. Harrington is --

13 MR. SPECTOR: Oh, I'm sorry.

14 THE COURT: Mr. Harrington, yes, sir.

15 MR. SPECTOR: I'm sorry.

16 MR. HARRINGTON: Good morning, Your Honor,
17 William Harrington.

18 THE COURT: Good morning.

19 MR. HARRINGTON: From the Office of the United
20 States Trustee pinch hitting for Joseph McMahon today. Your
21 Honor, I wanted to just get up briefly. There's been a lot
22 of talk mainly from the Debtors about what would happen sort
23 of post sale and some sort of structured dismissal but that
24 hasn't really been defined. There's no motion on the table.
25 I know Your Honor has read our motion. Our motion is very

1 simple.

2 THE COURT: Yes.

3 MR. HARRINGTON: And I don't think the Debtor
4 really disputes what's contained in our motion, although
5 they sort of disputed it today. I don't think they dispute
6 there's a continuing loss here. The reasonable likelihood
7 of rehabilitation, I think they were sketchy as to what's
8 going to happen with that. And the code talks about a plan,
9 Your Honor and the Debtors being able to propose a plan to
10 prove unusual circumstances and the best interest of the
11 creditors. That's not being discussed by the Creditors --
12 by the Debtors. And we have serious concerns regarding some
13 sort of structured dismissal that doesn't follow the code,
14 Your Honor.

15 There's two ways, there's I guess three ways to
16 get rid of a case in bankruptcy and the first is a plan.
17 And that's what is contemplated under the code in Chapter 11
18 that you'll get out through a plan of reorganization. We're
19 not -- no one's talking about doing that here. The second
20 is to convert the case and let a Chapter 7 go through the
21 claims and evaluate the claims and their distributions. And
22 then third would be a straight dismissal with no sort of
23 structure to it in certain circumstances.

24 So I did want to get up and rise because there is
25 sort of a lingering discussion of a structured dismissal

1 here with no sort of an amorphous structured dismissal.

2 It's been mentioned, but there's no kind of discussion as to
3 what form that would take. And we believe, Your Honor, the
4 two ways out here are reorganization plan or a Chapter 7
5 Trustee. And that's why we move for conversion. Thank you,
6 Your Honor.

7 THE COURT: Thank you, Mr. Harrington, thank you.
8 All right. Anyone else?

9 MR. MARRIOTT: Your Honor, David Marriott if I
10 may --

11 THE COURT: Of course.

12 MR. MARRIOTT: I think it might be to everyone's
13 advantage if we cleared some procedural underbrush. We have
14 provided the Court and counsel for the Debtors a set of
15 exhibits --

16 THE COURT: Yes.

17 MR. MARRIOTT: -- that we propose to move into
18 evidence during the course of these proceedings, Your Honor.
19 And I believe I'm right that the Debtors have objected to
20 only five of our proposed exhibits.

21 THE COURT: Yes, emails apparently.

22 MR. MARRIOTT: Yes, Your Honor. And we are
23 prepared to not seek the admission of two of those five
24 exhibits and I'll specifically identify them for Your Honor.
25 And other than -- and then I think you should have an

1 argument about those exhibits. But we'd like to move the
2 admission of the Movants' exhibits with the exception,
3 Judge, of Exhibit 11, 36, and 49. And 36 and 49 are two of
4 the exhibits to which the Debtors objected. That leaves
5 Your Honor, I need to argue about the admissibility of
6 Exhibits 37, 39, and 40. And so for the record if it's
7 agreeable to the Court, I'd like to move the admission of
8 those exhibits with the exceptions of 11, 36, and 49 now and
9 then have a discussion with Your Honor about the three as to
10 which there was an issue.

11 THE COURT: Is there any objection from the
12 Debtors' side? They're move --

13 MR. SPECTOR: Whatever procedurally I guess
14 whatever they say. I was going to say let's take it up if
15 and when it wasn't to come in one -- I think there are three
16 exhibits in that whole stack.

17 THE COURT: Right.

18 MR. SPECTOR: We didn't object to the 60 -- 59
19 other ones or whatever it was. These we have three
20 objections on. And I was -- typically I would like to get
21 the piece started. I waited since June. But if we're going
22 to spend -- if we're going to have to have a separate record
23 of this is what I'm anticipating which is why I hesitated.

24 THE COURT: Well my only reluctance is it's
25 helpful sometimes for me to be ruling on evidence more in

1 context of the case and it might be best, I think it would
2 be best were we to take those up when they're going to be
3 introduced.

4 MR. MARRIOTT: That's fine, Your Honor with
5 respect to those three.

6 THE COURT: Yes.

7 MR. MARRIOTT: So -- we then I believe -- so --

8 THE COURT: And the others I think I'm hearing
9 from Mr. Spector he does not have any objection to them and
10 I would admit them into evidence.

11 MR. MARRIOTT: Okay, fine, Your Honor, thank you.

12 THE COURT: Okay.

13 MR. MARRIOTT: Two other procedural matters. I
14 think what would be helpful is to give us the 30 minutes or
15 so which Mr. -- to which Your Honor would -- to review the
16 PSA if their first witness, the amendments to the PSA, if
17 their first witness is going to in any way address that so
18 that we don't find ourselves in a situation midstream in the
19 examination having to break to review the documents. So it
20 may make sense, Your Honor, to take those 30 minutes now.

21 And then finally, we would ask, Judge, that any
22 witness who will testify in the case be --

23 THE COURT: Be sequestered?

24 MR. MARRIOTT: Exactly, Judge, be sequestered
25 during the exam.

1 THE COURT: I certainly will grant that oral
2 motion to sequester witnesses. I think it's appropriate in
3 these cases. As far as the 30 minutes now will your first
4 witness be discussing the sale, Mr. Spector?

5 MR. SPECTOR: Not really. We're going to have
6 Mr. Nielson, CFO and Mr. McBride is the one who's primarily
7 talking about the sale.

8 THE COURT: All right. If it so happens that
9 there is any discussion of the sale, then I will certainly
10 give you that adjournment.

11 MR. MARRIOTT: Thank you, Judge.

12 THE COURT: Thank you, Mr. Marriott.

13 MR. SPECTOR: With regard to sequestration, of
14 course that's typical.

15 THE COURT: Yes.

16 MR. SPECTOR: I just have to point out Mr.
17 Tibbitts who's the general counsel is going to assist me in
18 trial, but he's also a witness.

19 THE COURT: Any objection?

20 MR. MARRIOTT: I'm sorry, Your Honor, I
21 apologize, I didn't hear you.

22 THE COURT: Mr. Tibbitts is going to assist Mr.
23 Spector here. He is a -- he will be a witness.

24 MR. MARRIOTT: Well, Your Honor, we would --
25 anyone who is a witness we think ought to be excluded during

1 the testimony. So yes, there's an objection.

2 MR. SPECTOR: What's the practice on that, Your
3 Honor? If --

4 THE COURT: Well I'm going to allow Mr. Tibbitts
5 to remain in the courtroom. I think to a large extent he is
6 the Debtors' representative.

7 MR. MARRIOTT: Can I suggest this compromise,
8 Your Honor. What if Mr. Tibbitts is the first witness?

9 THE COURT: Oh --

10 MR. MARRIOTT: I'm sorry.

11 THE COURT: -- yeah, we have to make sure we get
12 you on the record, Mr. Marriott. I'm sorry.

13 MR. MARRIOTT: I apologize. Can we solve the
14 problem by having Mr. Tibbitts as the first witness, Your
15 Honor?

16 THE COURT: Mr. Spector?

17 MR. SPECTOR: I suppose we could, but it wouldn't
18 -- I suppose we could do that. I -- there's really no
19 reason. It's just going to be a little out of order.

20 THE COURT: Is he going to be discussing the
21 sale? Will Mr. Tibbitts be discussing the sale?

22 MR. SPECTOR: Not really. That's not his primary
23 area either.

24 THE COURT: Okay, all right, that's a good --

25 MR. SPECTOR: Primarily Mr. McBride will be

1 talking about the sale. But, you know, in cross examination
2 as things come up, I noticed that, you know, they asked us
3 pre-trial what's this person going to talk about
4 specifically? And we said -- and we went through the
5 deposition and it was four hours of six of the topics had
6 nothing to do with it. So if that happens, Your Honor, and
7 I don't object for example, then we wind up going into other
8 areas. That's all I'm --

9
10 THE COURT: And if we go to the sale, then we'll
11 take a recess.

12 MR. MARRIOTT: Thank you.

13 THE COURT: Okay, Mr. Marriott, thank you. Thank
14 you for the -- I think that was a helpful suggestion.

15 MR. SPECTOR: Well in that case, we would ask Mr.
16 Nielsen and Mr. McBride to step outside. Who else? We've
17 got Mr. Hunsaker and Mr. Norris I suppose should step out as
18 well.

19 THE COURT: Yes, thank you.

20 MR. SPECTOR: Mr. Roderick is not listed as a
21 witness, but he could be rebuttal if something comes up.

22 THE COURT: Then why don't we have him excuse
23 himself as well.

24 MR. SPECTOR: One other housekeeping matter.

25 THE COURT: Okay.

MR. SPECTOR: This is going to be the cleanest

1 house in Wilmington. We have potential confidentiality NDA
2 concerns as things get through the testimony and the
3 exhibits come in. Counsel for the adversaries have agreed
4 that when we reach that we'll give a high sign or something
5 and they would not oppose clearing the court for those
6 periods.

7 THE COURT: All right, thank you.

8 MR. SPECTOR: Your Honor, now we have a very
9 interesting procedural question we have to ask Your Honor to
10 help us on. We took Your Honor's suggestion to expedite the
11 matter and three of our witnesses have prepared
12 declarations, not live testimony. Mr. Tibbitts is one of
13 those. I would like to hand up Mr. Tibbitts' declaration
14 and give copies of course to counsel and give everybody some
15 time to read it and then we'll let Mr. Tibbitts take the
16 stand for cross unless Your Honor has a better suggestion.

17 THE COURT: Mr. Marriott?

18 MR. MARRIOTT: May I, Your Honor?

19 THE COURT: Yes. There is a microphone at the
20 counsel table if that's helpful to you.

21 MR. MARRIOTT: Apparently I'm not close enough to
22 that though. I think it's sensible to proceed by way of
23 declaration, Your Honor. We have not of course seen these
24 declarations and this is the first we're hearing that the
25 declarations were used. As you know, we made the suggestion

1 last week and thought it had been declined. But what I
2 would suggest in view of that, Your Honor, is that we get
3 the declarations now, all of the declarations now. That we
4 take a break and that we look at the declarations and then
5 we proceed.

6 THE COURT: Yeah.

7 MR. MARRIOTT: And frankly, you know, I don't
8 know how Your Honor's going to count time. I don't want to
9 be petty about this, but there's some element here of the
10 time it takes to read them that we would suggest ought to be
11 taken into account in the time presentation.

12 MR. SPECTOR: One of the reasons I thought the
13 declaration idea was a great idea was because that way it
14 doesn't count on the clock.

15 THE COURT: Well as I said, you know, I'm not
16 inflexible on the time. I'm hoping the time will not be
17 that significant a factor --

18 MR. SPECTOR: The declarations are 8 pages, 10
19 pages, they're not 50 page declarations.

20 THE COURT: Okay.

21 MR. SPECTOR: I think it makes more sense -- if
22 were at a real trial, I'm not saying this isn't a real
23 trial, but if we had a trial the traditional way, we
24 wouldn't hear anything that direct is until the witness took
25 the stand and they'd hear it real time. I would suggest

1 that we shouldn't be penalized for doing the expedited
2 method. We could stand there with a proffer and read it out
3 loud one at a time which is another way Your Honor
4 suggested.

5 THE COURT: Right.

6 MR. SPECTOR: I don't think they should have all
7 of it advance and read it because they would get an
8 advantage they wouldn't get in a traditional trial. And
9 there -- you may not see it from the bench, Judge, but
10 there's an awful lot of points being scored in the
11 procedural side on their side that they don't really need
12 that extra help.

13 MR. MARRIOTT: Your Honor, isn't the compromise
14 here that they give us the declarations --

15 THE COURT: Yes.

16 MR. MARRIOTT: -- we take a break. They don't
17 count against their time and we move these things along?

18 THE COURT: Yes.

19 MR. MARRIOTT: Thank you, Judge.

20 THE COURT: But I do think we ought to give the
21 Movants an opportunity to review the declarations.

22 MR. SPECTOR: Why don't we give them to you, too?

23 THE COURT: I would like that, too.

24 MR. MARRIOTT: We have no objection, Judge.

25 THE COURT: All right, sir.

1
2 MR. MARRIOTT: Your Honor, when I say we have no
3 objection subject to whatever objections we may have when we
4 see the declarations.

5 THE COURT: Of course, I understand that.

6 MR. SPECTOR: May I approach?

7 THE COURT: Yes, of course, Mr. Spector, thank
8 you.

9 MR. SPECTOR: This would have been our first
10 witness.

11 THE COURT: Okay. Okay.

12 MR. SPECTOR: And here are the other two
13 exhibits.

14 THE COURT: So we have Declarations of Mr.
15 Nielsen, Mr. Tibbitts, and Mr. Hunsaker and that's what
16 we'll review. And you'll just let me know when you're ready
17 to proceed. Is that right, Mr. Marriott?

18 MR. MARRIOTT: Yes, Your Honor, thank you.

19 THE COURT: Thank you. All right, we'll stand in
20 recess as long as necessary.

21 (Recess from 10:30 a.m. to 11:10 a.m.)

22 THE COURT: You may be seated, thank you. Mr.
23 Marriott, did you want to respond to the declarations? I
24 mean, I know you're going to be -- you'll probably want to
25 cross examine, probably.

MR. MARRIOTT: We will, I believe have some

1 objections to the content of the declarations.

2 THE COURT: All right.

3 MR. MARRIOTT: But I think perhaps what makes
4 sense is to have the witnesses called and we can state our
5 objections when they've adopted their declarations which is
6 I assume the procedure we will be following.

7 THE COURT: Exactly.

8 MR. MARRIOTT: Thank you, Judge.

9 THE COURT: Thank you.

10 MR. SPECTOR: So you want me to --

11 THE COURT: Mr. Spector?

12 MR. SPECTOR: How exactly do you --

13 THE COURT: Well I guess we have to call Mr.
14 Tibbitts to the stand.

15 MR. SPECTOR: All right. Do I do that now?

16 THE COURT: Why not? I'll do it. Mr. Tibbitts?

17 (Laughter)

18 THE COURT: You may --

19 MR. TIBBITTS: Do I keep my declaration up there
20 with me?

21 THE COURT: Yes. I think that's a good -- you'll
22 probably need that, Mr. Tibbitts. Is that all right, Mr.
23 Marriott? Any objection?

24 MR. MARRIOTT: That's fine by me, Your Honor. I
25 have no objection.

1 THE COURT: Okay. And we will have you sworn,
2 Mr. Tibbitts.

3 RYAN E. TIBBITTS, DEBTORS' WITNESS, SWORN

4 THE COURT: Thank you, Mr. Tibbitts. When you're
5 -- yes, you may proceed.

6 DIRECT EXAMINATION

7 BY MR. SPECTOR:

8 Q Mr. Tibbitts, do you adopt your declaration?

9 A Yes, I do.

10 MR. MARRIOTT: Got it.

11 THE COURT: Thank you.

12 MR. SPECTOR: Thank you.

13 THE COURT: All right, now that's official.

14 MR. MARRIOTT: Thank you, Your Honor.

15 THE COURT: Thank you. Mr. Marriott?

16 MR. MARRIOTT: Good morning, Mr. Tibbitts.

17 MR. TIBBITTS: How are you?

18 MR. MARRIOTT: Your Honor, I may, I think in the
19 interests of expedition, what I'd like to do is state for
20 the record our objections to the certain paragraphs of Mr.
21 Tibbitts' declaration.

22 THE COURT: All right.

23 MR. MARRIOTT: And then I have but a few
24 questions for Mr. Tibbitts on behalf of IBM. Your Honor, we
25 would object to Paragraphs 7, 8, 9, 10, 11, 12, 16, and 17

1 on the grounds that they are speculative, not based on
2 personal knowledge and based on hearsay for reasons that I
3 believe are plain on the face of the document. I assume
4 Your Honor will take those objections under advisement if
5 and when you consider the merits of the testimony and you
6 don't wish to have further argument on that.

7 THE COURT: Well I suppose to the extent that I
8 sustained your objections, you would have to cross examine
9 on those points.

10 MR. MARRIOTT: I don't intend, Your Honor, to
11 cross examine on those points. The speculative nature --
12 the testimony in those paragraphs, Your Honor, speaks to
13 what would happen in a world in which the Tenth Circuit
14 Court of Appeals were to reverse Judge Kimball's decision in
15 Novell's favor in the District Court in Utah. And Mr.
16 Tibbitts' testimony is as Your Honor knows if you've had an
17 opportunity to review this --

18 THE COURT: Yes.

19 MR. MARRIOTT: -- lays out his view of several
20 possibilities in the event that event in the future, that
21 uncertain event in the future would occur. It's our
22 position that that is necessarily and inherently
23 speculative. That it isn't and can't be based on personal
24 knowledge. That it's based in parts on hearsay and for
25 those reasons alone Your Honor not take that into evidence.

1 I don't believe there's much additional cross examination to
2 about it. I think it is speaks for itself and on its face
3 and suffers from those problems. I have only several
4 additional questions for --

5 MR. JACOBS: If I may?

6 THE COURT: Please.

7 MR. JACOBS: This will be the first and last time
8 I disagree with Mr. Marriott today. But I actually think if
9 you were to rule, it would expedite my cross examination at
10 least because if it -- if I have to be concerned that it
11 might come in, then I have to develop further aspects of the
12 proposed testimony so --

13 THE COURT: And forgive me, your name again?

14 MR. JACOBS: Michael Jacobs, Your Honor, I'm
15 sorry.

16 THE COURT: I'm sorry, Mr. Jacobs.

17 MR. JACOBS; And I'm sorry for not being at the
18 microphone also.

19 THE COURT: No, I think we picked you up right
20 there at the table.

21 MR. MARRIOTT: And to be clear, Mr. Jacobs I
22 believe is the primary questioner of Mr. Tibbitts.

23 THE COURT: Yeah, okay.

24 MR. MARRIOTT: I am principally stating IBM's
25 objections which I think Your Honor should grant. And

1 because I only have several questions, it doesn't impede my
2 examination in the way of Mr. Jacobs.

3 THE COURT: All right. Mr. Spector, any response
4 to the objection?

5 MR. SPECTOR: Mr. Normand will handle this
6 witness, Your Honor.

7 THE COURT: All right, good morning.

8 MR. NORMAND: Good morning, Your Honor, Ted
9 Normand.

10 THE COURT: Yes.

11 MR. NORMAND: This goes to an issue that Mr.
12 Spector addressed in the argument last week so I have one
13 broad point and one specific point. As abroad matter, I'm
14 not sure the label speculative is of particular significance
15 here. And what Your Honor is charged with doing is to some
16 extent making a prediction about how these claims are going
17 to be resolved. I don't think there's any question that the
18 pendency of the litigation is relevant. We're not going to
19 address the merits. We're not trying to prove up the
20 merits.

21 THE COURT: Right.

22 MR. NORMAND: But I don't think there's a
23 question IBM and Novell haven't gone so far as to say that
24 the pendency of the litigation is irrelevant. So given its
25 relevance, Your Honor is charged with making one prediction

1 or another about what might happen. That's my general
2 comment. I would say specifically we have the general
3 counsel of the company who's been exposed to the proceedings
4 and who as a mechanism for Your Honor to gain some knowledge
5 through a witness about the company's view, trying to make
6 the point that, you know, there's a reasonable prospect of
7 rehabilitation. The company's view about how things might
8 play out. Now they're entitled to put up, I think they can
9 argue as attorneys. They can argue against it. The way
10 we've chosen to do it is to use the general counsel of the
11 company to argue about how he things given his many year
12 exposure, his investment in the issues as the general
13 counsel of the company, his non-stop experience of dealing
14 with them. He's qualified to speak to what he thinks will
15 happen upon, you know, any one of a number of events in
16 particular concerning the Tenth Circuit appeal. So for both
17 of those reasons, I think Mr. Tibbitts should be permitted
18 to testify to the substance of those paragraphs.

19 THE COURT: Thank you, Mr. Normand. Anything
20 further, Mr. Marriott?

21 MR. MARRIOTT: Your Honor, I would say simply
22 that without boring Your Honor again with all the detail of
23 our letter brief, Mr. Levin's letter brief to the Court, we
24 laid out there why Your Honor this testimony is inherently
25 speculative, why it's been disallowed by Courts in other

1 jurisdictions. It is offered here as I understand it, for
2 the purpose of showing that the Debtors have some prospect
3 of rehabilitation and an uncertain potential recovery at a
4 date uncertain in the future, Your Honor, is necessarily and
5 inherently speculative and for the reasons set out in those
6 papers and that have otherwise stated here, Your Honor, that
7 it not respectfully submit be allowed.

8 THE COURT: Yes, Mr. Jacobs?

9 MR. JACOBS: Michael Jacobs, Your Honor. For the
10 record, Novell joins in IBM's objections to this testimony.

11 THE COURT: All right. Mr. Normand?

12 MR. NORMAND: One last word, Your Honor.

13 THE COURT: Yes.

14 MR. NORMAND: It's important to note that part of
15 what Mr. Tibbitts is testifying to in these paragraphs is
16 based on his personal experience and that is in particular
17 what he thinks will happen in the market for lack of a
18 better term if there is some sort of reversal from the Tenth
19 Circuit. That's an issue that he has grounds to address
20 based on firsthand knowledge. And again, I think we're --
21 we shouldn't get hung up on labels. Is it speculative?
22 It's forward looking, but that's the context in which
23 everyone finds themselves, of course Your Honor knows that.
24 And Your Honor's task is to predict what's going to happen
25 in the future and Mr. Tibbitts has personal knowledge based

1 on which he can speak to that issue.

2 MR. MARRIOTT: May I just one additional point,
3 Your Honor raised by Mr. Normand's argument. A further
4 problem with Mr. Tibbitts' testimony, Your Honor is it is in
5 effect improper lay opinion testimony. What Mr. Norman
6 should have said and what Mr. Tibbitts says at Paragraph 10
7 of his declaration is that he will speak to the effect that
8 he personally believes a decision by the Tenth Circuit Court
9 of Appeals would have on the stock price and the market
10 capitalization of the SCO Group. That is if anything, Your
11 Honor, a classic question of expert opinion. It is not a
12 question for a lay witness, independent of the other reasons
13 for objection which we laid out. Thank you.

14 THE COURT: Thank you. Well, you know, Mr. --
15 let me ask Mr. Tibbitts one question. Mr. Tibbitts as
16 general counsel for SCO is your responsibility and there may
17 be others, but is it one of your responsibilities to monitor
18 the litigations to which you refer in your declaration?

19 MR. TIBBITTS: Yes.

20 THE COURT: Okay. Well given the fact that Mr.
21 Tibbitts is a lawyer, is general counsel, is charged with
22 the responsibility of monitoring litigation, I am going to
23 overrule the objection except as it relates to what impact
24 the litigation would have upon the stock prices because I do
25 not believe that Mr. Tibbitts as a lawyer has the expertise

1 to opine on that or to even speak to it as a fact, matter of
2 fact. But other than that as far as what might happen, I
3 think it goes to the weight of the evidence. I think we all
4 know that this is based on surmise to a large extent, but
5 nonetheless as general counsel, I do think that Mr. Tibbitts
6 ought to be entitled to testify or his declaration at least
7 as to those points should be admitted.

8 MR. MARRIOTT: May I inquire, Your Honor?

9 THE COURT: Yes.

10 CROSS EXAMINATION

11 BY MR. MARRIOTT:

12 Q Thank you. Mr. Tibbitts in your declaration, you
13 describe certain of the claims that the Debtors have against
14 Novell and IBM. Correct?

15 A Yes.

16 Q You do not mention, however, in your declaration any
17 counterclaims that either Novell or IBM has against the
18 Debtors. Correct?

19 A That's correct.

20 Q And, in fact, IBM has a number of counter claims
21 against the Debtors. Correct? Against the SCO Group, Inc.?

22 A Well I know at one point they had a number of
23 counterclaims and they dropped many of those. And I don't
24 know if they have many claims left or one or two, sorry.

25 Q But isn't a fact, Mr. Tibbitts that IBM asserted more

1 than ten counterclaims against the SCO Group including four
2 patent counterclaims which were -- which patent
3 counterclaims were dropped?

4 A I don't have the numbers in my head, but that sounds
5 about right.

6 Q And they're -- and IBM has asserted against the SCO
7 Group counterclaims in addition to patent counterclaims.
8 Correct?

9 A Yes.

10 Q And those cases are pending. Correct?

11 A Yes.

12 MR. MARRIOTT: In fact, IBM moved for summary
13 judgment for declaration -- with respect -- withdrawn, Your
14 Honor. No further questions.

15 THE COURT: All right, thank you. Mr. Jacobs,
16 when you're ready, sir.

17 BY MR. JACOBS:

18 Q Mr. Tibbitts, let's talk first about the timing of a
19 possible Tenth Circuit ruling. In your declaration, you say
20 that you have been advised, that SCO has been advised that
21 Judge McConnell plans to rule on this case as prior to his
22 departure date. Do you recall that testimony --

23 A Correct.

24 Q -- or declaration? What exactly has been said by whom
25 to whom, sir?

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2 MR. NORMAND: Your Honor, let me just object on
3 the basis of privilege. I think the phrasing of Mr.
4 Tibbitts' declaration on this point was intentional and
5 carefully done. We wouldn't want Mr. Tibbitts to speaking
6 to his discussions with counsel.

7 MR. JACOBS: Move to strike, Your Honor. If
8 they're asserting privilege over the basis for this
9 testimony, then that has to be stricken from the record.

10 MR. NORMAND: Your Honor, someone can have an
11 understanding that they've developed from discussion with
12 counsel and testify to that understanding without testifying
13 to the content of the discussion with counsel. I didn't
14 mean to preclude an answer to the question, I was objecting
15 to the extent that question was implicating discussions with
16 counsel and testimony directly about those discussions. Mr.
17 Tibbitts can speak to understandings he developed following
18 discussions with counsel.

19 MR. JACOBS: I don't see how he can testify to
20 what he understands the Tenth Circuit has told SCO without
21 telling us what the Tenth Circuit has told SCO.

22 THE COURT: I understand and I'll overrule that
23 objection.

24 MR. JACOBS: So, Mr. Tibbitts, who has said what
25 to whom?

THE COURT: I'm sorry?

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MR. TIBBITTS: I thought his counsel --

MR. JACOBS: You overruled the objection.

THE COURT: Yes.

MR. JACOBS: So I'm re-asking the question --

THE COURT: Yes, yes, okay.

MR. JACOBS: -- just to get --

MR. TIBBITTS: I just thought your co-counsel was waiving you there. So that's why I pointed over there. The first information I have on this is within a week of the hearings on May the 6th, 2009, I picked up the phone and called the -- there's an informational clerk at the Tenth Circuit to ask them the general question of -- let me back up. Judge McConnell announced he would be leaving the bench, I believe the day before our case was argued. I wondered -- we had discussed what the impact of that might be. And I wondered if they, if the Tenth Circuit had any information on it. So I called the general information clerk over there and said what is the effect of Judge McConnell's leaving the bench at the end of August? Would it be his intent or do you know is there a procedure that the intent would be that he would issue opinions on all the cases he's involved in prior to that date and that clerk said absolutely. I don't think we even discussed the SCO case. I just said in general what is McConnell going to do. And then I am aware that our counsel had a similar contact

1 some time after that, but my first information was when I
2 called the clerk.

3 BY MR. JACOBS:

4 Q And the similar contact, similar in terms of it being
5 of a general nature was the plan here in view of Judge
6 McConnell's impending departure?

7 A I don't know the answer to that. You mean with
8 others? I didn't -- it was general. My call was general.

9 Q And your counsel's call?

10 A I don't know.

11 Q Now have you -- at your deposition you were asked
12 about scenarios in which a Judge leaves the bench while a
13 case is pending. Do you recall that question or answer?

14 A Yes.

15 Q Isn't a fact, sir, that in certain circuits in the --
16 in this country if a Judge leaves the bench the two Judge
17 panel can continue to deliberate and issue a ruling?

18 A That may be true, but as I said in my deposition
19 that's news to me if they can do that.

20 Q And you don't know, in fact, what could happen, what
21 will happen here. It may be that the panel is divided.
22 That it takes more time for a ruling to come out.

23 A I suppose that's possible. What I do know is that
24 Judge McConnell sat on ten cases after he announced his
25 departure and if I got my numbers correct, I believe

1 opinions have come out on six of those ten so he is working
2 on the cases that he heard.

3 Q Were any of those cases complex commercial cases of
4 the sort at issue here?

5 A That he sat on?

6 Q Correct.

7 A I haven't drilled down on all of them. I know at
8 least one that was argued with our panel seemed fairly
9 complicated.

10 Q So it was on an asylum [ph] case I think wasn't it,
11 sir?

12 A That was the first one, the second one was a
13 commercial dispute as I recall.

14 Q Now in your declaration, you discussed various
15 scenarios what could happen depending on various Tenth
16 Circuit outcomes, yes?

17 A Correct.

18 Q And then you talk about -- and in your declaration you
19 discuss the scenario in which say the copyright rulings are
20 reversed.

21 A Yes.

22 Q It's possible that the -- that one of the possible
23 outcomes here is that the ruling, the Tenth Circuit affirms
24 Judge Campbell's decision on Novell's claim for money
25 against SCO.

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A Correct.

Q And it's possible that that could be coupled with different decisions say a remand on the copyright issue?

A Correct.

Q And then we would have a trial on the copyright issue?

A Correct.

Q And that could take place in 2009, 2010, possibly even 2011. Correct?

A Sure.

Q In addition, there's a pending arbitration relating to copyright issues, isn't there?

A Yes.

Q You didn't mention that in your declaration, did you?

A I did not.

Q But that arbitration has been stayed because, partly because SCO argued look, the ruling on copyright ownership moves any need to have an arbitration in Zurich over copyright issues.

A Say that again.

Q SCO argued in arguing that the arbitration shouldn't go forward --

A In this Court. Is that what you're referring --

Q In this Court and to the arbitration panel as well.

SCO argued that the copyright ruling in the District Court mooted any need for the arbitration to go forward in Zurich.

1 A I haven't studied all of that. It sounds about right,
2 but what I do know is the copyright issue was scheduled to
3 go to trial in September of '07 and was ready to go in Utah.
4 And I think we could get back there quickly.

5 Q If schedules allow. Correct, sir?

6 A Sure.

7 Q And depending on what additional record if any needs
8 to be developed after a Tenth Circuit ruling.

9 A Yes, if any.

10 Q And in terms of the arbitration, that's a whole other
11 category of potential expenses to SCO, isn't it?

12 A Yes.

13 Q You note in your declaration that the interest, some
14 of the interest owing may be non-allowable in bankruptcy in
15 Paragraph 7. Do you see that?

16 A Yes.

17 Q And that's one of the detriments to Novell isn't it
18 for the -- given the protracted nature of this bankruptcy.
19 If it should turn out that interest is not allowable, the
20 longer this persists, the lower the value of Novell's claim
21 against SCO. Correct?

22 A I guess you could do that math, yes.

23 MR. JACOBS: A moment, Your Honor?

24 THE COURT: Certainly.

25 MR. JACOBS: Thank you, Your Honor, no further

1 questions.

2 THE COURT: All right. Any redirect, Mr.
3 Normand?

4 MR. NORMAND: Just briefly, Your Honor.

5 THE COURT: Sure.

6 REDIRECT EXAMINATION

7 BY MR. NORMAND:

8 Q Good morning, Mr. Tibbitts.

9 A How are you?

10 Q Mr. Marriott had asked you about counterclaims. Do
11 you recall that?

12 A Yes.

13 Q Do you recall what amount of damages IBM claims for
14 those counterclaims that do remain?

15 A Not specifically. It was in the -- and I'm just going
16 from memory here. I haven't researched this. It was in the
17 -- well let me back up. I think when we took discovery on
18 that, their expert admitted something to the effect of they
19 didn't have any damages other than attorneys fees and what
20 that number is, I don't recall, but it was -- I just don't
21 remember specifically.

22 MR. MARRIOTT: And I would just object to the
23 characterization of what the expert admitted.

24 MR. NORMAND: I was asking Mr. Tibbitts about his
25 understanding --

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THE COURT: Right.

MR. NORMAND: -- as to whether IBM had asserted any damages for -- in support of their counterclaims.

THE COURT: Mr. Marriott?

MR. MARRIOTT: And in response, Your Honor --

THE COURT: Yeah.

MR. MARRIOTT: -- the witness purported to characterize an expert report which is not of record at which Your Honor ruled out of the record.

MR. NORMAND: He's not putting it in for the truth of the matter, he's putting it in to explain the basis for his understanding.

MR. MARRIOTT: Again, Your Honor, and the basis of his understanding is speculative and irrelevant. What matters is the underlying truth.

MR. NORMAND: That turns everything that I've heard for the last week around, Your Honor.

THE COURT: I'm going to overrule that objection.

BY MR. NORMAND:

Q Mr. Tibbitts, did you attend the oral argument in front of the Tenth Circuit?

A I did.

Q And was Judge McConnell at the argument?

A Yes, he was.

Q And do you recall whether he asked any questions?

1 A He asked the majority of the questions.

2 Q On this appeal in particular?

3 A On our case, yes.

4 MR. NORMAND: That's all I have, Your Honor.

5 THE COURT: Any new cross?

6 MR. MARRIOTT: Just briefly.

7 RE CROSS EXAMINATION

8 BY MR. MARRIOTT:

9 Q Mr. Tibbitts, you don't know precisely what IBM's
10 damages experts say are the damages that IBM has suffered at
11 the hands of SCO, right?

12 A I'm just going on memory from what I recall from that
13 deposition but I don't know the specifics.

14 MR. MARRIOTT: Thank you, no further questions.

15 THE COURT: Mr. Normand?

16 MR. NORMAND: This could be bad form in that it's
17 not within the scope of what Mr. Marriott just asked, but I
18 wanted to ask one further question on my redirect if that's
19 okay with Your Honor.

20 THE COURT: I'll let you have that leeway,
21 certainly.

22 REDIRECT EXAMINATION

23 BY MR. NORMAND:

24 Q Mr. Tibbitts, from your experience at the company when
25 you were with the company, do you know what the stock price

1 was before the summary judgment ruling in August of 2007 and
2 the day before that?

3 A Yes, I do.

4 Q And do you recall what that stock price was?

5 A On August 10, 2007 the day the ruling came out after
6 the market closed, our market cap was \$35.5 million
7 approximately and our stock price was \$1.56 a share.

8 Q And you recall what those numbers were the next day
9 after the ruling?

10 A Yeah, the next trading day was Monday and our stock
11 price closed at 44 cents for a market cap of \$9 million.

12 MR. NORMAND: Thank you, Your Honor.

13 THE COURT: All right, Mr. Normand. Anything
14 relating --

15 MR. MARRIOTT: Nothing here, Your Honor.

16 THE COURT: All right. Yes, I'm sorry, Mr.
17 Jacobs, nothing more? Mr. Tibbitts, you may step down, sir.

18 MR. TIBBITTS: Thank you.

19 THE COURT: Thank you.

20 MR. SPECTOR: Mr. Tibbitts is going to go call
21 Mr. Nielsen who --

22 THE COURT: Oh, fine, good.

23 MR. SPECTOR: -- who would have been our first,
24 but we -- now Mr. Tibbitts can stay here with us.

25 THE COURT: Yes, he's entitled to stay.

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2 MR. MARRIOTT: Your Honor, may I just inquire how
3 much time we've expended in the interest of keeping everyone
4 on the same page?

5 THE COURT: You know, it's very difficult because
6 some of -- a lot of its been argument. I have you at the
7 moment at 15 minutes.

8 MR. MARRIOTT: Thank you, Judge.

9 THE COURT: And I have the other side at about 25
10 minutes.

11 MR. SPECTOR: Your Honor, I guess we'd call Ken
12 Nielsen.

13 THE COURT: Mr. Nielson, thank you. If you'll
14 just remain standing while you're sworn, Mr. Nielson.

15 MR. SPECTOR: Now I think they want you behind --
16 there's a bible.

17 KENNETH RAY NIELSEN, DEBTORS' WITNESS, SWORN

18 DIRECT EXAMINATION

19 BY MR. SPECTOR:

20 Q Do you adopt your declaration, sir?

21 A Yes.

22 Q Do you know what that means?

23 A No, but I assume it means do I -- is this my
24 declaration.

25 Q Yes. And you're agreeing that that is accurate?

A Yes.

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THE COURT: Thank you.

MR. REYNOLDS: Good morning, Your Honor. Good morning, Mr. Nielsen.

MR. NIELSEN: Good morning.

MR. REYNOLDS: I'm Michael Reynolds from Cravath Swaine and Moore in New York on behalf of IBM. As a threshold matter, Your Honor, I'd like to on behalf of IBM object to Paragraphs 28 to 36 of Mr. Nielsen's declaration on the grounds that those -- the subjects described therein are beyond the scope of the topics that the Debtors indicated Mr. Nielsen would be here to testify about. The topics that we were advised he would be testifying about were and I quote "financial results and management steps to conserve" and did not relate to the topics that are addressed in the paragraphs I just listed. If I could further explain, Your Honor.

THE COURT: I was just waiting for a response, but go ahead. Please go ahead while you're there Mr. Reynolds.

MR. REYNOLDS: Yes. If you had a chance to review those paragraphs briefly, you'll see they relate to the witness' views on various intercompany impact of the conversion of Chapter 7.

THE COURT: Right.

MR. REYNOLDS: And that's a topic that does not

1 fall within the two that I mentioned. And, in fact, during
2 Mr. Nielsen's deposition, I specifically asked him just to
3 make sure there were no -- there was no chance of him going
4 into this area whether it was his intent to address this
5 subject and he was instructed by counsel not to go into that
6 subject even though I thought that was something that were
7 entitled to do in these depositions. And so as a result, we
8 do not have testimony going into great -- any real length on
9 his views as expressed here, nor did we receive documents of
10 which I'm aware that relate to these topics and it's the
11 first time that I am seeing these kinds of numbers and
12 information and so forth on these areas. And so for those
13 reasons, we object to those paragraphs.

14 THE COURT: All right, thank you, Mr. Reynolds.
15 Mr. Spector?

16 MR. SPECTOR: Well as a threshold matter, Mr.
17 Reynolds should stay right here. I'd like him to cite for
18 me where it is I told the witness not to testify about this
19 because that was the day that discovery was going on and Mr.
20 Nielsen and I were in another room with depositions. And I
21 don't recall that. I'd like to hear -- I'd like to see it.

22 MR. REYNOLDS: On page -- here it is, right here,
23 Mr. Spector. On Page 251 of Mr. Nielsen's deposition, I
24 asked do you have any view in particular of whether the
25 Bankruptcy Court should convert this proceeding to a Chapter

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2 7 under the Bankruptcy Code? Yes, I would. What is that
3 view? Which it should not. What is your basis for that
4 view other than anything you may have discussed with
5 counsel? I'm talking about your own personal view as to why
6 that should not happen. I don't think it serves the benefit
7 of stakeholders, be it customers, employees, creditors. Is
8 that a subject upon which you plan to testify at the hearing
9 on Monday? And Mr. Spector said objection, the witness said
10 I don't know. Mr. Spector: I want to finish the objection.
11 I objected the last time you asked it of another witness.
12 What this witness is going to testify about could only be
13 derived from conversations with counsel who prepares him for
14 that testimony. So I would ask that it not be answered.

15 MR. SPECTOR: Okay.

16 MR. REYNOLDS: And then it goes on and I
17 explained that I thought we could go into that. And he
18 instructed the witness not to answer.

19 MR. SPECTOR: Your Honor the -- a large -- this
20 is one of those, you know, don't take this pejoratively,
21 okay? I can't -- I'm having -- I'm tired and it's hard for
22 me to find the right words sometimes. It's one of those
23 pre-trial traps. There isn't anything in the Court Order.
24 There isn't anything in the Federal Rules of Civil
25 Procedure, the Federal Rules of Bankruptcy, Magna Carta
anywhere that say before we come to trial we have to say oh,

1 by the way, this person is going to step A through C and
2 somebody else is going to do D through F. And as a
3 courtesy, I tried when they asked and I'll remember if
4 there's a next time not to be so courteous, but I tried when
5 they asked to say well what is this guy going to talk about?
6 On each witness, I said well we're going to try put him for
7 this, we'll try to put him in that for that and then things
8 changed during the course. And I'm not saying that Mr.
9 Reynolds is misquoting anything that we said in emails three
10 weeks ago when I was thinking about how we're going to put
11 this case together. We had other witnesses. They didn't
12 show up. I won't even go into the side story about that. I
13 got subpoenas and they disappeared. And so things had to
14 change.

15 Having said that, Your Honor, there isn't
16 anything in these paragraphs that is mind blowing or outside
17 of the scope. The primary witnesses who are going to be
18 talking about conversion are Mr. McBride, Mr. Hunsaker. The
19 testimony they elicited in that deposition was and that I
20 objected to and they asked other witnesses, too is what are
21 you going to testify at trial? And I objected saying that
22 the witness is not prepared -- it's not proper to ask the
23 witness defense strategy, trial strategy. That's what that
24 objection goes to, Your Honor. I directed the witness not
25 to tell what you plan to testify to, what the lawyer tells

1 you you're going to testify about and so forth. That's what
2 I'm talking about. Now these questions, these paragraphs
3 talk about how the financials work in the company. The
4 intercompany transactions.

5 Some the issues that are addressed earlier in the
6 declaration talk about discrepancies between Novell and
7 IBM's accounting, the MRO's. Some of that is foreign
8 accounting. This all is part and parcel of one. There are
9 I have to admit not everyone of these paragraphs is that
10 way. Some of these talk about oh, by the way if it converts
11 we have 19 employees overseas and that may be a problem for
12 the case because they would have claims under the foreign
13 jurisdiction. We do have things like possible claims by
14 customers because the service contracts won't be audited.
15 Those things I probably could get in through other witnesses
16 later, but I don't think that's going so far a field or that
17 it's unfair to IBM, Novell, or the U.S. Trustee to let the
18 CFO testify about the internal financial affairs of the
19 company even if three weeks ago I may have thought that
20 wasn't going to come in through his testimony. And that's
21 really all I can say.

22 THE COURT: And how about documents? Were
23 documents produced?

24 MR. SPECTOR: I don't -- when Mr. Nielsen was in
25 the deposition when everybody else was producing documents.

1 There are documents. We have attached them. I don't know
2 that he has anything else to produce. Other people were
3 doing the document production while he was being deposed.
4 It was only a 24 hour process at that point, Your Honor.
5 Everybody was scrambling. I think we produced 12,000 or
6 17,000. How many -- more than 12, less than 17 perhaps
7 thousand documents in a space of 24 hours. Privileged
8 things got in there. And actually they put on some
9 privileged things. We're not even objecting to it. We just
10 don't want to take -- the effort isn't worth it anymore.
11 But, you know, we were writing these declarations right up
12 to midnight last night because the strategy is changing.
13 And they want to lock me into something I said as a courtesy
14 three weeks ago. I don't think it's fair.

15 THE COURT: Anyone else?

16 (No audible response heard)

17 THE COURT: The documents that are attached to
18 the declaration, Mr. Reynolds --

19 MR. REYNOLDS: Those documents --

20 THE COURT: -- were they produced?

21 MR. REYNOLDS: Oh, the documents attached this
22 declaration?

23 THE COURT: Yes.

24 MR. REYNOLDS: Most of those were -- almost every
25 page from what I remember were brought to the deposition by

1 Mr. Nielsen and I did have a chance to examine him about
2 those. But none of these relates to the intercompany --

3 THE COURT: No.

4 MR. REYNOLDS: -- matter that's the subject to
5 the paragraphs to which I referred, Your Honor.

6 THE COURT: I understand.

7 MR. REYNOLDS: And I would just like to refer
8 back to the transcript of the hearing before Your Honor on
9 June 15 in which the topic of a list of witnesses and an
10 outline of what their testimony would entail was discussed
11 and that Mr. Spector as he indicated would be happy to
12 supply that. My principal point is that we have not had
13 discovery on this matter. And I believe on that basis it is
14 unfair for the witness to be able to testify on the subject.
15 And as Mr. Spector has acknowledged, he has other witnesses
16 who have been identified as speaking directly to this topic
17 and I believe he should be able to rest on that, but I don't
18 see the reason to have this particular witness go into these
19 areas.

20 THE COURT: Okay.

21 MR. SPECTOR: Are those live is it just -- is
22 more convenient for us to do that way?

23 THE COURT: It probably would be just as well to
24 speak right from the table on objections.

25 MR. SPECTOR: All right. But in colloquy I guess

1 I got to get up.

2 THE COURT: Yes.

3 MR. SPECTOR: Okay.

4 THE COURT: Well you can remain at the -- you
5 certainly remain at the table on objections though.

6 MR. SPECTOR: Two things about that. The other
7 witnesses, there's only two live witnesses, Mr. Norris who
8 doesn't know anything about this. Mr. Tibbitts, pardon me,
9 Mr. Tibbitts' testified. Mr. McBride doesn't know anything
10 about what we're going to hit him with. Those are not
11 things that we prepped him for. So that's unfair.

12 Second, Your Honor, and I may come back to this
13 multiple times today. We showed up in Court on the assigned
14 date for trial on June 15 with eight live witnesses. Mr.
15 Nielsen was one of them. They wouldn't have had one width
16 of discovery on that day and we would have proceeded to
17 trial. I know we brought in some evidence. We could have
18 done that as the last witness at the trial if we wanted to.
19 We could have put that into evidence with the last of the
20 eight witnesses and say and here's the Purchaser Sale
21 Agreement that was inked three hours ago. And we would have
22 had the trial and they wouldn't have had anything from Mr.
23 Nielsen or anybody else. We've produced thousands and
24 thousands of documents. They've had -- they deposed
25 everybody. None of that would have happened if we had gone

1 to trial on June 15 when we were scheduled to go. We're not
2 begrudging we got six extra weeks, but it was all to the
3 advantage of IBM Novell.

4 I don't think the fact that they didn't get some
5 question in about something really as -- well foreign
6 employees or the effects in his mind of breaching contracts
7 on -- to customers or the effects of employee claims on --
8 that's what this is about is so overreaching or that I was
9 taking advantage of them by not telling them in advance
10 who's going to testify about that. Or I never permitted
11 them specifically in talking about the foreign employees,
12 never talked to them, prevented them from talking about the
13 effects of contracts. They didn't ask about that. They
14 could have asked about that. But I guess that's what I have
15 to say about it.

16 THE COURT: Well just look -- I think just for
17 the sake of moving things along, I'm going to overrule the
18 objection. I understand it. But I think that Mr. Spector
19 has made a good point and that is we had a hearing scheduled
20 previously that did not proceed and I will reluctantly
21 overrule the objection. And I think a few of the paragraphs
22 don't relate to the -- a few of the objected to paragraphs
23 don't relate to the foreign business.

24 MR. REYNOLDS: Very well, Your Honor. I'll do my
25 best to ask questions on this topic.

1 THE COURT: Okay.

2 CROSS EXAMINATION

3 BY MR. REYNOLDS:

4 Q I mean, we got the -- are we still in the morning?

5 Good morning, Mr. Nielsen again. I would like to ask you
6 first if you have had a chance to review your declaration
7 since you signed it?

8 A Yes.

9 Q Do you believe it to be true and correct in every way?

10 A Yes.

11 Q I would like to refer you if I could, Mr. Nielsen, do
12 you have a copy of the declaration in front of you, right?

13 A I do.

14 Q To page, Paragraph 18 of your declaration. And then I
15 would also like to refer the witness to Movants Exhibit 1.
16 Do you have the binder of exhibits there, Mr. Nielsen?

17 MR. MARRIOTT: Your Honor, may I be -- the
18 witness needs to have the binder of exhibits. May I take
19 them to --

20 THE COURT: You certainly may, yes, Mr. Marriott.
21 These are your exhibits, Mr. Reynolds?

22 MR. REYNOLDS: That's correct.

23 THE COURT: Yes, I think that's a good idea, Mr.
24 Marriott. Thank you very much, thank you.

25 BY MR. REYNOLDS:

1 Q Mr. Nielsen, do you have Movants' Exhibit 1 in front
2 of you?

3 A Yes.

4 Q Which is the Debtors' response to the objections by
5 IBM and Novell. Is that right?

6 A Correct.

7 Q And is that document that is Movants' Exhibit 1 the
8 document that you are quoting in Paragraph 18 of your
9 declaration?

10 A Yes.

11 Q Okay. So if you go to Page 5 of the Exhibit 1 which
12 contains language from that correspondence to the language
13 quoted here in Paragraph 18, I would just like to start by
14 asking you where do you see the first sentence, the monthly
15 operating reports, MOR's suggest an aggregate operating loss
16 of \$8,652,000 on Page 5 of Exhibit 1.

17 A I don't see it.

18 MR. SPECTOR: Oh, oh, my goodness, my bad, Your
19 Honor. I think I got that from an early draft because the
20 documents on our PDF and I went back to my computer and I
21 pulled up what I thought was our response and I quoted from
22 the wrong paragraph. I have to take that one on me. And I
23 apologize to Mr. Nielsen who signed that declaration based
24 on my -- it was late at night.

25 BY MR. REYNOLDS:

1 Q Well the numbers there are the ones, things I want to
2 talk about. Isn't it true, Mr. Nielsen that the number
3 \$8,652,000 does not appear on Page 5 of document -- of
4 Exhibit 1?

5 A Correct.

6 Q Okay. The next part of that first sentence does
7 appear on Exhibit 1. Is that right? The part that starts
8 the true aggregate net operating loss over that time period
9 was actually \$4.37 -- sorry, \$4.357 million, approximately
10 half of what the Movants allege. Is that right?

11 A Yes.

12 Q And at the end of that paragraph in Exhibit 1 is there
13 not a footnote?

14 A Yes, there is.

15 Q Is there a footnote in the corresponding part in
16 Paragraph 18 of your declaration that reflects that
17 footnote?

18 A No.

19 Q And isn't true that the number \$4,357,000 that appears
20 in that sentence is false?

21 A That's incorrect.

22 Q What's the correct number?

23 A If we go to Paragraph 20 of my testimony or my
24 declarations, that correct number is \$5,339,000.

25 Q So the submission to the Bankruptcy Court that is

1 Exhibit 1 understated the true aggregate net operating loss
2 of the Debtors over the time period described. Is that
3 right?

4 A Correct.

5 Q If you look now at the footnote that appears in
6 Exhibit 1, but not in Paragraph 18 of your declaration, does
7 it not state the MOR's, the monthly operating reports
8 include non-cash items. As of the latest MOR, aggregate
9 non-cash items listed as part of losses total \$4.295
10 million. Is that right?

11 A On Page 5 of Exhibit 1, right?

12 Q Yes.

13 A That's correct.

14 Q Okay. And that language again does not appear in
15 Paragraph 18 of your declaration. But if you look at
16 Paragraph 20 where you were putting forth what you say is
17 the correct version, there is a footnote at that space at
18 the end of the first sentence. Is that right?

19 A Yes.

20 Q And the first part of that footnote does say the MOR's
21 include non-cash items. But then it goes on to say that as
22 of the March 2009 MOR, aggregate non-cash items listed as
23 part of losses on the statement of operations totaled \$8.623
24 million before net advances to foreign subsidiaries of
25 \$6.004 million. Do you see that?

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A Yes.

Q If you look back at Exhibit 1 in Footnote 7, what should the correct number have been in that sentence where it said the aggregate non-cash items listed as part of losses total \$4.295 million?

A It would be the net of the \$8.623 and the \$6.004, so it would be \$2,619,000 if my math works.

Q So the non-cash items reflected in Footnote 7 were considerably less than the amount that you or the Debtors rather had submitted in Footnote 7 of Exhibit 1. Is that right?

A Correct.

Q Okay. Going back to this Paragraph 18, I could go through the numbers, but it's clear by comparing 18 to Paragraph 18 and Paragraph 20 that the submission that was made to the Bankruptcy Court, that is Exhibit 1, understated the financial liabilities and exposure of the Debtors. Is that right?

A That's correct.

Q And, in fact, looking into some of the key numbers, the amount that was listed as the true losses from business operations in Exhibit 1 that went to the Bankruptcy Court on June 5 was said to be \$561,000, but in fact, what should that number have read?

A \$1,137,000.

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Q Which is more than twice \$561,000, right?

A Correct.

Q Now if you look then in the next final paragraph of your Paragraph 18 quoted text, it talks about an erosion in cash of \$3.5 million in the 19 months. And it goes on to say when averaged over that time, the rate of cash burn is around \$184,000 a month. Do you see that?

A Yes.

Q What is the number that should have appeared there instead of \$184,000?

A \$281,000.

Q \$100,000 more per month. Is that right?

A Correct.

Q Now if you go to Paragraph 20, Mr. Nielsen, looking at that same quoted paragraph that begins the erosion in cash of \$3.5 million, isn't it true that here in Paragraph 20 you're supposed to be correcting the numbers that were false in the previous submission? Isn't that right?

A Yes.

Q But isn't it true that \$3.5 million is incorrect?

A No, that's still correct.

Q I thought you told me in deposition if you recall testifying on July 22, that that number should have been \$5.3 million.

A There's a difference there. And that difference is

1 the \$5.9 is the cash burn, the \$3.5 is the change in the
2 cash balance when that -- so what that means is of the \$5.3
3 that was generating cash operating loss, it was funded by
4 working capital resulting in a diminution of cash of \$3.5
5 million.

6 Q So are you telling me that when you said in deposition
7 that that number should have been \$5.3 million you were
8 wrong?

9 A Yes.

10 Q And then when you see in the next sentence it says
11 when averaged over that time period, the rate of cash and
12 working capital burn is around \$281,000. Is that right?

13 A That's correct.

14 Q Okay. And that number is greater than the one that
15 you previously reported as \$184. Correct?

16 A Correct.

17 Q \$184,000. And then going to the end of this
18 paragraph, let's look at 18. In Paragraph 18, the brief
19 that was submitted by counsel states that taking away those
20 months of cash burn yields a more normal rate of reduction
21 of \$150,000 per month, but in fact, that number was false.
22 Correct?

23 A Correct.

24 Q What is the correct number?

25 A \$244,000.

1 Q I'd like to refer you now to Paragraph 23 of your
2 declaration where you state that based on current
3 assumptions you project that SCO will have between \$1.4 and
4 \$1.6 million in total cash on hand as of August 31, 2009.

5 Do you see that?

6 A I do.

7 Q Isn't it true that approximately \$1 million of that
8 stated cash amount is restricted cash?

9 A Yes.

10 Q Turning onto the next page where you talk about in
11 Paragraph 26 that management's implemented several programs
12 to preserve cash. You talk about reduction of R & D efforts
13 and reduction in marketing expenses. Isn't it true that
14 research and development is something that is necessary to
15 help you actually achieve sales in connection with the
16 revenue that you were hoping to achieve in Paragraph 25?

17 A No. The projections in Paragraph 25 are based upon
18 existing R & D and existing product line. It doesn't have
19 any introduction of new product lines or new products.

20 Q In Paragraph 25, are you making an assumption based on
21 reduced R & D or then current existing R & D?

22 A Current and existing R & D.

23 Q So not taking into account the reductions that you're
24 taking part in right now?

25 A Paragraph 26 says management has implemented. So

1 referring to R & D cutbacks that were implemented throughout
2 the period of this pre-petition or of this bankruptcy.

3 Q Are you planning any further reductions in R & D or
4 marketing expenses?

5 A At this time, no.

6 Q In Paragraph 27, you mention that the Debtors did not
7 retain the services of an investment banker because they
8 could not afford the cost. Do you see that?

9 A Yes.

10 Q And you state that you -- everyone you spoke with
11 wanted a retainer of at least \$100,000.

12 A Correct.

13 Q Do you recall specific bankers with whom you spoke who
14 mentioned they wanted a retainer of that amount?

15 A D. A. Davidson.

16 Q I'm sorry, Mr. Nielsen?

17 A D. A. Davidson.

18 Q Anyone else?

19 A We spoke with others who weren't interested.

20 Q But can you name any other investment bankers with
21 whom you spoke who said they wanted a retainer of at least
22 \$100,000 besides D. A. Davidson?

23 A No.

24 Q Now that mention of \$100,000, isn't it true that one
25 of the Debtors' subsidiaries according to you paid Mr.

1 Steven Norris who represents the purchaser here, \$100,000 in
2 connection with work that he did for the Debtors or their
3 subsidiaries?

4 A Yes.

5 Q Now looking at these paragraphs that relate to
6 intercompany expenses and again, I don't have documentation
7 on this, but the way I -- my reading this correctly in
8 Paragraph 28 to say that the foreign subsidiaries of the
9 Debtors receive a commission on all of their sales of the
10 Debtors' products equal to 110 percent of the subsidiaries
11 operating expense. Is that right?

12 A Yes, of their direct selling and operating expenses.

13 Q From whom do they receive that commission?

14 A It's received through an accounting convention that's
15 booked through the general ledger.

16 Q Okay. So in a sense, the commission is received from
17 the Debtors, from an accounting point of view?

18 A Correct.

19 Q Okay. Are you aware of any documents, Mr. Nielsen and
20 at that, by that I include studies or XL spreadsheets and so
21 forth that relate to the topics that are reflected in
22 Paragraphs 28, 29, 30, 31 for example?

23 A Paragraphs 28, 29, 30 and 31?

24 Q Yes, the ones relating to this intercompany accounting
25 treatment.

1 A Yes, there's agency agreements with each of its
2 foreign subs that support the 110 percent.

3 Q Have you performed any study or have you -- are you
4 aware of anyone else performing any study of the subjects
5 that are put forth in Paragraphs 28 to 31?

6 A Yeah, the intercompany pricing transfer is assessed,
7 has been assessed with outside parties like Price Waterhouse
8 Coopers.

9 Q Has it been assessed in terms of the subject that
10 you're putting forth here? In other words, the impact on
11 the Debtors should there be a Chapter 7 conversion?

12 A No. In this case, the information in those paragraphs
13 are talking to the implementation of that 110 percent that
14 the company follows with its foreign subs.

15 Q In paragraph 34, you talk about employee protections
16 in various nations.

17 A Yes.

18 Q Do you personally have knowledge of those employee
19 protections and what significance they may have?

20 A I have a general understanding.

21 Q What's the basis of your understanding?

22 A Is that in most of our foreign subsidiaries which are
23 in Europe, their benefits carryover and the credit -- if the
24 employee is terminated that the employer has to pay those
25 benefits.

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Q Are you a lawyer, Mr. Nielsen?

A No.

Q In Paragraph 34, you state that you estimate that if the foreign subsidiaries were to close down, the resulting liability would be in the order of \$1.2 million. Do you see that?

A I do.

Q Did you perform any analysis that you reduced to writing that relates to that subject right there?

A The Director of H. R. performed that analysis who has a better understanding of the impact of terminating foreign employees.

Q Have you see any written analysis by the Director of H. R. or anyone else regarding your assertion that the liability would be in the order of \$1.2 million?

A Yes.

Q And do you know whether that's been produced to the Debtor -- to IBM or Novell in this matter?

A Not that I'm aware of.

Q In Paragraph 36, you discuss that if SCO goes out of business and is not able to fulfill its contractual obligations to licensees, there will likely be millions of dollars of new claims. Do you have any source for that information?

A Yes.

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Q And what is that?

A We've had claims submitted by CTI Group of \$3 million.

Q Other than that?

A We also have revenues that we book every -- annually for one year licenses and support agreements which are earned as the passage of time.

Q Have you performed or are you aware of anyone else who's performed any analysis or study regarding this topic?

A Not that I'm aware of.

Q I would like to refer you -- let's see if I've got it here -- to Movants' Exhibit 5 which is titled, captioned the United States Bankruptcy Court here in the District of Delaware and it's titled Third Amended Summary of Schedules. Do you see that?

A I do.

Q Is this a document that you signed on July 1, 2009 under penalty of perjury?

A Yes.

Q And does this document state that the total amount of the Debtors' liabilities as of that date is \$4,015,620?

A Yes.

Q I'd like to move onto a different topic if I could, Mr. Nielsen. Do you recall testifying at your deposition on July 22 that barring a transaction, the Debtors lacked sufficient liquidity resources to fund their operations

1 through any period after July 31, 2009?

2 A Yes.

3 Q Isn't it true that you actually testified in Exhibit
4 11 of Movants' exhibits which is your transcript that you're
5 free to look at if you'd like, Mr. Nielsen at Page 238. Do
6 you believe that the Debtors have sufficient liquidity
7 resources at this point today to fund their operations
8 through any period after July 31, 2009? Answer: No,
9 barring a transaction, no. Is that right?

10 A Yes.

11 Q And do you recall --

12 MR. SPECTOR: What deposition exhibit is his
13 transcript, please?

14 THE COURT: Eleven.

15 MR. REYNOLDS: Eleven.

16 MR. SPECTOR: Eleven, thank you.

17 BY MR. REYNOLDS:

18 Q Now you did go on to revise that. There was a little
19 colloquy with counsel if you recall. And there was a
20 revision in which you said that yes, the company could
21 survive one or two days. Do you recall that?

22 A I do.

23 Q And then we discussed before how the projections that
24 appear in Debtors' Exhibit, Movants -- not Movants'
25 exhibits, but Debtors' Exhibit 22 which is one of the

1 documents you brought to your depositions that one page
2 consolidate sheet, balance sheet, in which you estimate that
3 cash on hand by the end of September 2009 would be \$69,000.

4 Is that right?

5 A Barring the restricted cash.

6 Q Right. Now you're a certified public account, Mr.
7 Nielsen, right?

8 A I am.

9 Q And prior to becoming the CFO of the SCO Group, you
10 acted first as the Controller of Mrs. Fields Cookies and
11 then as the CFO of Foreign Foods. Is that right?

12 A Correct.

13 Q And you've performed evaluations of businesses before,
14 have you not?

15 A Internally for those purposes.

16 Q And you consider yourself to be competent to perform
17 evaluation analysis of the business. Is that correct?

18 A Yes.

19 Q And isn't true that you've never in the entire time
20 that you've been either interim or actual CFO of the
21 Debtors, you've never performed evaluation analysis of the
22 businesses that are the subject of the Purchase and Sale
23 Agreement that's before the Court today. Is that right?

24 A That's correct.

25 Q Isn't it true that you've never requested either that

1 any employee perform an evaluation analysis of any of the
2 businesses owned by the Debtors. Is that right?

3 A Correct.

4 Q And finally, isn't it the case that as CFO you never
5 requested an outside entity perform evaluation of any of the
6 assets of the Debtors. Is that correct?

7 A That's correct for the same reason we didn't engage an
8 IB.

9 Q Do you have a sense of the value of the mobility
10 business of the Debtors?

11 A No.

12 Q Okay. I'd like to now ask you, Mr. Nielsen about some
13 documents that are in our materials. I'll start off by
14 asking you whether Mr. Steven Norris has received \$100,000
15 from a SCO subsidiary in connection with any work that he
16 may have done for the Debtors or for the SCO subsidiary.

17 A Yes.

18 Q And did you authorize that payment?

19 A Yes.

20 Q And do you know approximately when that payment was
21 made?

22 A June of '08.

23 Q June of 0?

24 A 2008.

25 Q Okay. And if I could refer you to IBM or the Movants'

1 Exhibit 57. And this is an invoice from Steven Norris,
2 Capital Partners, LLC. Do you see that, Mr. Nielsen?

3 A Yes.

4 Q Isn't it true that this invoice is for \$100,000? Yes?

5 A Yes.

6 Q Isn't it true that it states that it's due on receipt
7 by May 31, 2008?

8 A Yes.

9 Q And isn't it also true that this invoice is directed
10 to Darl McBride of the SCO Group with its address in Lindon,
11 Utah?

12 A Correct.

13 Q And isn't true there's no mention anywhere on this
14 invoice of SCO Japan or any SCO subsidiary. Isn't that
15 true?

16 A That's correct.

17 Q And your testimony is that this money that's requested
18 in this invoice was paid?

19 A Yes, it was.

20 Q In you said around June of 2008?

21 A The first week of June.

22 Q I'd like to call your attention to the next -- the
23 authorization which I think is on the next page. And do you
24 see a one page document that says the SCO Group, Inc.,
25 payment authorization. Is that what it says?

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A Correct.

Q And does this document contain your signature at the bottom?

A Yes, it does.

Q Which is that you approve the payment of these \$100,000?

A Correct.

Q Is this the same \$100,000 that we previously discussed?

A Yes.

Q Did there come a time when you received invoices from SCO Japan for various amounts of money in connection with Mr. Norris?

A Yes.

Q And isn't it true that those invoices from SCO Japan which appear later in the same exhibits, there are three of them, that they are all dated after the payment of \$100,000 was made to Mr. Norris. Isn't that right?

A Correct.

Q In fact, they're dated September 1, 2008, October 1, 2008, and October 31, 2008. Isn't that right?

A That's correct.

Q And that each one requests approximately \$25,000. Is that correct?

A Yes.

1 Q And, in fact, each one is billed to the SCO Group at
2 its address in Lindon, Utah. Isn't that right?

3 A That's correct.

4 Q Did the SCO Group pay these invoices?

5 A No.

6 Q And why not?

7 A Those are used for intercompany billings to reassign
8 expenses from Japan as we consolidate everything in the U.S.
9 and then it's reallocated out to the various marketplaces.

10 Q So these were accounting adjustments that were made in
11 connection with the \$100,000 payment?

12 A Correct.

13 Q Is that correct?

14 A Correct.

15 Q That was already made?

16 A Correct.

17 MR. SPECTOR: You should wait until the question
18 is finished because your voice isn't going to be carried
19 over. So you're saying correct before he's finished the
20 question. I'm not sure your answer is registering.

21 MR. NIELSEN: Okay.

22 BY MR. REYNOLDS:

23 Q Are there any more invoices other than these three SCO
24 Japan ones that the Debtors received from SCO Japan?

25 A Not that I know of. I don't know the answer to that.

1 Q Are you aware of any other payments from the Debtors
2 or any of their officers or affiliates to Mr. Steven Norris?

3 A No.

4 Q Are you aware that Darl McBride made a payment to Mr.
5 Norris of \$100,000?

6 A Yes.

7 Q Are you aware of any agreement between Mr. Norris and
8 the SCO Group's German subsidiary?

9 A No.

10 Q We discussed in your deposition, Mr. Norris an acronym
11 called BRICKMIA [ph]. Do you recall that?

12 A Yes.

13 Q Can you state for the Court what BRICMIA stands for?

14 A It's for the emerging markets, Brazil, Russia, India,
15 Middle East, China, and Asia.

16 Q But isn't it true that BRICKMIA does not really stand
17 for Asia at the end, it stands for Africa?

18 A Oh, okay, Africa.

19 Q Does it now refresh your recollection that it does not
20 refer to Asia?

21 A Well I guess when I say China.

22 MR. REYNOLDS: No further questions.

23 THE COURT: All right, Mr. Reynolds, thank you.
24 Mr. Lewis whenever you're ready.

25 BY MR. LEWIS:

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Q Thank you, Your Honor. Good afternoon, Mr. Nielsen.

A Mr. Lewis.

Q I'm Adam Lewis. I represent Novell in this matter.

To recur to your testimony in your declaration and in response to the questions from Mr. Reynolds today about the incorrect information in your -- in the submission to the Bankruptcy Court in response to the Motions to Convert, do you recall that testimony generally?

A Yes.

Q Okay. Now I think in your declaration you say that you learned it was incorrect upon returning from a vacation. Is that right?

A I believe my declaration -- yes.

Q Okay. And you're free to review your declaration any time you want. I don't want to make this hard for you. I'm not trying to trap you on anything that appears there so if you want to look at it, it's Paragraph 19. You say --

A Yeah.

Q -- I noticed this error only after I returned from the vacation a day or so before the June 15, 2007 hearing. Do you recall that?

A Correct.

Q Did you disclose this error to anybody at SCO?

A I worked -- as I worked to recalculate the numbers, I presented those to bankruptcy counsel and was prepared to

1 correct those when on June 15 when I was to come in to
2 testify.

3 Q Okay. But you weren't called to correct those. Is
4 that correct?

5 A I don't recall.

6 Q Well you weren't called to testify, right --

7 A Oh, correct.

8 Q -- on June 15?

9 A Correct.

10 Q So you didn't get to correct the record on June 15?

11 A Correct.

12 Q Did you make any other efforts to correct the record
13 after June 15 until you signed this declaration?

14 A No.

15 Q And bankruptcy counsel, the Debtors' counsel, they
16 were aware of these issues were they not once you advised
17 them in advance of June 15?

18 A Yes.

19 Q Okay. Now you've been doing a lot of financial
20 analysis I take it in the last month or two. Is that right?

21 A Just a bit.

22 Q Okay. And pretty intense work on that. Is that
23 correct?

24 A Correct.

25 Q When was the last time the Debtor filed a monthly

1 operating report?

2 A It would have been in May and the first week, second
3 week in -- some time in June.

4 Q Now going back to Exhibit 57 in the exhibit book this
5 Steven Norris invoice that you just looked at, this is a
6 \$100,000 invoice. Is that correct?

7 A Correct.

8 Q And did you personally authorize the payment of this
9 invoice?

10 A I did.

11 Q Do you -- what do you do before you authorize the
12 payment of an invoice personally?

13 A We had discussions as an executive team of the purpose
14 and the nature of the invoice.

15 Q Okay. So someone told you what this was for?

16 A Correct.

17 Q What were you told what it was for?

18 A For the development of a marketing plan and a business
19 plan for the BRICKMIA market.

20 Q Okay. And did you make any effort --

21 MR. SPECTOR: Could you keep your voice up. I
22 don't know if Your Honor can hear it, but my ears it's
23 tough.

24 THE COURT: Are we picking him up on the -- we're
25 doing okay? But if you could speak maybe even a little more

1 into the microphone that would help us, please --

2 MR. NIELSEN: Okay.

3 MR. LEWIS: Your Honor, maybe if we bend the
4 microphone a little bit more towards the witness.

5 THE COURT: Yes, you can certainly do that. Move
6 it forward or bend it --

7 MR. NIELSEN: Or we can get rid of these books,
8 right?

9 BY MR. LEWIS:

10 Q Did you make any effort to verify whether there was
11 such an entity as Steven Norris Capital Partners?

12 A Yes.

13 Q Okay. What did you do to do that?

14 A We had already had some discussions with Mr. Norris
15 before at Capital Partners.

16 Q Did you verify the existence of this entity in any
17 way? Check with the secretary, state's records anywhere,
18 something like that?

19 A No.

20 Q And this invoice is numbered 9887. Is that correct?

21 A Yes.

22 Q Now I'm going to ask you to look at what has been
23 marked or identified by the Debtor as SCO's Exhibit 4. And
24 I don't know if you have an exhibit book up there for that
25 so I have an extra copy. May I, Your Honor?

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THE COURT: Of course, certainly.

MR. LEWIS: And would the Court like a copy, because I don't know --

THE COURT: It might be faster. Thank you.

MR. LEWIS: Your Honor, the copy I have and I don't know if it's made it to the exhibit book we got yesterday and I'm not complaining about it, but what happened was they provided us with a signed copy --

THE COURT: Yesterday.

MR. LEWIS: -- of this -- these minutes yesterday and I believe they have the unsigned copies previously so that's the only change. And I just don't know if it's made it to the Court's exhibit book.

THE COURT: Okay, thank you.

BY MR. LEWIS:

Q Mr. Nielsen, do you recognize this document as the minutes of the June 22, 2009 board meeting of SCO?

A Yes.

Q And you were at that meeting were you not?

A I was.

Q Were you there for the entire meeting?

A Yes.

Q Now in this meeting there -- in these minutes there's a liquidity discussion. Do you see that?

A Yes.

1 Q And in that liquidity discussion and this is on June
2 22 which is about a month ago.

3 A Yes.

4 Q You state that the Debtors current (inaudible) is
5 about \$650,000 a quarter. Is that correct?

6 A Correct.

7 Q All right. And you also state that the Debtor will be
8 out of cash by the end of July 2009. Is that correct?

9 A I believe the statement says has enough cash to
10 continue, not run out of cash.

11 Q Okay. What other -- is that referring only to
12 unrestricted cash? What's your test of what having enough
13 cash to continue operations is?

14 A Based upon our working capital needs and the
15 projection for operating expenses.

16 Q And does that mean that you will not have cash for
17 either of those purposes by the end of July of 2009?

18 A No, I have enough cash. The company has enough cash
19 through July of 2009.

20 Q Right. But after that you won't for those purposes?

21 A That does not state that here.

22 Q I understand that, but is that what it means when you
23 talk about having enough cash for your operating -- your
24 capital and operating purposes? What's the other side of
25 that coin? What is it that you will not have as of August

1
2 1, 2009?

3 A I don't know.

4 Q Okay. What calculations were involved in your making
5 this representation to the Board in terms of actual cash on
6 hand at the end of July?

7 A Actual cash on hand at that time, the sales bookings
8 and operating expenses.

9 Q As of August 1, how much cash would you have had on
10 hand other than unrestricted, other than restricted funds?

11 A As of August 1 of 2009?

12 Q Yeah, based upon your predictions here.

13 A \$300,000 to \$400,000.

14 Q Now in your damage calculations for -- if the case is
15 converted to a seven, do you recall that in your
16 declaration, you say -- I'm talking specifically about
17 Paragraph 36 of your declaration.

18 A Okay.

19 Q If the Debtor converts to a Chapter 7, you say if SCO
20 goes out of business and is not able to fulfill its
21 contractual obligations to licensees, there are likely to be
22 millions of dollars of new claims that licensees could
23 assert against the Debtors bankruptcy. Do you see that
24 sentence?

25 A Yes.

Q Do you know what happens to these licenses if the case

1 goes into a Chapter 7?

2 A No.

3 Q So you -- do you have any reason to believe that the
4 licenses won't be fulfilled in some way?

5 A Based upon CitiFinancial's claim of \$3 million, yes.
6 So I suspect that other licensees will have similar claims.

7 Q If their licenses are not fulfilled?

8 A Correct.

9 Q But you don't know that their licenses won't be
10 fulfilled after a conversion to a Chapter 7, that they won't
11 be sold to someone else by the Chapter 7 Trustee. That they
12 won't make their elections under Section 365 under the
13 Bankruptcy Code to retain their rights. You don't know any
14 of that?

15 A Correct.

16 MR. LEWIS: Okay. I have no further questions,
17 Your Honor, thank you.

18 THE COURT: Thank you, Mr. Lewis. Mr.
19 Harrington?

20 BY MR. HARRINGTON:

21 Q Very briefly, Your Honor. For the record, William
22 Harrington from the Office of the United States Trustee.
23 Have you ever been a Chapter 7 Trustee?

24 A No.

25 Q Are you aware that Chapter 7 Trustees can operate a

1 business?

2 A Yes.

3 Q Did you take that into account when you did your
4 declaration?

5 A Yes.

6 Q So when you say that the business terminates upon
7 conversion is that correct?

8 A Correct.

9 Q It is correct or it's not correct?

10 A Well it's not correct, but that's my assessment.

11 Q That was your testimony? Correct?

12 A Yes.

13 Q Okay. And that testimony is incorrect?

14 A Okay.

15 Q Well you just testified that they could operate a
16 business in Chapter 7. Is that correct?

17 A My testimony was that the business as we know it today
18 would not be viable. Engineers believe there would be no
19 support staff --

20 Q That's not what I asked you. I asked you whether or
21 not you could operate in Chapter 7, a Chapter 7 Trustee and
22 you said correct.

23 MR. SPECTOR: Your Honor, I'm going to object
24 about the scope of the question. If the counsel is asking
25 him legally can he operate, that's one answer. You know,

1 practically speaking can it operate it's a different -- it
2 can be asked -- asking and answering different questions.

3 THE COURT: All right, Mr. Harrington, perhaps
4 you could clarify your questions a little bit then that way.

5 MR. HARRINGTON: Your Honor, it may be easier if
6 I start again.

7 THE COURT: Okay.

8 MR. HARRINGTON: Are you aware that a Chapter 7
9 Trustee can operate a business in Chapter 7?

10 MR. NIELSEN: Yes.

11 MR. HARRINGTON: In Paragraph 32 of your
12 affidavit, that assumed that there would not be a business
13 operating in Chapter 7. Correct?

14 MR. NIELSEN: Correct.

15 MR. HARRINGTON: No further questions, Your
16 Honor.

17 THE COURT: Thank you, Mr. Harrington. Mr.
18 Spector?

19 REDIRECT EXAMINATION

20 BY MR. SPECTOR:

21 Q This is July 27. Correct?

22 A Correct.

23 Q All right. You can do that without checking your
24 calendar.

25 A Today I can.

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Q Are we out of -- is SCO out of cash?

A No.

Q Do you expect SCO to run out of cash tomorrow?

A No.

Q Or by July 31?

A No.

Q How much cash does SCO have right now?

A \$1.789 million.

Q And of that you said about a million is restricted.

Is that right?

A Correct.

Q And of the restrictions, how much of that is set aside for the Novell judgment?

A Roughly six and a quarter.

Q And that leaves \$375,000 that you call restricted, right?

A Correct.

Q What is the nature of the restriction as to the other \$375,000?

A It's to be used for litigation or approval by the legal team representing the company in its litigation.

Q That's Boies Schiller?

A Correct.

Q Is there any Court Order restricting those funds?

A No.

1 Q This is just something that's -- this is a practical
2 arrangement you have?

3 A Yes.

4 Q Okay. And has Boies Schiller indicated that it -- any
5 intention with regard to that \$375,000 about future use of
6 that or availability of those funds?

7 A My understanding it is available.

8 Q So it's restricted in a loose sense?

9 A Correct.

10 Q If the judgment against Novell is set aside tomorrow,
11 what happens to the restriction on the 625?

12 A It's released.

13 Q Okay. So in essence, that million dollars is either
14 restricted because there's a Court Order -- there -- strike
15 that, start over. You've done projections as to how much
16 cash you expect the Debtor to have through the end of
17 August?

18 A Yes.

19 Q Can you tell the Court what that number is?

20 A Between \$1.2 and \$1.4 million.

21 Q Now when you were at deposition last Thursday, I think
22 it was Thursday the 22nd, how up to date was your
23 information about revenue?

24 A It was a week to two weeks late.

25 Q Since that time, since you were deposed, have you

1 brought yourself up to date on the revenue side?

2 A Yes.

3 Q What changes have you noticed from what your
4 assumptions were when you testified on Thursday to today?

5 A My assumptions on Thursday were conservative. I had a
6 meeting. I was informed by the SCO Operating President that
7 the sales pipeline for this week has increased from \$100,000
8 to \$400,000.

9 Q And have you factored that new information into your
10 declaration?

11 A Yes.

12 Q Now in your deposition, you were asked are we going to
13 run out of money? When are you going to run out of money?
14 You say we have enough to go through July which is
15 consistent with the minutes that were produced. Correct?

16 A Correct.

17 Q When you addressed the Board with regard to the cash
18 position was that your understanding?

19 A Can you state that again, please?

20 Q Well let me strike. Let me start that over again.
21 Are the minutes accurate in your mind?

22 A Yes.

23 Q Okay. Did you -- when you reported to the Board, did
24 you tell the Board that you were absolutely going to run out
25 of money by the end of July?

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A No.

Q How would you have phrased those minutes if you were writing them with regard to that topic?

A If I understand the question, I would say the company has cash through July 31 and the operating concern is for some time thereafter.

Q And weren't you asked that on your deposition after this July 31 date that was raised? Do you recall? Do want to look at the --

A I don't recall.

Q Look at page -- I think I have it marked here, Page 238 of your deposition transcript which is Exhibit 12, I think. I don't think it's 11, I think it's 12. That threw me for a little bit. It is 11, I guess? Well you know it's pretty short.

THE COURT: It's is 12.

MR. SPECTOR: I could probably --

THE COURT: It's 12.

MR. SPECTOR: Huh?

THE COURT: It is 12.

MR. SPECTOR: It is 12, okay.

MR. NIELSEN: Okay. Which page?

BY MR. SPECTOR:

Q Page 238 when you were asked by Mr. Reynolds can you survive more than four days beyond July 31, what did you

1
2 answer?

3 A Yes -- well, sorry.

4 Q I'm not asking today how you answered but how did you
5 answer even then? Well, do you want me to read it out loud?

6 A Yeah, I'm just trying to find it, Arthur.

7 Q It's Line 21 on Page 238. You stated I provided you
8 those financial forecasts so that shows survivability
9 through the end of September. Is that right?

10 A That's correct.

11 Q Okay. Were you testifying accurately on that day on
12 Thursday?

13 A With information I had at hand, yes.

14 Q And is the information that you have at hand now
15 better or worse than it was on that date?

16 A Better.

17 Q And was the financial projection now better or worse
18 than it was on Thursday?

19 A Better.

20 Q Tell me about the change in accounts receivable. Has
21 the accounts receivable changed since your -- has your
22 knowledge of the accounts receivable, has that changed since
23 Thursday when you testified at the deposition?

24 A Collection efforts have been better.

25 Q Okay. Let's go to Mr. Norris and ask you about Mr.
Norris. There was an invoice that was addressed to Darl

1 McBride, I think it's Exhibit 37 at the SCO Group,
2 Incorporated. Is that right?

3 A Correct.

4 Q You saw that. They showed you that?

5 A Yes.

6 Q Was there ever a replacement invoice issued?

7 A I don't recall.

8 Q Do you know who paid that invoice?

9 A SCO Japan.

10 Q SCO Japan. Not SCO Germany and not SCO USA or either
11 of the Debtors I should say.

12 A Correct.

13 Q Do you know what that invoice was for?

14 A Again it was for market development and a business
15 plan for the BRICKMIA emerging markets.

16 Q And did Steve Norris Capital Partners produce such a
17 business plan and the documents that were called for?

18 A Yes.

19 Q Was there any budget in SCO Japan for a marketing
20 study like this?

21 A Yes.

22 Q Was this budget pre-existing the services by Mr.
23 Norris?

24 A Yes.

25 Q Or his company, Steve Norris Capital Partners?

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A Yes.

Q So SCO Japan -- what was is -- what was the study about? What was the study supposed to be about?

A About the expendability and emergence of the Unix space software and open server within those emerging markets.

Q And when that bill was paid by SCO Japan, what happened to the paperwork? Explain the paperwork that followed SCO Japan's paying that bill.

A I don't quite understand the question.

Q Intercompany accounting comes into play, does it not?

A Correct.

Q All right. So when SCO Japan pays an invoice of \$100,000, what happens in the SCO organization?

A For one it develops -- it may cross other business and divisions. We allocate it accordingly.

Q So this BRICKMIA marketing study, did it affect anybody other than SCO Japan?

A Well, yes.

Q So what you're saying is it was allocated among other companies?

A Correct.

Q So there are invoices and bills showing that other companies got charged with those expenses?

A Yes.

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Q And were any of those expenses charged to SCO Group?

A I don't know. I assume not. I don't do the manual general entry.

Q And as I say this -- you said this was in June '08. Correct?

A Correct.

Q And it was for a product that was delivered?

A Correct.

Q Do you know whether the company was -- the Japanese Company and the foreign affiliates were happy, pleased with the product that was delivered?

A I believe they were.

Q Now you testified on cross examination that SCO was not planning to do any further reductions in R & D or some other area Is that right?

A Yes, currently.

Q Is that entirely correct?

A No.

Q Are there any -- what plans, if any, are there for SCO to what I think I colloquial used to say skinny down further than what it's already skinnied [ph] down?

A Well we have the plan that if we have to skinny down further, we'll reduce our head count from 62 to 25 and go to a service and support model and launch with that the expected launch of our virtualization product.

1 Q And if that should happen -- let's strike that. Would
2 that happen if Unxis closed the sale and bought the Unix
3 business?

4 A Will that happen if --

5 Q I mean is that -- strike that. Is that necessary to
6 do if Unxis closes the sale and pays \$2.4 million to SCO?

7 A No.

8 Q So this is a contingency in case Unxis doesn't close?

9 A Correct.

10 Q And or anybody else doesn't close.

11 A Correct.

12 Q If you get to the -- so reduced in financial ability
13 you have to make further reductions. Is that what this is
14 about?

15 A Correct.

16 Q Okay. And so you go from 62 to 25 employees?

17 A Correct.

18 Q And on that model, what's the -- how's the revenue
19 going to be produced?

20 A It will be through virtual licenses and support
21 agreements that will extend out.

22 Q I mean the Unix business would still be operating.

23 A Correct. It's to move the Unix customers to a
24 virtualization model which allows them to upgrade their
25 hardware and continue to run their businesses on the Unix

1 platform.

2 Q And will the business be cash flow positive on such a
3 model or cash flow negative?

4 A Cash flow positive.

5 Q So if you went to the skinny down mode after failure
6 to liquidate the assets, the company should become
7 profitable again, but in a much reduced scale?

8 A Correct.

9 Q Not again, I should say for the first time actually,
10 right?

11 A Correct.

12 Q Did this -- did SCO formerly use the services of a
13 financial consultant with investment banking experience?

14 A No. Oh, yes, Mezero [ph].

15 Q Okay. And when you tried to sell the company -- well
16 did SCO try to sell its assets to a company called York
17 Capital?

18 A Yes, we did.

19 Q And did SCO have any financial consulting or
20 investment banking assistance in that process?

21 A Yes, Mezero Financial.

22 Q And how did SCO find that process finally to SCO?

23 A Draining.

24 Q Do you know how much money SCO spent in that process?

25 A Roughly \$690,000.

1
2 Q Do you calculate that -- is that experience within
3 SCO's calculations when it determined whether to hire an
4 investment banker to sell the property again?

5 A Yes.

6 MR. LEWIS: Your Honor, I'm not sure where this
7 comes in within the scope of either direct or cross. This
8 seems to be way far afield. It seems to be more addressed
9 to counsel's remarks about York and other people. I'm not
10 sure that this is the right time for these questions and I
11 ask this line of questioning be ended and the prior
12 questions be stricken.

13 MR. SPECTOR: Your Honor, Mr. Reynolds asked this
14 witness about an investment banker expense of \$100,000. Who
15 they asked. I think he said D. E. something, Davidson or
16 something, whatever the name of the company was I don't
17 remember. So this is responsive to cross examination.

18 MR. LEWIS: Your Honor, he asked him if they
19 looked at the investment bankers and he said no. He didn't
20 go into any detail about who they were and why -- the
21 witness said they didn't have any money. That was the end
22 of that.

23 MR. SPECTOR: He did go into detail.

24 MR. LEWIS: No, I don't think he did.

25 THE COURT: No, I don't think he did.

MR. SPECTOR: He named the company he talked to.

1 He --

2 THE COURT: And it was D. E. Something.

3 MR. SPECTOR: Right, as I recall.

4 MR. LEWIS: That's not exactly going into detail

5 --

6 MR. NIELSEN: D. A

7 MR. SPECTOR: D. A

8 MR. LEWIS: We're not talking about the merits of
9 various investment bankers. It was a question that had to
10 do with the finances of the company. And if counsel wants
11 to ask a question about how come you didn't hire any other
12 investment bankers and the answer is going to be because we
13 couldn't afford them, I have no problem with that. But
14 that's not what's going on here.

15 THE COURT: Understood. I have to agree with
16 Mr. Lewis here.

17 BY MR. SPECTOR:

18 Q How come you didn't hire other investment bankers?

19 A The company couldn't afford the cash flow.

20 Q Well why do you think you couldn't afford the cash
21 flow?

22 A From our past experiences, as well as, inquiry of D.

23 A. Davidson and others.

24 Q Past experience with whom?

25 A Mezero Financial.

1 Q And tell us about your past experience with Mezero
2 Financial. How much did it cost you?

3 A Roughly \$690,000.

4 MR. SPECTOR: That's all I have on redirect.

5 THE COURT: All right, thank you, Mr. Spector.
6 Anything further, Mr. Lewis?

7 RE CROSS EXAMINATION

8 BY MR. LEWIS:

9 Q Your Honor, I won't prolong this very long. Mr.
10 Nielsen, you testified that the \$625,000 that's currently
11 being held in a trust account on account of the Novell
12 judgment would be freed up if the Tenth Circuit reverses.
13 Do you recall that testimony?

14 A Yes.

15 Q Do you know what the Tenth Circuit is going to say if
16 it reverses, what the scope of the reversal will be, what it
17 will say, and whether it will provide for further
18 protections for Novell? Do you have any idea at all?

19 A No.

20 MR. LEWIS: Okay, thank you.

21 MR. SPECTOR: I'm not rising to ask any
22 questions. I just want to say that I believe in the
23 thousands, 12,000 or more documents we produced while Mr.
24 Nielsen was testifying, I believe somebody came across a
25 replacement invoice that went to Japan as opposed to the

1 Utah company. If we can find it before the trial is over, I
2 may wish to call Mr. Nielsen to show him the invoice. So
3 I'm rising only to say I'd like an opportunity to recall him
4 if we can find that document.

5 MR. MARRIOTT: Your Honor, just on a general
6 subject.

7 THE COURT: Yes, Mr. Marriott.

8 MR. MARRIOTT: Mr. Spector has repeatedly given
9 the impression that the Movants ask for documents and
10 received --

11 THE COURT: I think you were doing okay, but
12 thanks.

13 MR. MARRIOTT: The suggestion that I wasn't
14 coming through. So Mr. Spector has repeatedly given the
15 impression to this Court that the Movants asked for a
16 collection of documents and that the Debtors have fully
17 complied with the subpoenas and did so in a timely way. And
18 I don't want to distract us with that now, we can take that
19 up at a break when it's more convenient to Your Honor. But
20 it's absolutely untrue and there are significant quantities,
21 we believe of documents that we've asked for that haven't
22 been produced. And in particular, we think documents from
23 the files of the witnesses who are here to testify. But I
24 say only that for now and we can come back to that at a time
25 more convenient to the Court.

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THE COURT: All right.

MR. SPECTOR: I don't believe that that's correct, but in the 24 hours we had to produce it, there could have been errors is all I can say. It could have crept in. But we produced massive amounts. Ms. Cruz and three or four people spent overnight to get it to them. Physically couldn't get it to them by the deadline because it just couldn't be done. But on top of that, Your Honor, well now I forgot the main reason I rose. That's --

THE COURT: I think to comment upon Mr. Marriott's --

MR. SPECTOR: Yeah, I know that was -- that was prefatory to what I really rose for. And as testament -- and if comes to me, I'll come back and tell you again about it.

THE COURT: All right.

MR. SPECTOR: I don't know if you want to take a break at this time --

THE COURT: Well let me ask if there's any more questions for Mr. Nielsen --

MR. SPECTOR: Please don't tell me --

THE COURT: Yes.

MR. SPECTOR: Oh, I thought we were done, sorry.

THE COURT: It's all right.

BY MR. REYNOLDS:

1 Q Mr. Nielsen, do you recall testifying in response to
2 some of Mr. Spector's questions and you had come up recently
3 with some new numbers about cash on hand?

4 A Yes.

5 Q Do you recall that? Have you produced any documents
6 that reflect those numbers?

7 A No.

8 Q Have you had those numbers audited by any
9 professionals in the accounting world?

10 A They're projections.

11 Q Okay. So have they been reviewed by anyone else
12 beside yourself?

13 A No.

14 Q And you've acknowledged earlier that some of your
15 previous financial projections and numbers have been wrong.
16 Is that right?

17 A Correct.

18 Q And isn't it possible that these numbers that we
19 haven't seen in writing could also be in error?

20 A Possibly.

21 Q And were you aware that at the time that Mr. Steven
22 Norris received this payment as you said from SCO Japan in
23 2008, that he was also working with the Debtors in
24 connection with their reorganization plan and their attempts
25 to raise capital. You're aware of that, right?

1
2 A Yes.

3 MR. REYNOLDS: No further questions, Your Honor.

4 THE COURT: Does that prompt anything, Mr.
5 Spector?

6 REDIRECT EXAMINATION

7 BY MR. SPECTOR:

8 Q Yes. Mr. Nielsen, you're a very agreeable guy and you
9 like to go along agreeable. That's an observation. Listen
10 carefully to the question that was just asked that you just
11 answered. You answered something about that you were aware
12 that Mr. Norris was out there raising capital for the
13 Debtor. Is that accurate?

14 A No.

15 Q Okay. But you said yes. Correct?

16 A Correct.

17 Q Okay. Was Mr. Norris putting together buyers for him
18 to buy the company at some point in '08

19 A Not that I'm aware of.

20 Q What was Mr. Norris' relationship to the company, if
21 any?

22 A He had one, the first Steve Norris deal that was done
23 in January.

24 Q And what was that Steve Norris deal that was done in -
25 - well was cooked in late '08 -- strike that. In January of
-- which year are we talking about?

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A 2008.

Q January 2008.

A It was January 2008.

Q So it was cooked in late 2007 and in 2008 it was a plan on with --

A On file.

Q -- Steve Norris Capital Partners as the sponsor.

Correct?

A Correct.

Q And he was buying the company in that role, wasn't he?

A Correct.

Q Buying the assets, I mean?

A Correct.

Q Okay. Was that his relationship with the company trying to find people to work with to buy the company with him?

A I believe his role was to buy the company.

Q Okay. All right. And he was never retained by the Debtor to be a consultant was he?

A Correct.

Q I mean other than --

A Other than --

Q -- the Japan marketing study.

A -- the marketing study.

Q Okay. But the Debtor, SCO Group and SCO Operations,

1 the never used them as a consultant or an investment banker
2 or anything of that nature, did he?

3 A Correct.

4 MR. SPECTOR: Okay. That's all.

5 THE COURT: Anything further from the Movants?

6 MR. MARRIOTT: No, Your Honor.

7 THE COURT: All right.

8 MR. MARRIOTT: May I just --

9 THE COURT: Mr. Nielsen, you may step down, sir,
10 thank you. Well I assume people would like to have some
11 lunch.

12 MR. SPECTOR: Okay, yeah.

13 THE COURT: So -- and hopefully there's lunch at
14 the offices because Wilmington doesn't serve lunch very
15 quickly. Can we reconvene at 2:00? Would that do it for
16 everyone?

17 MR. MARRIOTT: Yes, Your Honor.

18 THE COURT: All right. Then we'll stand in
19 recess until 2:00.

20 MR. SPECTOR: Can we lock --

21 THE COURT: Yes, this room will be locked and
22 counsel should not discuss the testimony that we've heard
23 here with those witnesses who have been sequestered.

24 MR. MARRIOTT: May I just inquire as to the order
25 of the proceedings, Your Honor? It would be helpful if we

1 know who the next witness is.

2 THE COURT: Oh, sure.

3 MR. MARRIOTT: You're being asked --

4 THE COURT: The next witness, Mr. Spector?

5 MR. SPECTOR: It is our present intention to call
6 Mr. McBride after the lunch break.

7 THE COURT: Okay.

8 MR. SPECTOR: For live testimony and not that
9 much.

10 THE COURT: Yes. Oh, okay, yeah, that's right,
11 very well.

12 MR. MARRIOTT: Thank you.

13 THE COURT: All right, counsel, thank you.

14 (Recess from 12:40 p.m. to 2:04 p.m.)

15 THE COURT: Thank you, everyone. Please be
16 seated. I apologize that it's a little warm in here, but
17 apparently it's a building problem and not just this
18 courtroom. Anyone who would like to take off his jacket is
19 welcome to do so. I would not be at all offended. So
20 however you're comfortable.

21 MR. SPECTOR: Good afternoon, Your Honor.

22 THE COURT: Good afternoon.

23 MR. SPECTOR: May we proceed?

24 THE COURT: Yes.

25 MR. SPECTOR: SCO calls Darl McBride to the

1 stand.

2 THE COURT: All right. Mr. McBride, hello.

3 MR. MCBRIDE: How are you today?

4 THE COURT: If you'll just remain standing while
5 you're sworn.

6 DARL CHARLES MCBRIDGE, DEBTORS' WITNESS, SWORN

7 THE COURT: Whenever you're ready.

8 MR. SPECTOR: Your Honor, we discussed the last
9 time we were here about the fact that this Court has urged
10 certain witnesses testifying in the past at other hearings -

11 -

12 THE COURT: Yes.

13 MR. SPECTOR: -- and we could spend some time
14 going through Mr. McBride's pedigree again, but I would ask
15 Your Honor, to allow for the use of that testimony in prior
16 hearings rather than going through that again if there's no
17 objection.

18 THE COURT: Any objection?

19 MR. MARRIOTT: As to the pedigree, Your Honor?

20 THE COURT: Yes.

21 MR. MARRIOTT: By that we mean background as to
22 where he went to school --

23 THE COURT: Yes, education and so on.

24 MR. MARRIOTT: No objection.

25 THE COURT: All right, thank you.

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MR. LEWIS: None here, Your Honor.

THE COURT: All right, Mr. Lewis, thank you, sir.

MR. LEWIS: You also stated that we would get the testimony from the last June 15 hearing would be brought in to this record as well. I believe that was stated the last time.

MR. LEVIN: Your Honor, the June 15 testimony was on a specific narrow issue that this Court set up to determine whether it even consider the purchase and sale agreement.

THE COURT: Yes.

MR. LEVIN: And it was not for the general purposes that I recall --

THE COURT: I don't recall that either.

MR. SPECTOR: I do recall that.

THE COURT: All right.

MR. SPECTOR: Your Honor, at the end of the hearing you said we could take everything that was brought up at that hearing and use it here so we don't have to do it again. There was a lot of testimony regarding, you know, other deals and the like and so I could abbreviate the testimony today by saying you've testified about experiences and other deals and that's just Mr. McBride. I think Ms. Kaplan testified about it as well.

THE COURT: Do you have a preference?

1 MR. MARRIOTT: Your Honor, we don't have
2 objection to any incorporation of that testimony to this
3 hearing.

4 MR. SPECTOR: Thank you.

5 THE COURT: Mr. Lewis is that acceptable?

6 MR. LEWIS: That's all right, Your Honor.

7 THE COURT: All right, then we will do that.

8 DIRECT EXAMINATION

9 BY MR. SPECTOR:

10 Q Mr. McBride, describe the original business of SCO
11 Unix and UnixWare [ph].

12 A The original business really had two parts to it; one
13 was a source licensing business and the other one was a
14 products business. So Unix is one of the major operating
15 system platforms around the world, arguably the most
16 powerful platform from a business standpoint. And large
17 companies like IBM, Sun Micro Systems, a number of companies
18 from Japan, Hewlett Packard, Dell, Oracle, and the like took
19 down licensees to that Unix operating system --

20 Q Can you stop for a second? You're using lingo. Took
21 down, what does that mean?

22 A They licensed our operating system through --

23 Q Okay.

24 A -- a contract. That basically is one part of the
25 business which is here's this tree if you will that has this

1 rich intellectual property running through it and the
2 companies become various branches off from that. So each
3 large company goes off and does what they're going to do to
4 tailor that Unix operating system to their particular
5 clientele or customer base. That's the core foundation if
6 you will of the company. The second part of the Unix
7 business that SCO owns is one of these branches. So think
8 of the branches being a product business. SCO actually owns
9 two of those branches and one is called UnixWare and one is
10 called Open Server. SCO's particular twist or customer base
11 if you will that they focused on over the years is to supply
12 highly reliable Unix operating systems on really cheap
13 hardware like Intel chip sets. And so basically when you
14 have large companies like McDonald's, seven of the top ten
15 retailers in the U.S. are customers of ours, large customers
16 that have many, many branches. In the case of McDonald's
17 they have 14,000 branches where you will find our software.
18 So it's the source licensing business and then it's the Unix
19 products business.

20 Q Has SCO expanded its business beyond those two areas?

21 A Yes, it has.

22 Q In what way?

23 A Well in a couple of ways. First of all, we expanded
24 into a realm around mobile software applications and
25 powering that software with back end servers. So we've

1 always been a server company. And so rather than just
2 creating client site applications that run on your cell
3 phone or your iPhone or whatever, we've specialized in
4 developing applications that are powered by a back end
5 server. The second area that we've grown into is an area
6 called Unix virtualization. And so those are the two
7 primary growth areas we've had over the last several years.

8 Q Explain what virtualization is about and what the need
9 is and why you decided to go into it.

10 A Unix virtualization is basically taking our Unix
11 operating system and the associated application that sits
12 with that, that sits on top of the operating system and
13 building a layer if you will that allows that package to sit
14 on top of another operating system such as Windows or Linux
15 or something of that nature.

16 Q What's the purpose of having that?

17 A The purpose is to allow our customers to be able to
18 run their application for -- that they've been running many
19 times, you know, a decade or two and to get another decade
20 or two of use out of their application they've already
21 developed. By putting this virtualization layer in there,
22 it allows a customer to get updated and refreshed hardware
23 by putting it on top of a different OS that has more
24 certifications than we may have.

25 Q What happens if they don't have virtualization? What

1 problems would a customer face if they don't have this
2 virtual product?

3 A Well the challenge we face as a small company is
4 staying ahead of the game. Every time a big hardware
5 company like Sun or HP or IBM or somebody comes out with a
6 whole new set of hardware devices, it's hard for us to keep
7 up with all of the certifications. And so what would happen
8 over time is it would be more and more difficult for a
9 customer to take on the new hardware, to get faster hardware
10 because their applications would not tend to work with it if
11 it wasn't certified.

12 Q Let's go back to your mobility business, the cell
13 phone and so forth.

14 A Yes.

15 Q When this case began, what was the state of that
16 mobility business?

17 A We had been in development for I don't know, two or
18 three years. And we were about ready to go to market with
19 some early stage products that we had developed for a
20 company up the road here in Allentown, Pennsylvania, the
21 Day-Timer Company. And we were just on the verge of going
22 to market with our first real mobility products at that
23 stage of the game.

24 Q And what happened then after you filed Chapter 11?

25 A The Day-Timer Company came back and as a result of our

1 filing Chapter 11 said they didn't want to go forward with
2 the partnership.

3 Q Did SCO give up on mobility at that point or did it go
4 forward?

5 A We went forward. The whole idea of what we had
6 created up to that point, there were a number of
7 applications, but the core of it that was interesting was
8 the idea of having your time management system that you may
9 see on a desktop such as Outlook, packaged up and on your
10 Smart Phone. And so what we did at that point is we went to
11 another time management company. The two largest ones out
12 there really are Day-Timer Company and the Franklin Cubby
13 Company. So when Day-Timer Company backed out of the deal,
14 we then went to Franklin Cubby and a few months after that
15 we cut a deal with them. And we got the products developed.
16 We introduced them into the marketplace here recently. And
17 we're actually pretty excited about the uptick and the
18 uptake we're getting from new customers that are buying
19 those products.

20 Q Tell us about the products that you are selling
21 through Franklin Cubby.

22 A We have a set of products that are in the marketplace
23 and another set that are just about ready to be released.
24 The first one is a product called FC Mobile Life. And
25 that's where you have the ability to do your scheduling,

1 your task management, setting your goals, being able to have
2 a micro blogger or micro communication system if you will
3 phone to phone. And so that one was the first one we came
4 out with. And that runs on Blackberry's. It runs on
5 Windows Mobile Phones, things of that nature. The next step
6 that we took was to take chunks of those -- that broad
7 system and put them down into individual applications so we
8 released for example an application on the Apple iPhone in I
9 think it was February or so. And that is basically a task
10 management system. So we took one of these modules out of
11 the big system and put it down into one modular system,
12 released it into the iPhone App Store. Since we have done
13 that, we've had some really good uptake as I said earlier.
14 Since we released these first couple products in the
15 marketplace, SCO now has in just the last two quarters
16 period of time, we have 10,000, over 10,000 new customers
17 that have come in to the SCO fold so to speak during that
18 period of time. And so we're excited about that. We have
19 another -- the sake task management system that has been so
20 popular on the iPhone. That one product alone has sold
21 nearly 8,000 units, the number I have said earlier. And
22 that's just on the iPhone. We released an announcement last
23 week that we have now developed that same application called
24 FC Tasks on Blackberry's. So Blackberry's are obviously
25 very popular in businesses. And so I think we're going to

1 see a similar uptake on that platform.

2 Q Has Franklin Cubby marketed your applications?

3 A Yes, they have.

4 Q I'm going to show you what's been marked as Debtors'
5 Exhibit 18. Can you identify this, please?

6 A Yes.

7 Q I've got copies for the -- do you need these or do you
8 already have these?

9 MR. LEVIN: We would like a copy.

10 THE COURT: Mr. Spector, do I have a binder with
11 your exhibits or --

12 MR. SPECTOR: Well they objected to all our
13 exhibits so I didn't think --

14 THE COURT: Oh, that's right.

15 MR. SPECTOR: I wouldn't want to be presumptuous
16 and let you look at them without --

17 THE COURT: Understood.

18 MR. SPECTOR: Okay. I mean, I could have, but I
19 didn't.

20 THE COURT: That's fine. If I could just have a
21 copy of --

22 MR. SPECTOR: Do you want a copy now?

23 THE COURT: Sure.

24 MR. SPECTOR: I can give you one.

25 THE COURT: Oh, no, that's -- this is fine, thank

1
2 you.

3 BY MR. SPECTOR:

4 Q All right. Can you identify that exhibit, sir?

5 A Yes, I can.

6 Q What is that?

7 A This is the Franklin Cubby Company's Summer of 2009
8 Catalog that they sent out to hundreds of thousands of their
9 customers.

10 Q Has that catalog generated a revenue for SCO?

11 A Yes, it has.

12 Q Do you have an idea today how much revenue has been
13 generated from the products that are marketed in that
14 catalog?

15 A Yeah, to date, I would say we generated in the order
16 of tens of thousands of dollars.

17 Q Okay. And this is just beginning?

18 A Yes.

19 Q Was this product ever rated by some rating agencies
20 how popular it is? Is there some kind of rating system for
21 applications?

22 A Yes. If you go into the iPhone App Store, they have a
23 ranking system in there. And since we've released the FC
24 Tasks product, it has consistently been in the top 50 of
25 productivity applications and more frequently in the top 20.
And I think the highest point we reached was #13.

1 Q You previously stated there was a press release issued
2 last week?

3 A Yes.

4 Q I show you Defense, I mean, Debtors' Exhibit #29.

5 A Yes.

6 Q Let me give that to you. Can you identify that
7 exhibit, please?

8 A Yes, this is a press release that we issued last week
9 regarding our mobile products business and the Franklin
10 Cubby product line in specific.

11 MR. SPECTOR: Your Honor, I offer Exhibits 18 and
12 29 as Exhibit 18 and 29.

13 MR. MARRIOTT: Can we get a copy of the second
14 exhibit, please?

15 MR. SPECTOR: Of course.

16 MR. MARRIOTT: And for what purpose? The
17 documents, Your Honor, I think --

18 MR. SPECTOR: I didn't give Your Honor one, did
19 I?

20 THE COURT: No.

21 MR. SPECTOR: Okay.

22 THE COURT: Thank you, thank you, Mr. Spector.

23 MR. SPECTOR: I don't know if the Court has ruled
24 on that or not yet.

25 THE COURT: I was waiting to hear whether there

1 is an objection.

2 MR. MARRIOTT: Your Honor, we have no objection
3 to the exhibits.

4 THE COURT: Okay. Then they are admitted.

5 MR. SPECTOR: Thank you, sir. I just would ask
6 the Court to note on the front of Debtors' Exhibit 18, the
7 application that's right on the front page of that is the
8 Debtors' FC Mobile Life application.

9 THE COURT: Okay, thank you.

10 BY MR. SPECTOR:

11 Q What were the state -- what was the state of
12 development to these products when the cases were filed in
13 September of 2007?

14 A They were early stage iteration, early iterations. It
15 hadn't really gone to market yet.

16 Q During the pendency of these Chapter 11 cases you
17 brought these to market?

18 A Correct.

19 Q And you're starting to derive revenue that was never
20 there before?

21 A That's correct.

22 Q How did the Novell announcement on May 28, 2003 that
23 it and not SCO on the Unix copyright effect SCO stock price?

24 A It had a damaging effect.

25 MR. MARRIOTT: Your Honor again --

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THE COURT: Yes.

MR. MARRIOTT: -- as was the case with Mr. Tibbitts, I think the witness is incompetent to speak with all respect to the witness is incompetent to speak to the effect of events on the stock price of the company.

THE COURT: In other words, the witness can factually say what the prices were on a certain date.

MR. MARRIOTT: As Mr. Tibbitts did --

THE COURT: Yes.

MR. MARRIOTT: -- without attributing the causal link that I believe the witness has begun to --

MR. SPECTOR: Okay. That's fair. I accept that as accurate.

THE COURT: Okay, fine, sustained.

BY MR. SPECTOR:

Q Before -- I will rephrase that. Before -- well was there an announcement from Novell relative to the ownership of the Unix copyrights?

A Yes.

Q When was that?

A That was on May 28.

Q What year?

A 2003.

Q Do you know what the stock price was or the market capitalization was of SCO before that announcement?

1 A Yes, it was \$9 a share.

2 Q And do you know what the price was after the
3 announcement?

4 A Yes, it was \$5.85 a share.

5 Q What's the stock price today?

6 A I checked --

7 Q Well as of the close of business Friday I should say.

8 A It was at 17 cents a share.

9 Q When we came to Court on June 15, 2009, before the
10 Unxis sale was delivered to this Court, what was the sale --
11 what was the price of the stock, a share of stock in SCO at
12 that time?

13 A It was 12 cents a share.

14 Q So since June 15 the stock has gone up from 12 to 17
15 cents?

16 A Yes.

17 Q I'll do the calculation. I think that's a 42 percent
18 increase or something thereabouts. Has anything material
19 happened to SCO between June 15 and now other than the
20 announcement of the Unxis sale?

21 A No.

22 Q What effect do you anticipate on SCO's stock price if
23 the Tenth Circuit should reverse the decision by the
24 District Court in the Utah case?

25 MR. MARRIOTT: Objection, Your Honor. I think

1 Your Honor was ruled on this and there's no reason the
2 ruling should be any different as to this testimony then to
3 the prior two times in which Your Honor ruled.

4 THE COURT: I sustain the objection.

5 MR. SPECTOR: What effects on the business of SCO
6 do you reasonably project should the Tenth Circuit grant the
7 relief SCO has asked for?

8 MR. MCBRIDE: We think that will have very
9 positive effects on the business.

10 MR. MARRIOTT: Objection. Your Honor, objection.

11 THE COURT: Mr. Marriott?

12 MR. MARRIOTT: I think it's speculative and lacks
13 foundation. I don't think that the witness has personal
14 knowledge of the effects of a future event on the current
15 operation of the business.

16 MR. JACOBS: And I would only add that that
17 future event itself has very -- has a lot of variables
18 associated with it.

19 MR. SPECTOR: Your Honor, we have confronted
20 these kind of issues in deposition. And Mr. Tibbitts
21 testified about what was going to happen. And I said well
22 do you know there's going to be a reverse? No. Do you know
23 that if the judgment is reversed the \$625,000 you can take
24 out of escrow and use will actually help the company? Do
25 you know you'll be using marketing? Do you know you --

1 well, the only thing I can say in response is if you ask the
2 witness if he's standing there on a street corner and he
3 sees a car being driven without a driver or a heart attack
4 victim is behind the wheel and another person crossing in
5 front of it and you ask them do you foresee some problem in
6 front of you, I think a normal witness could say yes, I
7 think it's likely that there's going to be an accident in
8 front of him. This is -- we're not asking for way out
9 projections. This is the CEO of a company and you're --
10 we're asking him on -- if you ask the CEO of a company if
11 you spend this money on marketing and development, do you
12 anticipate some benefit, yes, I do. Was that objectionable?
13 I mean, this is the kind of stuff that's grist for the mill
14 in every case. This witness is the CEO Of the company, a
15 major event in the life of the company is days away and it
16 has to project what it's going to do in the event if X, Y,
17 or Z occurs. I don't think it could be any more pertinent.
18 I don't think it could be -- it is by no means speculative
19 because you're -- the witness will testify why he has these
20 opinions. Most of it is logic and probably could be argued
21 to some extent. But I can't imagine that this is in any way
22 objectionable on the grounds or any other grounds.

23 MR. MARRIOTT: Your Honor, I would add to that
24 based on counsel's own argument to additional objections
25 which is its cumulative because if as counsel just said Mr.

1 Tibbitts addressed these issues and we need not hear it
2 again from Mr. McBride, and if his counsel says it's
3 argumentative, then we ought not be having argument through
4 the mouth of this witness, Your Honor. That's in addition
5 to the objections we've already stated.

6 MR. SPECTOR: Your Honor, you've heard it from
7 the perspective of one person. The best person to hear it
8 from, it's not cumulative when it comes from the CEO who's
9 in charge of the business affairs of the company. The
10 issue, one of the major issues in this case is the ability
11 to rehabilitate. You've heard Mr. McBride talk about the
12 going forward business after the sale. That's part of the
13 rehabilitation process. But also what happens if he has the
14 \$625,000? How will that help the rehabilitation? What
15 happens if he has the ability to sue parties for -- who on
16 the SCO source program which we haven't gotten to yet?
17 That's going to bring revenue in. I have to --

18 MR. MARRIOTT: Your Honor, if I may, yet another
19 objection. Counsel identified, I believe at Your Honor's
20 direction if not and at a absolute minimum with Your Honor's
21 approval, the subjects on which the Debtors' witnesses would
22 testify at these proceedings. Mr. Tibbitts was expressly
23 identified as a witness who would testify as to the impact
24 of the litigations on the Debtors' prospect for
25 rehabilitation. He was as a result at Your Honor's order

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deposed on that subject. Your Honor made clear in the
Court's order that we were allowed to have the opportunity
to examine Mr. Tibbitts or he wasn't allowed to be called at
his hearing.

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THE COURT: Right.

MR. MARRIOTT: This witness, Your Honor, with all
respect was not identified as a witness who would speak as
to the supposed impacts of the litigation on the
rehabilitation prospects of the company. And so what
counsel has done is come in and now offered by way of an
additional witness, cumulative testimony on the subject as
to which the witness wasn't identified and as to which we
did not have an opportunity at deposition to question the
witness.

MR. SPECTOR: It's not true. Mr. McBride was
always a witness for everything. That's why it's no
declaration. He's the man on everything. And they had
seven hours of -- a full day of deposition of this witness
and they did cover these items. It is certainly no surprise
that Mr. McBride's going to talk about rehabilitation on a
Motion to Convert.

MR. MARRIOTT: It is a surprise, Judge. At least
as it relates to the litigation. It's not a surprise as it
relates to the mobility business and we're prepared to
proceed on that basis.

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MR. SPECTOR: We cannot be restricted by the --

THE COURT: All right I'm going to overruled the objection.

MR. SPECTOR: Thank you.

THE COURT: I'll take the witness' answer because -- or answers because I think it is a particularly important subject.

BY MR. SPECTOR:

Q Thank you, Your Honor. On the basis of SCO, what effect would it have if the Tenth Circuit were to reverse the decision of -- the summary judgment decision of the District Court?

A Well it would be very positive across a number of fronts. It would be positive as it relates to our employees dealing with customers, positive as it relates to my discussions with investors, positive from a market perception standpoint. The fact that we would have some vindication that we believe we deserve would have, we believe a very positive effect on the company.

Q How hard is it to employ qualified individuals in your current situation?

A It's very difficult.

Q If SCO received vindication by the Tenth Circuit, would it be better or harder to employ qualified individuals?

1 A It would be much easier.

2 Q Have customers been receptive of SCO's marketing since
3 this company was subject to the summary judgment ruling in
4 August of '07?

5 A It has been a difficult row to hoe.

6 Q How do you perceive the market reaction if SCO were to
7 receive vindication from the Tenth Circuit?

8 MR. LEWIS: Your Honor, I have to object here.
9 I'm going to be -- and Mr. McBride, too. And this in a
10 serious of previous questions about how they would react if
11 they reversed -- I mean, that's a thoroughly incomplete
12 hypothetical. There are all kinds as Mr. Jacobs has said,
13 all kinds of possible forums of reversal, instructions,
14 remand, and so on and so forth. I think what we're hearing
15 here and assuming is that it's a virtual outright victory on
16 various grounds for the Debtor. But it's certainly an
17 incomplete hypothetical and I don't think these are proper
18 questions. And I think the witness should not be allowed to
19 answer them or offer opinion testimony on them. We don't
20 even have yet any kind of groundwork for his competency to
21 offer an opinion on the effect of a legal decision which is
22 probably in a pretty -- I mean, it's one thing to talk about
23 gee, I've been selling these things for three years and this
24 is our track record and I've been doing this marketing and
25 that marketing study and so forth and that's one thing.

1 This is unprecedented. It's not like he -- the witness has
2 prior experience and we certainly haven't heard of it.
3 Prior experiences with this kind of situation and what the
4 effect would be on marketing, you know. And so I think the
5 testimony is incompetent and I think the questions are
6 incomplete hypothetical's and I think the entire line should
7 be shutdown and the prior answers should be stricken as a
8 consequence. Thank you, Your Honor.

9 THE COURT: Mr. Marriott?

10 MR. MARRIOTT: I'd simply join in that, Your
11 Honor.

12 THE COURT: I have to agree with them. I just
13 think it's --

14 MR. SPECTOR: I can ask it better.

15 THE COURT: -- it's too far reaching and too
16 uncertain. And I will sustain the objection.

17 MR. SPECTOR: It was too wide a question, too.
18 He's -- he was right about that because it didn't identify
19 what part of it. I was supposing all of it, but -- and I
20 wasn't clear about that. Let's take it piecemeal.

21 THE WITNESS: Okay.

22 BY MR. SPECTOR:

23 Q If the judgment -- the money judgment suffered --

24 A Yes.

25 Q -- by SCO --

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A Yes.

Q -- in favor of Novell were overturned --

A Yes.

Q -- would there be any immediate benefit to SCO?

A Yes.

Q What would that be?

A Immediately, we would have \$625,000 released from an escrow account that is -- has been reserved. And if that money part of the Tenth Circuit ruling was overturned, that would go out of escrow and back into our bank account.

Q Would it do anything to your --

THE COURT: Mr. Lewis.

MR. LEWIS: I have the same objection, Your Honor. If -- even if the Court reverses the money judgment, it might say, but I want to keep this money in escrow, I want to keep this money on the side. If the debtor gets its wish and gets this Chapter Seven -- this case dismissed without providing for payment to us, the Circuit might decide they're going to look after us instead. Again, we're assuming hypothetical result that's not clear.

THE COURT: Here --

MR. LEWIS: We don't know what the Circuit's going to do.

MR. SPECTOR: That's cross-examination, Your Honor. That --

1 THE COURT: Well, but here -- here's what's
2 disturbing me a little bit. You know, with this line of
3 questioning, it's -- it's as if you're getting the benefit
4 of having established that you were going to win on the
5 merits when we didn't -- when my ruling was that we weren't
6 going to get into the merits of litigation.

7 MR. SPECTOR: Correct.

8 THE COURT: So here, it's as if you had
9 established your point on the merits when you haven't even
10 proven them --

11 MR. SPECTOR: Well --

12 THE COURT: -- those issues by -- based upon my
13 ruling, I understand. I just think it's all so speculative.

14 MR. SPECTOR: Well, Your Honor --

15 THE COURT: Because, for example, the Judge -- it
16 could be reversed, but an appeal could be taken, and then
17 the \$625,000 might not be released immediately. And you
18 know, there is just so many --

19 MR. SPECTOR: That is --

20 THE COURT: -- possibilities.

21 MR. SPECTOR: All of that is quite true. And in
22 -- never is it the fact that a witness, when it testifies,
23 has absolute certainty of the assumption that's going to be
24 there. And all of that goes to the weight. And in --
25 normally, a witness will testify, and then in cross-

1 examination they say, well, couldn't this happen? Yes.
2 Couldn't that happen? What's -- what are the likely of
3 that? And then, the Court weighs it.
4

5 But you know what, Your Honor, I think this is
6 something Your Honor can understand. We aren't permitted to
7 talk about the likelihood of any result because that goes to
8 the merits.

9 THE COURT: Right.

10 MR. SPECTOR: And so I assume the same thing for
11 them. They can't come in and cross-examine and say, isn't
12 it the long shot that you win? So the point is assuming
13 that -- am I wrong about that?

14 MR. LEWIS: You -- please finish.

15 MR. SPECTOR: Okay.

16 MR. LEWIS: They were having just a colloquy for
17 a minute.

18 MR. SPECTOR: Okay. But the --

19 THE COURT: "So assuming," you started to say.

20 MR. SPECTOR: Assuming I can do it this way, Your
21 Honor. I'll withdraw that question. I'll ask it a
22 different way.

23 THE COURT: All right.

24 MR. LEWIS: Your Honor, if I may?

25 THE COURT: Mr. Lewis.

MR. LEWIS: It's not a question of the weight

1 given the -- all the possibilities. The problem is we don't
2 know how to assess the possibilities. They're all just
3 possibilities. I can see the debtor might win a home run.
4 But on the other hand, we might win a home run. How can we
5 possibly assess what that's going to mean when we have no
6 idea of the contours? We're going to be here all day
7 examining and cross-examining on all kinds of possible
8 outcomes and permutations of what the Tenth Circuit might
9 rule and what it might do in connection with such a ruling.

10 I think we can all say with some comfort that if
11 the debtor gets some sort of victory of some kind in the
12 Tenth Circuit, the debtor will be, in some way, better off.
13 But the problem is trying to assess how much better off, and
14 there, I think, we can't possibly make an assessment without
15 spending the next three days with testimony. And even then,
16 we still might not be able to make an assessment. I just
17 think this whole line of questioning ought to be stricken
18 and we ought to just move onto something else.

19 And -- well, I'll agree that the debtor might be
20 better off if it wins something on appeal. And I think
21 that's where it ought to end.

22 MR. SPECTOR: Judge, basically --

23 THE COURT: Yes.

24 MR. SPECTOR: -- the effort here is to render our
25 claims irrelevant. It -- it's part of our balance sheet on

1 our claims against these companies, IBM, Novell, and others.
2 It's part -- it's the largest part of our balance sheet.
3 It's the major asset of the case. By a couple of words here
4 and there, they're basically saying, who knows? Let's throw
5 it away. It's worthless. Well, just the argument is
6 attacking the merits of our balance sheet.

7 The prognosis about reorganization,
8 rehabilitation depends upon whether you have a viable
9 balance sheet. Now, I'm being trying very carefully not to
10 step over the line and talk about merits, but if they're
11 saying because it's so speculative, we can't talk about it
12 at all or the effects it would have, it renders the fact
13 that we have these claims irrelevant. It's not subject to
14 discussion.

15 I can try to work around this and get it in
16 another way, but I can't allow it to go unsaid that what
17 they're trying to do is just take the claims and make it go
18 away and say, they're really not part of this case. They
19 are a part of this case. They're the 800-pound gorilla of
20 the case.

21 MR. LEWIS: Your Honor, we'll concede that if
22 they win something on appeal, they might be better off. And
23 I assume they'll concede that if we win something -- if we
24 win something on appeal, they might be worse off. Beyond
25 that, I don't see how you can incorporate into the balance

1 sheet. I mean, do we have a balance sheet which -- I don't
2 recall seeing any balance sheets which have any kind of
3 perspective value for these claims. I recall hearing
4 billions of dollars, if they win everything.

5
6 But we're not talking about the balance sheet
7 right now. As a matter of fact, the debtor hasn't put our
8 claims on the balance sheet. We have a three-and-a-half-
9 million-dollar proof of claim, and the debtor just filed an
10 amended Schedule F, and it doesn't even show up. It's a
11 judgment.

12 So, you know, that's -- and that's at least a
13 judgment that's been rendered. And for the moment, it's
14 still a judgment. But the idea that we're somehow taking
15 their balance sheet away from them, this whole case, Your
16 Honor, this whole proceeding today -- both proceedings that
17 are being heard today is based upon the debtor's contentions
18 that the litigation is extremely valuable and this Court
19 should essentially bend over backwards to keep that alive in
20 the hands of the debtor's current management.

21 And we think it's not terribly valuable, and
22 that's about as far as we can go on either side. I just
23 don't see how the Court can value the litigation or consider
24 very much what the witness is going to say about what he
25 thinks the results are going to be and how it's going to
affect their business, other than, yeah, if they get some

1 results, we'll be somewhat better off.

2 THE COURT: Well, I have enough trouble deciding
3 my own cases, let alone somebody else's cases, and that's
4 really the problem. I certainly am prepared to take notice
5 of the fact that you have -- that the debtors have very
6 serious litigation that's pending and that if they prevail
7 on that litigation, it is going to help their
8 rehabilitation. I don't have a problem with that.

9 But I do have a problem with the speculation
10 about what it's going to do for employees and customers and
11 that sort of thing. I think as a general proposition, fine
12 -- it's fine, but as a specific proposition, it's
13 problematic.

14 MR. NORMAND: Your Honor, Mr. Normand. I think --

15 THE COURT: Mr. Normand, you may.

16 MR. NORMAND: -- just a few points.

17 THE COURT: You may, please.

18 MR. NORMAND: The first is, I think we're all in
19 agreement that, as you just said, the litigation is
20 relevant. And I think we're all in agreement about
21 obsessing litigation does involve some amount of
22 speculation. That's the word that anyone will see it as.
23 You're in a forward-looking position. That's what you're
24 charged with. I don't think anyone disputes that. Forward-
25 looking falls along a spectrum. I mean, there's a spectrum

1 of speculation.

2 What Mr. McBride needs to speak to is the next 35
3 days. And contrary to counsel's argument, there is not a
4 world of possibilities that could follow from the Tenth
5 Circuit argument. There's a limited universe of results
6 that could follow, and Mr. Spector was going to speak to Mr.
7 McBride about three or four principal possibilities in the
8 next 35 days. It is not a year out, two years out. I don't
9 think it's particularly wishy-washy.

10 So I think on that spectrum of speculation, if
11 that's the word that people want to use, that Your Honor is
12 forced to grapple with, this is on the far end, in the near
13 end. And I think for that reason, we should hear the
14 testimony.

15 MR. LEWIS: Your Honor, it's no less speculative
16 for the next 35 days than it is for the next two or three
17 months. And we don't know what's going to happen in the
18 next 35 days. We don't know, as the Court heard this
19 morning, whether the Circuit will rule it out, Judge, I
20 mean, if they're not ready to rule yet. We don't know. And
21 so we don't even know it's for the next 35 days.

22 But even if it is for the next 35 days, it's just
23 as speculative today as it is tomorrow, as for the third
24 day, as to the fourth day, to the fifth day, until such time
25 as there is a result. And there isn't a result right now,

1 and I don't see how the fact that we're looking at a shorter
2 horizon makes it any less speculative.

3 And I want to contrast this with, again, the
4 example I used earlier. Yes, we're always talking about
5 forward-looking stuff when you're talking about
6 rehabilitation. But there, you're looking at past sales,
7 marketing studies, you know, cost analysis, all kinds of
8 stuff that people are used to dealing with. You know, it's
9 a little like the difference between trying to value stock
10 that's traded on a public market and trying to value -- I
11 don't know if the Court remembers that once upon a time, you
12 had to have a plant that made what was called heavy water --
13 H₃O -- to make nuclear fissionable materials? We're not
14 competent to value a heavy water plant in this setting.

15 And I think we're -- it's really an analogous
16 situation. And there's -- and I think as a consequence, we
17 are just talking about speculation. If the debtor wants us
18 to concede that if the debtor wins something -- and it will
19 be an unspecified something because we don't know what the
20 contours are.

21 I mean, the Court -- Ten Circuit might remand for
22 trial on a very narrow issue with instructions that might
23 make the outcome almost a certainty for one side or the
24 other. And in the meantime, it might say, I want that
25 \$650,000 held onto in the meantime because this isn't going

1 to take very long. And it might not. How can we possibly
2 fit this testimony in to that issue without going over every
3 possibility, most of which we can't think about?

4 THE COURT: See, that's the problem I have, Mr.
5 Normand, is technically, as almost the end of the questions,
6 each question that Mr. Spector is asking should begin
7 hypothetically "if." And we don't do hypotheticals with
8 fact witnesses. We do hypotheticals with expert witnesses.
9 And I don't think there's an expert witness who could
10 possibly testify on the outcome of this -- of the pending
11 litigation and appeal.

12 MR. NORMAND: Well, Your Honor, it may be
13 forward-looking, but to Mr. Lewis' point that, you know, we
14 have, typically, company employees who deal with, you know,
15 financial practices of the company in the past and therefore
16 they have a baseline level of personal knowledge from which
17 they can testify, Mr. McBride certainly meets that standard.
18 I mean, he's been doing nothing, to speak colloquially, for
19 six years except grapple with people about what is happening
20 in your litigation and how is that affecting your company.

21 If anyone on the planet can speak to those
22 issues, he can. And if he can't speak to the issues, then
23 the implication is Your Honor is not entitled to hear from
24 any witness about prospects of this litigation. Not the
25 merits, but the prospects. And I don't know how the

1 litigation can be entirely put to the side like that.

2 To the second point, to Mr. Lewis' offer that
3 there be some sort of amorphous stipulation that upon a good
4 result in litigation, something good would happen for the
5 company, it sounds to me that that's of no value at all,
6 that after a hearing where there had been such a
7 stipulation, IBM and Novell would still be in the position
8 of saying, we see no specificity and no testimony about what
9 would actually happen, only an amorphous agreement that
10 something good would happen. So that would be of no value
11 to SCO.

12 I think if --

13 THE COURT: Well --

14 MR. NORMAND: -- anyone can testify these issues,
15 Mr. McBride can. And I just don't see how we can't have no
16 witness at all on this issue. I don't know how that helps
17 Your Honor at all.

18 THE COURT: Well, I don't see how this witness
19 can testify as to what will actually happen.

20 MR. NORMAND: No, but it would be his best
21 estimate based on his six years of dealing with this at the
22 company. It does go to the weight, Your Honor. You can
23 take it or not. I think it's relevant. My point is, I
24 don't know how else Your Honor would assess what could
25 happen with the company. And I think that's part of what

1 Your Honor is being asked to do, to assess what would happen
2 with the company. Mr. McBride's testimony is as good as any
3 witness for that.

4 MR. LEWIS: Your Honor, Mr. McBride's testimony
5 depends on two elements. One is whatever his experience is
6 with customers. The other is possible outcomes of the
7 litigation, without getting to the merits, just possible
8 rulings. And he has no expertise in possible rulings,
9 whatever expertise he may have in dealing with customers of
10 the firm. And that's part of the problem.

11 And yes, I suppose it's true that this means, as
12 the Court has previously ruled in deciding it wasn't going
13 to ask -- what they're basically asking you to do, Your
14 Honor, is to let Mr. McBride estimate the value on the
15 merits because you've decided not to. That's essentially
16 what's going on. And I don't think he's a good substitute.
17 And I don't mean that as a criticism of Mr. McBride. That's
18 out of this case.

19 And the fact that it means that they can't
20 present everything they would like to, because that's the
21 argue -- that's the argument we're really doing. You can't
22 present hearsay either. That's the rules.

23 THE COURT: Here is the practical problem. Mr.
24 McBride can now testify as to all of the good things that
25 will happen if there is victory on the appeal.

1
2 Subsequently, I'll have cross examination on what
3 happens if they -- if you don't win on appeal, and it will
4 counterbalance everything that we've heard for however long
5 it takes. So it is valueless to my decision what will
6 happen if wonderful things happen.

7 MR. SPECTOR: We understand the Court's ruling.
8 We'll move on.

9 THE COURT: And that -- I'll sustain that -- the
10 objection.

11 MR. SPECTOR: We'll move on.

12 THE COURT: And we'll strike --

13 MR. LEWIS: Thank you, Your Honor.

14 THE COURT: And we'll strike the previous answers
15 relating to the merits. Or I should say the -- the possible
16 outcome.

17 MR. LEWIS: Thank you, Your Honor. Excuse me,
18 one moment.

19 THE COURT: Okay.

20 MR. SPECTOR: Thank you.

21 MR. LEWIS: Thank you, Your Honor.

22 THE COURT: Yes.

23 BY MR. SPECTOR:

24 Q When the case has commenced, do the debtors have some
25 idea of an exit plan from Chapter 11?

A Yes.

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Q Would you tell us what it was?

A When we commence the cases, the idea is that we would have an internal reorganization plan that we would present to the Court.

Q Did something happen that changed management's mind about that?

A Yes.

Q What was that?

A Within a few days after filing Chapter 11 in September of '07, I received a call from Charlie Hale from York Capital, who expressed a desire to come in and put an investment into the company, and that would serve as the basis of a reorganization plan.

Q What did you do after you received this call?

A Went back and met with Mr. Hale and his associates at York Capital.

Q Describe the efforts made by the debtors to conclude a deal with York Capital.

A For a period of about two months, I'd say going from October through the end of November, maybe early December, there were very intense efforts to try and get a deal done. In fact, on the Friday before Thanksgiving of that year, there was a tentative term sheet we had come to agreement on, and so we flew everybody into New York on both sides, went literally two and half days around the clock to try and

1 consummate a deal with a lot of professionals on both sides
2 trying to drive that transaction to completion.

3 Q Who was with you in New York for those intense
4 negotiations?

5 A We had -- on our side of the table, we had our CFO,
6 Mr. Nielson. We had counsel. We had --

7 Q Who were the counsel, if you recall?

8 A On our side we had Mr. Caplan from your firm. We had
9 Mr. Lampert from your firm. We also had some financial
10 experts from Mesirow Financial that were engaged in the
11 process.

12 Q How many?

13 A I don't remember exactly, but it was a number of them.

14 Q Was there someone else from our firm, as well, an
15 associate?

16 A Yes.

17 Q Do you remember her name?

18 A Not right now. I remember her face, though.

19 Q And do you know how many people were there on the
20 other side of the table?

21 A They had more than we had. Let's put it that way.

22 Q And this was in the offices of which law firm?

23 A Proskauer, as I recall.

24 Q And in what city?

25 A In Manhattan.

1 Q And you said already, it went two and a half days
2 around the clock?

3 A Yes.

4 Q And when you say around the clock, are you just saying
5 that or it really went around the clock.

6 A Well, it literally went around the clock. I know
7 because I showed up in the middle of this. I think I landed
8 around midnight at JFK, and by the time I got into the
9 hotel, both sides were going strong. And literally, it was
10 an all-nighter where nobody slept. I don't believe the
11 second night was as intense, but it was still, it was
12 basically that entire weekend.

13 Q Besides Mr. Hale, was there somebody else there for
14 his firm?

15 A Yes, Mr. Charnin [ph], David Charnin, as I recall was
16 his key business partner on that.

17 Q Ultimately, did SCO and York decide to proceed?

18 A No, we did not.

19 Q Why did SCO choose not to proceed with York Capital?

20 A Well, there are a number of reasons. The biggest
21 problem that we had in the trying to get to an agreement
22 with York was we had agreed on a term sheet, and in the
23 process of trying to convert a term sheet into actual
24 documents, the mapping wasn't taking place. We would talk
25 to the York group. We would take a term, and then as we

1 tried to transfer and translate that term into written words
2 on the fly, they continually were trying to adjust the terms
3 to a different set of terms than what we'd already agreed
4 to.

5 Q Did you come to some conclusion about the good faith
6 of the people on the other side of the table during these
7 negotiations?

8 A Yes.

9 Q And what was that?

10 A Well, we were concerned that if we couldn't get to an
11 agreement -- if we couldn't even agree one week and then go
12 the next week and transfer what we'd agreed to onto the
13 paper, it was going to be very difficult to have a long-term
14 relationship with these guys. And the nature of the deal
15 was a long-term relationship across all of our major
16 business categories.

17 Q By the end of the negotiations, did you trust them any
18 longer?

19 A The trust had pretty much evaporated.

20 Q What did they try to do at the end when we got close
21 to a deadline?

22 A Well, there were -- they tried to force us to take a
23 lower deal than, again, what we had agreed to or what we
24 wanted to do.

25 Q And do you remember in which areas those were?

1 A Yes. It had to do with payments that were going to go
2 to them. It had to do with accounts receivables that we had
3 not agreed to pay them. They wanted to take those. There
4 were a number of categories there where, originally, the
5 deal was so -- kind -- formed up as a sort of a \$36 million
6 deal, and by the time -- I just remember thinking, by the
7 time we got done with what they wanted to spend on paper, I
8 was worried that we were going to have to write them out a
9 check.

10 Q Even before you were contacted by York, did you have
11 talks with anybody else?

12 A Yes.

13 Q Who is that?

14 A There were a couple in the fall timeframe.

15 Q And by the way, before we go any further down this
16 line, if there's anybody that we're going to be talking
17 about that has a contract with you -- hold a nondisclosure
18 agreement or some confidentiality provision, please let me
19 and the Court know because we have means to protect the
20 confidentially in that event.

21 So before you give the name of whoever contacted
22 you before York, is there a confidentiality concern as to
23 that?

24 A Yes.

25 Q Phew, just caught it in time.

1 A Yes.

2 MR. SPECTOR: Your Honor, I'd like to invoke the
3 procedure we discussed earlier today.

4 THE COURT: Does anyone wish to be heard on that
5 issue? Yes.

6 MR. JACOBS: Your Honor, my suggestion is that
7 Mr. McBride refer to Party A --

8 THE COURT: All right.

9 MR. JACOBS: -- and describe what happened, and
10 then at some convenient moment, in a closed courtroom, he
11 can -- we can go through a list of the confidential items
12 that have to be put on the record.

13 THE COURT: I think that's a good idea.

14 MR. SPECTOR: That's a great -- I've never heard
15 that one before.

16 THE COURT: Yes.

17 MR. SPECTOR: But that really is a very good idea
18 because we're going to have to do it multiple times.

19 THE COURT: Exactly.

20 MR. SPECTOR: Somebody keep track of the letters.

21 THE COURT: We'll start with A

22 MR. SPECTOR: All right.

23 THE WITNESS: I guess I have to remember these
24 too, then.

25 THE COURT: Mr. Marriott.

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2 MR. MARRIOTT: The only point of clarification
3 that I would seek is, I thought at the outset of the
4 examination, counsel had indicated that he was not going to
5 incorporate the long back and forth that is alleged to have
6 occurred in finding other buyers in an effort to speed
7 things up. And we had said, I thought, that that was fine
8 by us. It sounds to me like we're, nevertheless, doing
9 that. I'm just seeking some guidance as to whether or not -
10 - and if it hasn't already been achieved by the prior
11 agreement that we have as to what comes in from the past
12 hearing.

13 MR. SPECTOR: Well, we have to make -- we have to
14 win this case, Judge. There was a record. It wasn't the
15 primary issue at that time. The issue was, did we just
16 trump up this deal. We'll be speaking to that quite a bit
17 more, also. I didn't mean to say that we use that as our
18 record for this case. I just want to say that there are
19 things that may have come in that we don't want to go back
20 over.

21 THE COURT: All right. I'll allow you to
22 proceed.

23 MR. SPECTOR: Thank you.

24 BY MR. SPECTOR:

25 Q So, Party A, you had conversations with Party A

A Yes.

1 Q When did that commence?

2 A That commenced in early September of 2007.

3 Q That would have been before September 14th, when the
4 case was filed?

5 A Correct.

6 Q And can you describe those talks briefly? We don't
7 need a lot of detail on that.

8 A Yes. Briefly, it was an idea of selling off our UNIX
9 business to Party A. I don't know, these discussions were
10 going on simultaneous to discussions about bankruptcy and,
11 you know, we didn't come to an agreement with them.

12 Q Why did that deal fall through with Party A?

13 A Party A had difficulties with the UNIX ownership
14 rights that were spelled out in Judge Kimball's ruling in
15 that summer timeframe.

16 Q All right. Now, let's go after the York deal fell
17 apart. How long after the York deal fell apart did you
18 begin talks with others with regards to potential deal?

19 A And before I go to that, I had mentioned earlier there
20 were two in the fall. Did you want me to hit --

21 Q Oh, yes.

22 A -- the other one now?

23 Q Yes, that's right. You're right. Please go on.

24 A So Party B came on almost the same time as York. They
25 were more of a short cycle, so Party B, we had discussions

1 with. Again, nondisclosure. They went through and did due
2 diligence, another discussion about buying the UNIX
3 business. So that was in -- beginning to end, probably went
4 through the month of October of 2007.

5 Q After the York deal terminated, how long was it before
6 you got contacted by another party?

7 A It was the same month.

8 Q And who was this other party?

9 A That was Stephen Norris.

10 Q So you spoke with Mr. Norris?

11 A Yes.

12 Q Describe the discussions that commenced in the initial
13 weeks of your acquaintance with Mr. Norris.

14 A Mr. Norris was interested in the UNIX business. He
15 believed that it was -- had a lot of value, that there are
16 only a handful of platforms around the world that really do
17 operate in system management, if you will, in the computer
18 industry, and we were in the ownership position of one of
19 them. And so he found that very intriguing, and Mr. Norris
20 has, you know, he has a lot of contacts worldwide, and so we
21 found it intriguing to have those discussions with him.

22 Q After those initial conversations, were there any
23 follow-up conversations?

24 A Yes, there were.

25 Q And how long did those last?

1 A Oh, a period of weeks.

2 Q As I understand it, Mr. Norrison [sic] was trying to
3 put together a team to buy the company from you -- buy the
4 UNIX business from you, I mean.

5 A Yes.

6 Q Did you ever come to some kind of an agreement as to
7 terms with Mr. Norris or as, actually, Steve Norris Capital
8 Partners?

9 A Yes. So what happened then is we talked to Mr.
10 Norris. He was the founder of the -- what has become the
11 largest product equity firm in the world, the Carlyle Group.
12 He represented to us that he was prepared to take our
13 company into his hands and go out and form up some capital
14 arrangements with some people around the world. He talked
15 to various partners.

16 MR. SPECTOR: Well, my question, though, and I
17 guess that's a nonresponsive. But I guess that's mine. I'm
18 going to ask that as nonresponsive.

19 THE COURT: Well, you don't have to strike that.

20 MR. SPECTOR: I don't have to. All right.

21 THE COURT: You can --

22 BY MR. SPECTOR:

23 Q The question was, did you ever come to some agreement
24 as to terms with Steve Norris Capital Partners.

25 A Yes, so we did come to terms with him.

1 Q And what were the terms of that original deal with
2 Steve Norris Capital Partners? Generally speaking, because

3 --

4 A The -- generally speaking --

5 Q -- the actual document is on file.

6 A Sure.

7 Q Okay.

8 A Generally speaking, the terms were, we signed a
9 Memorandum of Understanding. The Memorandum of
10 Understanding called for a \$5 million capital infusion into
11 the company and then a \$95 million line of credit that was
12 going to be on the back end of that, depending on how much,
13 if any, that line of credit was tapped into was going to
14 have a dilutive effect on the shareholders of SCO, and
15 obviously, a lot more punitive to the extent that you drew
16 down more of the capital line.

17 Q Do you remember when a plan was filed with those
18 terms, generally speaking?

19 A I believe it was February of '08.

20 Q Did there come a time that the deal with Mr. -- with
21 Steve Norris Capital Partners also fell apart?

22 A Yes.

23 Q Was there something in the press about the time that
24 that happened?

25 A Yes.

1 Q What was it in the press that was noteworthy in
2 regards to these talks?

3 A There was a story that came out that said that SCO or
4 a new company in this case, Steve Norris Capital Partners,
5 whoever was buying the business from SCO was going to have
6 to pay 95 percent of the monies they collected as a royalty
7 back to Novell.

8 Q Did that have some effect on the desire of Stephen
9 Norris Capital Partners to close this deal?

10 A Yes, it had a very chilling effect, and even though
11 that statement was untrue, there was so much noise out
12 there, and the people we were dealing with were across the
13 ocean and they became very nervous about completing the
14 transaction.

15 Q And they cancelled it?

16 A Yes.

17 Q Now, Judge Gross has heard some talk about 95/5 in the
18 early stages of this case. Do you -- do you want to remind
19 the Court what the real 95/5 deal is about?

20 A You're talking about the SNCP?

21 Q Yeah. No, no, no, I'm sorry.

22 A Oh, you're --

23 Q I -- I'm being vague.

24 A Okay.

25 Q The article you just related said --

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A Oh, the other, the UNIX royalties, yes.

Q -- 95 percent of the revenues that SCO would collect would have to go to Novell --

A Sure.

Q -- leaving SCO --

A Yes.

Q -- with only five percent of gross revenues.

A Yes.

Q Which you said is untrue. What -- there is a 95/5 split with Novell, though, isn't there?

A Yes, there is.

Q Okay. And we discussed this in Court on a previous occasion when Novell raised it, right?

A Yes. I believe in the fall of '07, if I'm not mistaken, Novell was concerned about a royalty stream that we, as part of our agreement with them in the 95 Asset Purchase Agreement, would pay to Novell, which was older versions of UNIX that we collected, mostly out of Japan. We would send 95 percent of that revenue to Novell. That was always part of the deal. Our deal was that we were going to own UNIX where we already had open server, and so it was just those older versions of UNIX that we're paying 95 percent.

So when this article came out, saying SCO has to pay 95 percent, they had mistakenly attached that to our

1 actual product business, and if that would have been a true
2 statement, we wouldn't be in business today because we would
3 have no revenue to run our company.

4 Q Now, deal talks apparently ebbed and flowed during the
5 past two years; is that right?

6 A Yes.

7 Q Once the SNCP deal failed and the Novell case was set
8 for trial, were deal talks active or were they in a lull?

9 A They were definitely in a lull. Once that came down,
10 there was a dampening effect.

11 Q So the -- this is a matter of record, but I believe
12 the SCO -- the Novell trial, fixing damages on the
13 constructive trust issue, came to -- started in the first
14 part of May; is that right?

15 A That -- that's correct.

16 Q Of 2008?

17 A Yes.

18 Q So during the late spring and early summer, how would
19 you characterize the pace of talks with potential suitors?

20 A The pace of talks had dramatically slowed down.

21 Q Now, you previously testified on one of our
22 exclusivity extension motions about this particular
23 phenomenon, did you not?

24 A Yes.

25 Q And eventually, you received a ruling from Judge

1 Kimball on the liquidation of the amount of the constructive
2 trust claim of Novell; is that right?

3 A That's correct.

4 Q Now, was that in July of 2008?

5 A Yes, I believe it was July 16th, 2008.

6 Q Was that award \$2.54 million, plus prejudgment
7 interest?

8 A Yes.

9 MR. SPECTOR: Your Honor, I have a copy of the
10 judgment or the findings, I suppose. Findings, I guess.
11 And that's what happened in July. The judgment was months
12 later.

13 THE COURT: Yes.

14 MR. SPECTOR: And the Court can take judicial
15 notice of a District -- a U.S. District Court judgment, but
16 I'm going to have a copy for you, so you can have it in case
17 we discuss it later.

18 THE COURT: Okay.

19 BY MR. SPECTOR:

20 Q Now, this has been marked as Debtor's Exhibit Number
21 28. Would you identify this for the Court, please? And
22 I'll hand them out.

23 THE COURT: Thank you. Thank you, Mr. Spector.

24 (Pause.)

25 Is there any objection? Well, I guess you really

1 haven't established it with the witness yet, right? I'm
2 sorry.

3 BY MR. SPECTOR:

4 Q Can you identify that, please?

5 A Yes, it's a Findings of Fact, Conclusions of Law and
6 Order in Case Number 204CB139DAK in the Novell versus SCO.

7 MR. SPECTOR: I offer Debtor's Exhibit 28.

8 MR. LEWIS: No objection, Your Honor.

9 THE COURT: No objection. It is so admitted,
10 then.

11 (Debtor's Exhibit 28 received in evidence.)

12 BY MR. SPECTOR:

13 Q After the -- Novell received that judgment, did talks
14 begin again?

15 A Yes, they did.

16 Q Which company was the next one that you spoke with?

17 A The next one was -- well, let's see, it was York and
18 SNCP, DNE, or am I just going to unidentified ones?

19 Q Well, after July 2008, SNCP was off.

20 A Right.

21 Q York was off.

22 A Right.

23 Q Was there somebody else?

24 A Right. I understand. I'm just trying to figure out
25 what lettering I'm up to now.

1 Q Oh, oh, I see.

2 THE COURT: C.

3 THE WITNESS: I'm confused.

4 MR. SPECTOR: Up to C, I believe.

5 THE WITNESS: I've never done this before. I
6 just -- I'm -- am I counting all of the people that we've
7 done, or are we just using --

8 MR. SPECTOR: No, no, just in order of your
9 regular test --

10 THE WITNESS: -- code letters for people that
11 aren't identified?

12 MR. SPECTOR: In order of your testimony.

13 THE WITNESS: Okay.

14 MR. SPECTOR: We had A, we had B, call this one
15 C, then.

16 THE WITNESS: Okay. Let's call this one C, then.
17 Company --

18 BY MR. SPECTOR:

19 Q Tell us about C.

20 A Com --

21 Q Who was C?

22 A Yeah.

23 Q No, no, I didn't mean who is C. Tell us a little
24 something about C without trying -- without --

25 A Okay.

1 Q Unless your description of C will help identify it,
2 which is going to be a little bit of a problem here.

3 A I think I can work around that.

4 Q Okay.

5 THE COURT: Okay.

6 BY MR. SPECTOR:

7 A Company C was a technology company based out of York.
8 It had some -- what shall we call this? I'm trying to
9 figure out how to say this without --

10 Q Well, rather than describing it, it's a technology
11 company in Europe.

12 A Okay.

13 Q That's good enough for these purposes.

14 A Okay. Let's just call it a technology company in
15 Europe. The general idea with Company --

16 Q Well, I didn't ask you anything else. It's my turn.
17 What was the general idea about the deal with this company?

18 A The general idea with Company C was that we would
19 merge the SCO group with Company C, and then there would be
20 some additional capital that would be invested into the
21 merged company.

22 Q Right out of the chute, was there a lot of activity?

23 A Yeah, initially, there was a lot of action, a lot of -

24 -

25 Q What type of action?

1 A Well, there were a lot of discussions. There were
2 meetings -- meeting with the principals of Company C,
3 putting together business plans. One of the things -- one
4 of the general ideas of Company C and the merged company,
5 SCO -- with SCO would be to go into the emerging markets
6 around the world. There's a term called BRICMEA -- Brazil,
7 Russia, India, China, Middle East, Africa, if I'm not
8 mistaken.

9
10 So the emerging markets of the world, we
11 believed, were a prime target for the SCO operating system,
12 and that was where we spent a lot of energy and market
13 development and marketing work to understand better that --
14 that opportunity.

15 Q What happened to those talks?

16 A They eventually just fizzled out.

17 Q About the time that the talks with Company C were
18 fizzling out, did you reengage with Mr. Norris on some other
19 venture?

20 A Yes, we did.

21 Q And what was the name of this other company he
22 introduced you to as a purchaser of the UNIX business?

23 A This was with MerchantBridge.

24 Q Tell us what you know about MerchantBridge.

25 A MerchantBridge is a merchant bank that is based out of
London. It has some very highly qualified financial people

1 that run it. The top guy of MerchantBridge is a guy named
2 Basil al-Rahim, who worked with Mr. Norris in their Carlyle
3 days. And in fact, I believe Basil ran Carlyle
4 International when Steve was at Carlyle.

5 Q What else do you know about MerchantBridge?

6 A Oh they had some other strong players there. We were
7 especially intrigued by -- well, there were two other things
8 I would say. One is some management talent they had there
9 that really understood UNIX. One senior executive at
10 MerchantBridge had worked at the Digital Equipment
11 Corporation and really understood UNIX very well. And then
12 the other person working with him, Rafe [ph], was also a
13 very strong UNIX advocate. So we had Rafe and Eric that
14 were big UNIX aficionados, if you will?

15 And then the other thing that was compelling
16 about MerchantBridge is they had very strong ties into some
17 big money players in the Middle East.

18 Q Did you make any trip to London to meet with these
19 folks?

20 A Yes, I did.

21 Q And when was the first time you did that?

22 A My first trip to meet with them on this was, as I
23 recall, in September of 2008.

24 Q Would you characterize this more as an introductory
25 talk?

1 A Yes, that's exactly what it was. It was a first
2 meeting.

3 Q How did they appear to you when you finished the
4 introductions? I mean, let's -- we strike that. That's
5 terrible. How receptive were the people at MerchantBridge
6 after they had been introduced to you and UNIX and SCO?

7 A The -- they seemed very receptive. They basically
8 said, we'll get back with you. We heard shortly after that
9 that they were very interested in the idea of buying the
10 UNIX business from us, investing in it, and then moving it
11 forward into these emerging markets.

12 Q So what did you do after that meeting to further those
13 discussions?

14 A Next thing we did then, is we scheduled a two-day
15 working session with the principals of MerchantBridge and
16 the key management players that would be involved in it, and
17 then, the key SCO management team players.

18 Q And when did you have this two-day working session?

19 A That was in the first part of November 2008.

20 Q At that time, in the first part of November 2008, how
21 confident were you that you'd have a deal soon?

22 A Well, we didn't know that we were going to have a deal
23 soon. We were trying to push for that because we knew we
24 had a deadline coming up with this Court at the end of the
25 year. So we were pushing for that, but it was still early

1 in the game.

2 Q Now, what, if anything, did the folks at
3 MerchantBridge do to advance the discussions? Did they do
4 any due diligence?

5 A Yes, they did. So what happened after the two-day
6 meeting in November -- so it was a very -- again, a working
7 session where we went through the technology. Our
8 technologist was in the meeting, Mr. Andy Nagel. Our
9 marketing people was there, Mr. Hunsaker. We had a very
10 deep set of discussions.

11 A couple of weeks after that, they came back
12 again and said, okay. It's not -- we passed another hurdle,
13 which is we've gone through this deep working discussion,
14 and they're very interested in pursuing it. And what they
15 wanted to do next was to come to the U.S. and to do more due
16 diligence to get a better, more full understanding before
17 moving to actual papering of the deal.

18 Q Did they do that?

19 A Yes, they did.

20 Q And when was that?

21 A Well, it started in December, and what happened is
22 the -- they started that deep due diligence just about ten
23 days before Christmas. And they were getting into the
24 depths of it, and we were pushing them very hard to try and
25 get a deal signed by the 31st of December.

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Q Did they have lawyers to help paper a deal?

A Not at that point.

Q And we have a deadline of December 31st before we lose exclusivity?

A Right.

Q And what were you trying to do with regard to that?

A Well, we were trying to get a -- some kind of a signed agreement in place.

Q And if there were no signed agreement with them or anybody else, what was the only alternative to -- for the debtor at that point?

A To go back to the original plan that we had when we came into the Court, which is to go to a company-internal reorganized plan, where we would dramatically reduce the size of the company into a plan that we could reorganize on our own.

Q But what was your real goal? What did you really want to do, as we entered into the Christmas week? What was your real intent?

A What we really --

Q SCO really -- what did it really want to do at that point?

A Well, we really wanted to get a deal with them that would allow the UNIX business -- we don't want to send all these employees home. We don't want the customers to

1 suffer. We were trying to get a deal signed to be able to
2 move forward.

3 Q Did there come a time in late December when it was put
4 up or shut up time?

5 A Yes.

6 Q And did that time come and go?

7 A Yes, it did.

8 Q Okay. And then, we had to file a plan that did not
9 include a deal with MerchantBridge; is that right?

10 A That -- that's correct.

11 Q Okay. After that -- and that plan was filed in the
12 early part of January 2009; is that right?

13 A Yes.

14 Q After that plan was filed, did you hear back from the
15 MerchantBridge folks again?

16 A Yes, I did.

17 Q What was the import of the conversation at that point?

18 A Well, they had seen that we had filed papers saying
19 we're going to go out and try and open this up to other
20 people to come and look at it. And they came back and said,
21 hey, we're -- just because we didn't get that signed didn't
22 mean we're not interested. We want to dive back in, but we
23 also don't -- we want to go down the path of a private sale
24 like we've been talking about. And that was the nature of
25 that discussion.

1 Q All right. Did you honor the request to reengage with
2 MerchantBridge?

3 A Yes, we did.

4 Q About that same time, in late January or early
5 February 2009, were any other inquiries made by other
6 parties to discuss being a stalking horse or something of
7 that nature?

8 A Yes.

9 Q And who were those people?

10 A From the period of --

11 Q Again, if you have to use letters --

12 A Yes.

13 Q Otherwise, if you don't have to use letters, if you
14 don't have an NDA, if you don't have confidentiality, you
15 can name names.

16 A So you mentioned 2000 -- January of 2009.

17 Q Yes.

18 A Did you want just that timeframe or did you want over
19 the ensuing months?

20 Q Well, answer it the best you can. I was talking about
21 when you filed the plan in January, 2009.

22 A Right.

23 Q But we can go back because I know there are other
24 companies, as well.

25 A Okay. Well, I'll just do --

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Q Let's talk about this.

A You want me to take the January 2009?

Q Yes.

A Okay. So in that timeframe, we had two entities emerge, one that we had talked to before and a new one. The --

Q Who were they?

A The company -- let's go Company D, based out of New York, software company had expressed a desire to, again, buy the UNIX business.

Q How far did those talks advance?

A They went into a level of NDAs, sharing information, due diligence.

Q Did it -- what came of those discussions?

A They received an offer from another technology company to buy them, and that basically precluded them from doing a deal with us.

Q And what about the other company that you engaged with after?

MR. SPECTOR: What's that?

THE COURT: Is that the phone?

MR. SPECTOR: Stop that stopwatch.

THE COURT: Let's try it again.

MR. SPECTOR: Okay.

THE COURT: I'm sorry.

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BY MR. SPECTOR:

Q Go ahead. You were answering.

A So the other company that came forward at that point in time was -- I got to think back on the NDA status of this one before I say it. To be safe, let's call it Company E, and then I'll disclose later who it is.

Q Okay. That's fair.

A So Company E stepped forward and expressed an interest in purchasing the UNIX business.

Q Could you describe for the Court the offer made for the purchase of the UNIX business by Company E?

A Yes. Company E was trying to buy the business for a lower amount than the discussions we had on the table with MerchantBridge. And they -- and in terms of doing that, they were basically saying, look, we don't need to pay prepetition creditors a dollar on dollar. That's crazy. I mean, most people coming out of bankruptcy are happy if they get ten or twenty cents on the dollar.

Our commitment all along was to take care of all constituents at 100 percent, including shareholders, including creditors, employees, customer -- we were trying to keep everybody intact. And their plan basically called for cramming down customers, and that was -- that didn't sit well with us.

Q It wouldn't be customers, it'd be vendors, wouldn't

1 they?

2 A Yes.

3 Q I mean, customers aren't creditors, are they?

4 A That -- that's right.

5 Q Okay.

6 A Yeah, I meant to say creditors. Right. Yeah.

7 Q Is there anybody who is a part of Company E that you
8 had met before in your discussions with other companies?

9 A Yes.

10 Q And who is that? As far as I know --

11 A Pers --

12 Q -- is there any reason why you can't give the name of
13 the person whom you dealt with for Company E?

14 A I don't know. That's the question. It's either
15 Person A or its --

16 Q Do you see that person in the courtroom?

17 A Yes.

18 Q Would you point him out? It sounds like the criminal
19 trial.

20 A It's right over my shoulder. Yeah.

21 Q I don't know who it is, so that -- what is he wearing.

22 A The guy smiling over there.

23 Q Raising a hand. All right. The gentleman without a
24 jacket with a bow tie. Do you know that person's name?

25 A Yes.

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Q As what is his name?

A That's Charlie Hale.

Q Oh, that's the one way to get where I was coming from.

A Okay.

Q And is he a principal of some other company that you did discussions with?

A Yes.

Q And which company was that?

A That was York Capital.

Q Okay. And we've already discussed those negotiations and how you were left -- the feelings you were left with at the end of those; is that right?

A Yes.

Q Okay. I take it no agreement was reached with Company E?

A Correct.

Q And whose request was that let go?

A It was -- it wasn't something that we accepted. It just didn't work.

Q Again, since January of '09 and through -- well, that was January or February period?

A Yes.

Q Was there somebody else you spoke with before that we haven't already talked about -- let me strike that. Were there any other companies with whom you spoke with reference

1 to the sale of the UNIX business or other financial
2 arrangement that occurred before February 2009 that we
3 haven't already addressed?

4 A Not that I can think of.

5 Q Okay. Then, let's move forward.

6 A Okay.

7 Q After you had spoken with Company E and reengaged with
8 MerchantBridge, were there any other players out there?

9 A Yes.

10 Q All right. If you can give the names, give the names.
11 If you can't, let's use the letters again.

12 A Okay. Let's, first of all, go to Company F. Company
13 F was a group that wanted to come in and put investment into
14 the company. Actually, it was in the form of a DIP loan to
15 the tune of about between \$5 and \$6 million. The return for
16 that immediately was going to be, they would take somewhere
17 between 65 and 80 percent ownership in the company's shares
18 for that \$5 to \$6 million DIP loan.

19 Q Was there a company out of California with whom you
20 dealt?

21 A Yes.

22 Q We're talking about G now.

23 A Yes.

24 Q Right?

25 A Yeah, now we're at Company G.

1 Q Tell us about that.

2 A Company G is a very large buyout company. They buy
3 technology companies. And we had several discussions with
4 them, and that did not materialize in an offer, but the
5 discussion was that they would buy our UNIX business.

6 Q Did you have talks with an existing shareholder with
7 regards of financial deal about the same time you were
8 dealing with Company F and Company G?

9 A Yes.

10 Q And, of course, MerchantBridge, which --

11 A Yes.

12 Q -- you haven't gotten back to yet.

13 A Yes.

14 Q Is that name available or is it something we have to
15 put an H --

16 A Let -- let's be safe, let's put an I.

17 Q H -- I think we're up to H.

18 A We're up to H. Okay. Let's put an H behind that one.

19 Q And --

20 A That was an existing shareholder who had ties into
21 some other investors in the New York City area, and we had
22 several discussions with them about a possible investment.
23 The idea there was that they were going to put millions of
24 dollars into the company and get equity warrants and
25 possible upside on the litigation returns.

1 Q Now, at the time we were approaching the June 15th
2 hearing --

3 A Yes.

4 Q The latter of May, first week of June period.

5 A Yes.

6 Q How many different deals were being discussed at the
7 same time by management and counsel?

8 A Four.

9 Q It was the MerchantBridge deal; is that right?

10 A Yes.

11 Q And then there were H, G, and F?

12 A It actually would have been H, G, and one we haven't
13 talked about.

14 Q All right. What's the one we haven't talked about?

15 A The one we haven't talked about was a deal with our --
16 the chairman of our Board of Directors, Ralph Yarrow, who
17 was going to agree to backstop to a certain level a line of
18 credit that would allow us to move forward to complete a
19 deal with one of these other three. And then, as a means of
20 not causing harm to creditors in the event that it didn't
21 come to fruition.

22 The other one there was MerchantBridge. So we
23 have MerchantBridge, F, G, and Yarrow.

24 Q So let's get back to MerchantBridge. When we -- did
25 we have a name for this kind of competition at that time

1 where we were working with all four deals?

2 A What -- we -- it was during the time of the Triple
3 Crown Races, and so we referred it to as our horse race.

4 Q Was MerchantBridge always in front?

5 A No.

6 Q We know it won the race, but was MerchantBridge always
7 in front?

8 A No.

9 Q And there came a time that it pulled away from the
10 pack. And when was that?

11 A Yes. They pulled away from the pack when they put
12 down a \$250,000 deposit into escrow.

13 Q And then moved on from there? Did we get into
14 negotiations and, I mean, papering the deal?

15 A Yes.

16 Q Okay. And as of June 15th -- strike that. As of June
17 5th, when we had a deadline to file a response to the
18 motions to convert, did we have, at that time, any knowledge
19 which of the four horses were going to win that race?

20 A No.

21 Q We didn't know that anybody was going to do a deal; is
22 that right?

23 A Correct.

24 Q Okay. When did you finally ink a deal with
25 MerchantBridge?

1 A About five minutes before the hearing on June 16th --
2 June 15th.

3 Q Okay. And His Honor has heard plenty about that
4 already. Now, let me -- I kept calling it MerchantBridge,
5 so we didn't have a problem with nomenclature. And I want
6 to go back and connect the dots on that, Mr. McBride.

7 When you first met MerchantBridge folks in London,
8 were they the only people involved in this deal?

9 A No.

10 Q Who else was involved as getting -- as part of this
11 deal from the purchasing side?

12 A Steve Norris.

13 Q In one of his companies?

14 A Yes.

15 Q And you didn't know which company it was at the
16 beginning, did you?

17 A No.

18 Q Ultimately, did a company emerge of Steve Norris's?

19 A Yes.

20 Q And what was the name of that company?

21 A It was called Gulf Capital Partners.

22 Q Okay. Now, did the two of them, MerchantBridge and
23 Gulf Capital Partners, jointly do this deal?

24 A They -- no, I wouldn't say it that way.

25 Q All right. How would you describe their relationship

1 on the deal that has ultimately come before this Court?

2 A Those two companies, MerchantBridge International and
3 Gulf Capital Partners, formed a new entity called Unxis.
4 That is the organization that we ended up doing the deal
5 with.

6 Q As far as you know, they're joint ventures in that
7 entity?

8 A Yes.

9 Q Okay.

10 MR. SPECTOR: May I have Exhibit 1, please? Now,
11 I had with me on June 15th, brand new, not even dry ink
12 version of the signed contract and probably have it in here.
13 We had objections that what I had sent in was not a signed
14 version, so do you have a signed version here?

15 THE CLERK: No.

16 MR. SPECTOR: I have it in my briefcase, but I
17 hate to put it up. I'd like to show it to you guys since it
18 is the original. And a folder I had that day for the
19 exhibits. And at some point during the day, I think counsel
20 for the other side actually held this document.

21 MR. LEVIN: Your Honor. Your Honor, to be clear

22 --

23 THE COURT: Yes, Mr. Levin.

24 MR. LEVIN: -- I don't recall that we ever
25 objected to the document that was handed to us on June 15th.

1 The only objection we had was, wait a minute, you're giving
2 us something with original signatures. Don't you want to
3 retain this and give us a copy?

4 MR. SPECTOR: Right. And I'm doing that now.

5 THE COURT: That's a copy?

6 MR. SPECTOR: No, this is the original. So, I
7 mean, the only reason I'm making this little drama here is
8 that we -- the objection we received was that it wasn't the
9 original. So I'm saying I've got it. I'd like not to put
10 it into evidence. I'd like to put a copy into evidence.

11 THE COURT: That would be acceptable.

12 MR. SPECTOR: This is the entire document. If
13 you want to hand it -- oh, and give it to them. We don't
14 have any copies of this?

15 THE CLERK: Well, because it's been on file, its
16 hundreds of pages.

17 THE COURT: Why don't you give it to the movants?

18 MR. SPECTOR: All right. We don't have an
19 exhibit number on that one, either.

20 MR. LEVIN: Your Honor, I might note that some of
21 the exhibits were filed under seal.

22 MR. SPECTOR: That's correct. Thank you for
23 reminding me of that.

24 THE COURT: That's right.

25 MR. SPECTOR: Well, it is filed and it is very

1 bulky. And we don't have I don't know how many, 15 copies
2 of everything else with us.

3 THE COURT: It is filed, and I don't think it's
4 critical that it be marked for that reason.

5 MR. SPECTOR: Thank you.

6 MR. LEWIS: Your Honor, just for the record.

7 THE COURT: Mr. Lewis.

8 MR. LEWIS: This is not what was presented to us
9 that day, as the Court may recall. We were presented with
10 the transactional documents and a couple of the exhibits and
11 were told everything else was coming, being copied at that
12 very moment.

13 THE COURT: Right. There was a 500-page document
14 or something like that that was coming.

15 MR. LEWIS: Something like that.

16 THE COURT: Yes.

17 MR. SPECTOR: Does Your Honor want the one we
18 brought to Court?

19 THE COURT: No, I do not need that one.

20 MR. SPECTOR: Well we'll just assume that that
21 purchase of sale agreement is in evidence.

22 THE COURT: Yes.

23 MR. SPECTOR: We were going to call it Exhibit 1
24 -- the Debtor's Exhibit 1, but it's in evidence under
25 whatever title it is. Fine.

1 BY MR. SPECTOR:

2 Q So your talks eventually were memorialized in that
3 exhibit that just was admitted, correct?

4 A Yes, that's correct.

5 Q Would you describe the principal deal points,
6 remembering the documents in evidence and people have looked
7 it over. Just the principal deal points that you remember.

8 A Yes, so the principal deal points were that we were
9 going to get about \$2.4 million, I believe, in cash for the
10 UNIX business and there was going to be a line of credit
11 that would relate to their potential judgment. However, we
12 resolved the Novell judgment for another \$2.85 million, and
13 we would divest of the UNIX products business to them and
14 the SCO Mobile server business to them. We would retain all
15 rights in what was going on in the litigation, and we would
16 also retain the SCO Mobile product applications.

17 Q From the SCO point of view, what were the benefits of
18 this deal?

19 A Well, it was a good deal. It is a good deal because
20 it addressed the objective we had from the beginning of our
21 entry into bankruptcy court, and that was to take care of
22 all of the stakeholders that related to us, whether it was
23 customers, shareholders, employees. Anybody who had a stake
24 in SCO, we wanted to be able to take care of them. This
25 deal does that.

1 Q Now, you talked about employees. How does this deal
2 keep the employees intact?

3 A What we're able to do with this Unxis deal is to take
4 the good, hardworking employee base that's been with the
5 company for decades that started at AT&T Bell Labs, some of
6 which are here in the room today, and the worldwide sales
7 force that hold this SCO ecosystem together and move that
8 pretty much en masse to this new investor.

9
10 And so that moves over to them, and then they
11 come in and, not only buy the business, but commit to take
12 it forward and to develop the UNIX products and to continue
13 to make good value for the customers.

14 Q So I take it from what you said, one of the goals of
15 the SCO management was to make sure that the customers --
16 the install base UNIX customers --

17 A Yes.

18 Q -- were taken care of by somebody committed to the
19 product?

20 A That's correct.

21 Q And are you satisfied Unxis folks will do that?

22 A Yes.

23 Q Well, you've already said their -- I think you said --
24 well, maybe if you did, I'll ask you again. Are they
25 committed to take over the employment of the core cadre of
engineers who have worked on this product for 20-some-odd

1 years?

2 A Yes, they are. That's a core part of the deal.

3 Q And is that evidence to you of anything -- about some
4 commitment to the product?

5 A Yes.

6 Q Okay.

7 A Going back to the very first discussions with
8 MerchantBridge, they have these two UNIX pros who were very
9 excited about taking the UNIX line forward.

10 Q So that part of the deal covers your concern about
11 employees and the UNIX install base?

12 A Yes. And the customers.

13 Q What about paying claims?

14 A Okay. So the other part, then, is unlike the -- I
15 forget which company letter it was. I think it was F, where
16 in the spring of '09, the proposal was to do a cram-down on
17 the creditors. Well, a cram-down on the creditors is also
18 going to, I believe, have a cram-down effect on
19 shareholders, and the whole thing was just going to not meet
20 our objective.

21 So in this case, what we have is a deal with
22 Unxis that allows us to go in and take care of our
23 prepetition creditors and do that at 100 percent level,
24 rather than a 10 or 20 percent level.

25 Q Why hasn't the debtor assumed the 1995 Novell Asset

1 Purchase Agreement with Santa Cruz operations?

2 A There's no need to. The contract has been performed
3 on each side, so it's not an executory contract.

4 MR. LEWIS: Objection Your Honor. Calls for an
5 opinion. It's a legal opinion.

6 THE COURT: A legal opinion.

7 MR. SPECTOR: I asked why didn't the seller
8 assume a contract. He says, because we don't need to. Why
9 don't you need to? Because it's not executory, everything
10 is done. I don't understand why this -- I mean, how do you
11 get that testimony? You know, I mean, I asked if they want
12 a factual record. Here's a factual record. The president -
13 - the CEO of the company is saying, we chose not to assume
14 it. We didn't have to choose not to assume it. We didn't
15 have to make that choice. It's not an executory contract.

16 BY MR. SPECTOR:

17 Q What is your understanding of an executory contract?

18 MR. LEWIS: Same objection, Your Honor.

19 THE COURT: I think I have to sustain the
20 objection.

21 BY MR. SPECTOR:

22 Q Are there any duties left on the Novell side to
23 perform from this APA?

24 A No.

25 Q Okay.

1 MR. LEWIS: Your Honor, it's the same objection.
2 It calls for legal conclusion, and the document speaks for
3 itself. We can argue that. He can testify about, you know,
4 what he has to do or doesn't have to -- what he thinks he
5 has to do or doesn't have to do. But his testimony is not
6 competent testimony on the question of what is an executory
7 contract.

8 THE COURT: Understood.

9 MR. SPECTOR: Your Honor, a company -- a
10 businessman is testifying about a contract. We're asking
11 him, is the contract completed, yes or no. Yes, it is. I
12 mean, this --

13 THE COURT: All right. I will allow that
14 question and answer.

15 BY MR. SPECTOR:

16 Q Mr. McBride, is the contract completed?

17 A Yes.

18 Q Okay. Does SCO owe -- other than to remit five
19 percent collection -- strike that -- 95 percent of the
20 collections, are there any obligations that SCO has to
21 Novell under that contract?

22 A No.

23 Q And does Novell owe any duty to SCO when you pay the
24 95 percent of the revenues?

25 A No.

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Q Okay.

MR. MARRIOTT: Your Honor, just for -- if I may, just for the record.

THE COURT: Mr. Marriott.

MR. MARRIOTT: I'd like to join and reiterate the objection that this is incompetent testimony that goes for a legal conclusion as to whether or not SCO has obligations, whether Novell has obligations, and whether the obligations have been satisfied. I want to make sure we've got a record that both has spoken.

THE COURT: I think we need a record that it -- that -- to his knowledge.

MR. SPECTOR: All right.

BY MR. SPECTOR:

Q Do you know of anything that you have to get, that SCO has to get from Novell as a result of this APA?

A No.

Q All right. Is it -- what is SCO's position as to what you got -- well, strike that. Let me go back to something. With whom did SCO -- who did SCO purchase -- strike that. Who did Novell sell the assets to in the 1995 APA? Who is the other party?

A The Santa Cruz operation.

MR. SPECTOR: And I'm trying not to go into the merits of the case, Your Honor. That's why I'm trying to

1 think about the question in a very careful way.

2 BY MR. SPECTOR:

3 Q Did whatever the Santa Cruz operations get go to
4 somebody else?

5 A Yes.

6 Q To whom?

7 A Caldera International Corporation.

8 Q Did whatever -- and did Caldera get everything that
9 Santa Cruz operations had?

10 A To my knowledge, yes.

11 Q And did Caldera International transfer those same
12 assets to another company?

13 A Not yet.

14 Q Those intellectual property assets?

15 A No.

16 Q All right. Did Caldera --

17 A Well, we renamed the company --

18 Q All right.

19 A -- but they didn't transfer them.

20 Q They renamed the company. I see.

21 A Yes.

22 Q And what is Caldera International now called?

23 A The SCO Group, Inc.

24 Q Okay. So the asset purchase agreement was never
25 between Novell and SCO Group, Inc.; is that right?

1 A That's right.

2 Q All right. So it's not your contract to assume or
3 reject with Novell?

4 A That's my understanding.

5 MR. JACOBS: Your Honor, this is --

6 THE COURT: Yes.

7 MR. JACOBS: -- this is really way beyond the
8 scope now. And --

9 THE COURT: It certainly is.

10 MR. JACOBS: -- go -- there's a lot of litigation
11 history that goes to whether this company, the SCO Group, is
12 bound by the asset purchase agreement. We object.

13 THE COURT: I'll sustain the objection. I think
14 that is beyond this witness's ability to testify.

15 MR. SPECTOR: The --

16 THE COURT: Let me just point out, too, your two
17 and a half hours has roughly been used up.

18 MR. SPECTOR: Not mine, by my watch.

19 THE COURT: You've been going for an hour --

20 MR. SPECTOR: 2:08.

21 THE COURT: -- an hour and a half, roughly.

22 MR. SPECTOR: Right. And I had about ten
23 minutes.

24 THE COURT: And you had about an hour --

25 MR. SPECTOR: No, not -- I didn't Judge.

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THE COURT: -- of use.

MR. MARRIOTT: Yes, Your Honor. That's consistent with our time.

THE COURT: Yeah.

MR. SPECTOR: I didn't. I wish we had a running clock because I was careful.

THE COURT: Well, I've been keeping track, and I'm just saying, I'm not cutting you off, but --

MR. SPECTOR: I've only got maybe four or five more questions -- maybe six more questions.

THE COURT: All right. I'm not cutting you off. I'd like to get all of the evidence.

MR. SPECTOR: Are you -- wait a minute, are you counting the colloquy? I thought you said the colloquy wasn't going to count.

THE COURT: No. No, I'm not.

MR. SPECTOR: Well, I wish we could get a running -- someone let me know.

THE COURT: But I don't have a stopwatch. Each time there's an objection, I don't stop it, you know, the time.

BY MR. SPECTOR:

Q All right. Why are you not -- why is SCO not assigning any of the rights under the 1995 APA between SCO Group -- strike that -- between Santa Cruz operations and

1 Novell? Why is it not assigning any rights arising from
2 that contract? Has it been asked to assign it?

3 A No.

4 Q If Judge Gross grants our motion, authorizes the
5 debtor to close the sale of the Unxis, when do you expect
6 the closing to occur?

7 A Middle of August.

8 Q In the 34 days between today and August 31, will SCO
9 continue to lose money, according to the company's
10 estimates?

11 A According to our estimates, yes.

12 Q Okay. Will it be a material amount?

13 A No.

14 Q What if, on August 31st, Unxis refuses to close? Will
15 the losses incurred in the 34 days prejudice creditors?

16 A No, I don't believe it will.

17 Q Why not?

18 A We have multiple backstops in place that we believe
19 will be there to preserve the creditors.

20 Q Tell us what those are.

21 A Well, the first one is what we mentioned earlier, that
22 we do have a signed letter agreement with our chairman,
23 Ralph Yarrow, for the benefit of creditors, to the extent
24 that the deal doesn't come through. That's probably about
25 the amount that we may lose.

1
2 To the extent that it's more than that, I was
3 informed by my CFO this morning, earlier today, that we're
4 actually running a couple of thousand to the positive better
5 than we were. That's another couple of hundred thousand.
6 We have a patent that is for sale. We filed that motion on
7 Friday. The estimate is there is we could get 500,000 to a
8 million. That one is a little bit speculative, so I put
9 that out above or beyond the other two. The first two are
10 pretty solid. We have a potential judgment. If we were to
11 get the judgment reversed in the Circuit Court of Appeals
12 and they agreed to release it, that would be -- I'd put it
13 up there with the patent, maybe speculative, but a
14 possibility.

15 And then, there's one more source of funds that
16 we would have access to, which is if the -- the Unxis deal
17 does not complete, we do have a \$250,000 deposit they've put
18 down that would come our direction.

19 Q Is that 250 or 200?

20 A 250.

21 Q You're talking about 250 for Unxis?

22 A Yes.

23 Q Oh, I was talking about Mr. Yarrow. What about Mr.
24 Yarrow?

25 A So 200,000 from Mr. Yarrow.

Q Okay.

1 A We're -- we're to the good a couple of hundred
2 thousand, but better than we thought we'd be at this point,
3 according to the CFO and then the Unxis deposit.

4 Q Do you have an agreement with Boies Schiller with
5 regard to their pre-petitioned fees of \$515,000?

6 A Yes.

7 Q What is that?

8 A The agreement there is that that pre-petition debt
9 goes away, and in return for that, we gave them some more
10 upside and a possible recovery in the litigation.

11 Q What company -- what subsidiary company for SCO
12 handles the marketing in Russia?

13 A The marketing in Russia would be handled by our
14 Germany operation.

15 Q What company handles the marketing for China?

16 A That would be our Germany operation.

17 Q German.

18 A Oh, I'm sorry. I -- our Vice President of
19 International --

20 Q Well.

21 A -- is in Germany.

22 Q Yes, but is there a --

23 A But the marketing --

24 Q Is there a -- who runs Japan?

25 A Mr. Ossell runs Japan.

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Q Okay. Does he --

A And he is also over China.

Q I see. So Japan runs the marketing in China?

A Yes.

Q Okay. Which of the foreign subsidiaries holds the most cash?

A The foreign subsidiaries that hold the most cash would be Japan.

Q And how much cash is in Japan -- the Japanese subsidiary's coffers or were there in May or June of 2008?

A Oh, less than a million, more than 500,000.

Q And did any of the other foreign subsidiaries hold any money?

A Not other than just doing the trade-type tables.

Q From whose cash did the 100,000 -- well, let me strike that. Did one of the SCO subsidiaries pay Steve Norris Capital Partners any money for any kind of work?

A Yes.

Q Which company was that?

A That was the Japan operation.

Q Was there a marketing budget for this market study?

A Yes.

Q Did it preexist Mr. Norris's coming forward?

A Yes.

Q And did Steve Norris Capital Partners perform the

1 duties that were necessary for this marketing study?

2 A Yes, they did.

3 Q Did it deliver a product that satisfied the
4 subsidiaries?

5 A Yes.

6 Q Is this the BRICMEA marketing study?

7 A Yes.

8 Q Okay. And do you have -- do you have any reservations
9 whatsoever about the bona fides of Unxis or its principals
10 in closing this deal promptly?

11 A No.

12 Q Is there anything that SCO has to do or the sellers
13 has to do -- have to do, other than obtain an order from
14 this Court --

15 A No.

16 Q -- to satisfy the closing terms?

17 A No.

18 Q And is there any reason you have -- I think I already
19 asked you. And do you have any reservations doing business
20 with Unxis?

21 A None, whatsoever.

22 Q Do you have any doubts about the ability and desire of
23 Unxis to close this deal promptly?

24 A No.

25 MR. SPECTOR: All right. I have no further

1 questions.

2 THE COURT: Thank you.

3 Counsel.

4 MR. MARRIOTT: Your Honor, may I suggest a
5 recess? Given the time, we've been going almost two hours.

6 THE COURT: Yes. I think that's -- my only
7 problem is I have a 4:30 conference call with another judge
8 outside of the country that I'll have to take. Well, even
9 so, why don't we take a ten-minute recess. And then, we'll
10 come back, and then there'll be a brief interruption at that
11 time. Thank you, counsel.

12 MR. MARRIOTT: Thank you, Judge Gross.

13 (Recess at 3:46 to 4:03 p.m.)

14 THE CLERK: Please rise.

15 THE COURT: Thank you everyone. Please be
16 seated. All right. Are you leading off Mr. Marriott?

17 MR. MARRIOTT: I am, Your Honor, with the Court's
18 permission.

19 THE COURT: You may.

20 MR. MARRIOTT: Thank you, Judge.

21 CROSS EXAMINATION

22 BY MR. MARRIOTT:

23 Q Good afternoon, Mr. McBride.

24 A Good morning, Mr. Marriott.

25 Q Fine. Thank you, sir. Just to expedite the

1 examination, I have placed, in addition to the binders that
2 are behind you, some documents from those binders, including
3 from defendants. They're to your far right, Mr. McBride.
4 It may be most convenient if you just grab those. Though
5 they're in the binders, I think it'll make it easier for you
6 to follow along.

7 A Right here?

8 MR. MARRIOTT: May I approach, Your Honor?

9 THE COURT: Yeah, you may, Mr. Marriott. Of
10 course.

11 THE WITNESS: The other far right? Yeah, those
12 are the ones I had.

13 MR. SPECTOR: Judge, just so it's clear, we're
14 the debtors.

15 MR. MARRIOTT: What did I say?

16 MR. SPECTOR: Defendant.

17 MR. MARRIOTT: Well I apologize to the debtors.

18 BY MR. MARRIOTT:

19 Q Mr. McBride, you understand that IBM and Novell and
20 the United States Trustee have made an application to have
21 this case converted to Chapter 7, right?

22 A Yes.

23 Q And SCO debtors have opposed that application,
24 correct?

25 A Yes.

1 Q And SCO told the Court, did it not, that while it had
2 lost money during the course of this bankruptcy proceeding
3 there has been no substantial diminution of the estate,
4 right? SCO said that?

5 A I believe there is -- it was in one of the findings.

6 Q Let me refer you to MX 1, Mr. McBride, at Page 6. Do
7 you have that, sir?

8 A Okay.

9 Q And I would point you in particular to the first full
10 paragraph, the second sentence. SCO told the Court, did it
11 not, that quote, "For starters, the true aggregate net
12 operating loss over that time," referring to the time since
13 petition, "was only \$4.357 million," right?

14 A I don't see that.

15 MR. MARRIOTT: May I approach, Your Honor?

16 THE COURT: Yes.

17 THE WITNESS: Did you say the -- oh, it's Page 5
18 and Page 6.

19 MR. MARRIOTT: Yeah, I'll make that --

20 THE WITNESS: Okay.

21 BY MR. MARRIOTT:

22 Q All right. Let me direct you to Page 5, Mr. McBride.
23 Do you see that? See where it says, first full paragraph,
24 second sentence, "For starters, the true aggregate net
25 operating loss over that period," referring to the period of

1 the bankruptcy, "was only \$4.375 million." See that?

2 A Yes.

3 Q And that's a false statement, is it not, Mr. McBride?

4 A I don't know that to be false.

5 Q Well, let me ask you, if I may, Mr. McBride, to take a
6 look at Defendant's Exhibit 21, which I believe --

7 MR. SPECTOR: That would be Debtor's Exhibit.

8 MR. MARRIOTT: Debtor's Exhibit 21. Thank you.

9 BY MR. MARRIOTT:

10 Q See that, Mr. McBride?

11 MR. SPECTOR: Your Honor, Debtor's Exhibit 21 is
12 not in evidence. I was going to move the admission of
13 documents later. Do you want us to do that now? Make it
14 easier because right now I would have an objection as, you
15 know, we haven't admitted this into evidence Judge.

16 MR. MARRIOTT: Your Honor, its cross-examination.
17 It's debtor's exhibit. If counsel would like to move the
18 admission of Debtor's Exhibit 21, we obviously have no
19 objection.

20 MR. SPECTOR: Well, I was going to move -- Mr.
21 Nielson's referred to a bunch of the spreadsheets. I was
22 going to move them all in at once.

23 MR. MARRIOTT: Your Honor, I'd like to, if I may,
24 stick with my -- on this cross-examination --

25 THE COURT: Exhibit 21.

1 MR. MARRIOTT: -- Exhibit 21. We can deal with
2 the others.

3 MR. SPECTOR: I won't interrupt. I'll leave it,
4 then.

5 MR. MARRIOTT: Thank you.

6 BY MR. MARRIOTT:

7 Q Okay. You see that, Mr. McBride?

8 A Yes.

9 Q Okay. And so isn't it a fact, sir, that the -- SCO's
10 statement to the Court in its brief that, for starters, the
11 true aggregate in that operating loss over that period was
12 only 4.357 million was a false statement? Take a look at
13 the bottom right, if you would, Mr. McBride, at
14 Defendant's -- Debtor's Exhibit 21. Net loss from
15 operations, 5.339 million. You see that, sir?

16 A I see what you're talking about, but with sitting here
17 on this short notice, I have no way of being able to compare
18 this number to the one that's in your other brief to know if
19 those numbers match up.

20 Q But when you say, "your other brief," you mean
21 debtor's other brief, right?

22 A The first document that you gave me.

23 Q And that's debtor's document, is it not, sir?

24 A I don't know.

25 Q Okay.

1 A I mean, that's what I'm saying is you're throwing a
2 bunch of documents in front of me and asking me to interpret
3 them. If you want me to settle down and kind of read
4 through them before asking me if I'm --

5 Q Well, I want you to take whatever time --

6 A -- if we're lying about them. You know --

7 Q Sure.

8 A -- I would be glad to read through them. But I'm -- I
9 can't sit here and respond yes or no to your questions
10 without absorbing this just a little bit.

11 Q I want you to take whatever time you need to absorb
12 them, Mr. McBride.

13 A Okay.

14 Q Both of these documents are documents of the debtor,
15 Debtor's Exhibit 21 and Debtor's Brief.

16 (Witness examines documents.)

17 MR. SPECTOR: Your Honor.

18 THE COURT: Yes.

19 MR. SPECTOR: I got a suggestion from Mr. --

20 THE COURT: O'Neal?

21 MR. SPECTOR: -- O'Neal, and I don't want to do
22 this in front of the witness, so I'd ask that we can
23 approach the bench on it?

24 THE COURT: Sure. We'll -- keep us on the
25 record, if you can.

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(At sidebar on the record:)

MR. SPECTOR: (indiscernible) It's a waste of our time. What I would do is just let him kill time.

MR. MARRIOTT: Let me make a suggestion.

THE COURT: Yes.

MR. MARRIOTT: Why don't I take him through the four statements, asking (indiscernible).

THE COURT: All right. That --

MR. SPECTOR: I didn't want to waste their time going through -- he doesn't know. It doesn't really matter.

THE COURT: Okay. Thank you, counsel. That's helpful.

(End of discussion at sidebar.)

BY MR. MARRIOTT:

Q At the suggestion of your counsel, take a look, if you would, in addition to the first full paragraph to which I pointed you, this is now in MX 1. Take a look at the second full sentence. You see where it says, "The primary component of the aggregate net operating loss consists of bankruptcy and related reorganization expenses of \$2.3 million." See that?

A Yes.

Q Okay. Take a look, if you would, in the same paragraph at the fourth sentence, starting with the parenthetical quote, "561,000 are true losses from business

1 operations," closed quote. Do you see that?

2 A Yes.

3 Q Take a look, if you would, same paragraph, next
4 sentence, quote, "That figure over 19 months equates to an
5 operating loss of \$29,500 a month." Do you see that?

6 A Yes.

7 Q Okay. Mr. McBride, Mr. Nielson, CFO of your company,
8 testified that those representations to the Court as to SCO
9 losses were all false. Do you have any reason to disagree
10 with Mr. Nielson's testimony?

11 A No.

12 Q And your counsel has represented to the Court in the
13 sidebar that we just had that all of those figures were
14 false. Do you have any reason to disagree with the
15 representations of your counsel?

16 A Not if the CFO represented it that way.

17 Q But if just your counsel represented it, you -- do you
18 have a problem?

19 A Let put both of them in that bucket. As long as they
20 both said it, then I will agree with them.

21 MR. SPECTOR: Your Honor, I rise only to say that
22 the choice of words is incorrect. We're not saying they're
23 false. We're saying they were incorrect. Those number were
24 not correct when we put them down were that. I know it's
25 quibbling over words, but "false" has a stronger

1 connotation. We owned up to that. We would have June 15th.

2 MR. MARRIOTT: You can set those against the
3 side, Mr. McBride. I won't quibble over the distinction,
4 Your Honor. I see no distinction, but I will not quibble
5 over it.

6 BY MR. MARRIOTT:

7 Q Mr. McBride, SCO's mobility business is comprised of
8 two parts, right, a mobility server business on one hand and
9 a mobility applications on the other, right?

10 A Yes.

11 Q And Unxis here proposes to acquire the mobile server
12 part of that business, and it proposes to acquire one of the
13 applications, an application called HipCheck, right?

14 A HipCheck is one that's going to be tied into both
15 organizations. They will own the intellectual property to
16 it, but SCO Group, Inc., going forward, will have an
17 unlimited license to use that and sell it.

18 Q Okay. And SCO proposes to retain the mobile
19 applications of SCO's current mobile business, with the
20 exception of HipCheck, right?

21 A No, we keep HipCheck, as well, as I just described it.

22 Q You keep a piece of HipCheck, right?

23 A It's like IBM has a license to AIX from us. Well, we
24 have a license to HipCheck from them.

25 Q Hey, you described on examination a series of

1 communications that you had with a number of potential
2 investors in debtor, correct?

3 A Yes.

4 Q And isn't it a fact, Mr. McBride, that you discussed
5 with a number of those potential investors SCO's mobility
6 business?

7 A Yes.

8 Q You had discussions with --

9 MR. MARRIOTT: And, Your Honor, I frankly don't
10 know whether this is protected on an NDA or not, so I can't
11 refer to these by A, B, C, and D without -- and communicate
12 with the witness because we haven't made that linkup.

13 THE COURT: Put the letters to the names.

14 MR. SPECTOR: Do we want to clear the courtroom?

15 MR. MARRIOTT: Let me just take a second and ask
16 counsel if any of these present a problem.

17 MR. SPECTOR: Okay. As if I know. I don't know
18 about any, as long as they're in the room.

19 MR. MARRIOTT: Well, it sounds like it doesn't
20 present a problem.

21 MR. SPECTOR: Oh, no, no, no. I didn't say that.
22 You asked me -- you got to be very careful here. I said, I
23 don't know. That's what I said. I don't know.

24 MR. MARRIOTT: Neither do I, Your Honor. The
25 witness testified as to this as his deposition. I want to

1 be sensitive to not disclosing information.

2 MR. SPECTOR: None of these are A, B, through --
3 or mentioned in the direct. Not one of those four, except
4 one of those is mentioned in relation to something else, but
5 not as an acquirer.

6 MR. MARRIOTT: Right.

7 BY MR. MARRIOTT:

8 Q You had discussions with a number of entities about
9 making investments in SCO, correct?

10 A Yes.

11 Q And in some of those discussions, you had
12 conversations about SCO's mobility business, correct?

13 A Yes.

14 MR. MARRIOTT: Your Honor, may I approach to
15 address this concern?

16 THE COURT: You may.

17 BY MR. MARRIOTT:

18 Q I'm going to show you my outline, Mr. McBride.
19 Without waiving the privilege, I trust. Mr. McBride, isn't
20 it a fact that you had conversations with this company that
21 I'll refer to as K.P. about us potentially making an
22 investment in SCO's business?

23 A Yes.

24 Q And you had discussions with this company, which I'll
25 refer to as F.C., about intentionally --

1 MR. SPECTOR: All right. Your Honor, you know,
2 we can say who the --

3 THE COURT: Why don't we call the numbers, then?
4 Number 1 --

5 MR. SPECTOR: Initials, you know --

6 MR. MARRIOTT: Right.

7 THE COURT: -- number 2.

8 MR. SPECTOR: R-I-C-H-A-R-D.

9 BY MR. MARRIOTT:

10 Q Did you have discussions with Company 1?

11 A Yes.

12 Q Did you have discussions with Company 2?

13 A Yes.

14 Q Did you have discussions with Company 3?

15 A Yes.

16 Q Did you have discussions with Company 4?

17 A Yes.

18 Q And none of those companies made an offer to acquire
19 the mobility assets that you are proposing now to sell to
20 Unxis, correct?

21 A That is correct.

22 Q Now, as part of the deal -- as part of the Unxis
23 proposed deal, SCO was required to terminate some of its
24 employees, correct?

25 A SCO was required to -- well, we're transferring

1 employees to a new organization. If that means terminating
2 from SCO, yes.

3 Q Exactly. In a language of the PSA, it's contemplated
4 that they be terminated and that they become employees of
5 the new company, correct?

6 A Correct.

7 Q And what one of those individuals is a fellow by the
8 name of Steve [sic] Cutler, right?

9 A I don't --

10 Q Shaun Cutler. I apologize.

11 A Shaun Cutler, yeah.

12 Q And Shaun Cutler is a one of the SCO individuals
13 responsible for SCO's mobility business, correct?

14 A Yes.

15 Q He's a key player, is he not, with respect to that
16 business?

17 A He -- he's a marketing manager for us, yes.

18 Q He's a key player with respect to that business, is he
19 not?

20 A He -- he's a key marketing manager.

21 Q Okay. And under the proposed deal, he will no longer
22 be employed by debtors. He will be employed by Unxis,
23 correct?

24 A Yes.

25 Q Right. At what point, Mr. McBride, during the

1 discussions with the proposed buyers here, they were going
2 to purchase the entirety of SCO's mobility business, right?

3 A Yes.

4 Q And they asked SCO questions about that mobility
5 business, right?

6 A Yes.

7 Q And SCO provided the answers to them with respect to
8 SCO's products, right?

9 A Yes.

10 Q And specifically, Mr. Cutler provided information with
11 respect to SCO's mobility products, right?

12 A You'd have to ask Mr. Cutler. I don't know.

13 Q Well let me direct you to MX 50, if you would, Mr.
14 McBride. It should be in the stack of documents in front of
15 you. Do you see that, sir?

16 A Yes, I see it.

17 Q Okay. And this is an email from Jeff Hunsaker to Eric
18 le Blan and Rafe [ph] at -- both of whom represent -- who
19 were affiliated with Unxis, correct?

20 A That's right.

21 Q And they asked questions of Mr. Cutler on behalf of
22 SCO about SCO's Mobility business, right?

23 A Yes.

24 Q And in response to those questions, SCO provided
25 information, correct?

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A Yes.

Q Take a look at Exhibit 50, Pages 1 through 2, would you please? At the bottom of the page you'll see a listing of certain SCO products. You see that, sir?

A Yes.

Q You see mobile -- FCmobilelife by FranklinCovey, Shout Postcards, Shout Marketing, Shout 119, Shout Back, Shout Coupon. You see all that?

A Yes.

Q Now, the majority of -- at the time of this report, the majority of users for FCmobilelife were trial account subscribers, right, Mr. McBride?

A I don't recall at that point in time what the breakdown was.

Q Well, take a look at the paragraph at the bottom of the first page, second sentence. The majority of the users were, at that time, trial account subscribers, correct, sir?

A Yes.

Q Take a look, if you would, on the next page at Shout Postcard. See there, where it says that, as to this product, further development was on hold.

A Yes.

Q Take a look, if you would, at Shout Marketing, the next product on the list. As of this report, the total revenue to date for that product was \$20,000, right?

1 A That's right.

2 Q And now look, if you would, at Shout 119, Shout Back,
3 and Shout Coupon. You see there where it says that those
4 three products are -- were, as at the time of this report,
5 awaiting a business driver to justify development. Do you
6 see that, sir?

7 A Yes.

8 Q Now, Mr. McBride, SCO shares whatever revenues that it
9 gets from these products with FranklinCovey, correct?

10 A That's not correct.

11 Q Take a look, if you would, sir, at the bottom part of
12 that Page 2. You see where it says in bold text quote,
13 "Please give a breakdown of the current position Me Inc. has
14 with respect to partnerships or current deals. In
15 particular, what is the current fee-sharing arrangement with
16 FranklinCovey?" Do you see that, Mr. McBride?

17 A Yes, I do.

18 Q Now, look at the paragraph two down from that. If the
19 product is sold by FranklinCovey, the revenue share is 60
20 percent SCO, 40 percent FranklinCovey --

21 A Right.

22 Q -- in year one. You see that?

23 A Yes.

24 Q So SCO shares its revenues with respect to those
25 products with FranklinCovey, correct?

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A Yes.

Q SCO has competitors, does it, not in the marketplace for its mobile products?

A Yes.

Q And it faces competitors in the area called technology collaborative, right? Take a look at the next page if you would, Mr. McBride, Page 3, second paragraph. SCO faces competition for its mobile products with respect to technology collaborative, technology calendaring and non-technology, right?

A Right.

Q And SCO's main competitor with respect to collaborative competitors are solutions like Google's Calendar, right?

A Yes.

Q You can put that document aside if you'd like, Mr. McBride. Who was involved on behalf of debtors in negotiating the terms of the PSA which is offered to this Court for approval? Who are the individuals?

A The primary one would have been Jeff Hunsaker.

Q Okay. And who besides Mr. Hunsaker negotiated this proposed -- this deal which is proposed for approval with Unxis and its principals?

A Well, let's see, as far as negotiating? I think Jeff would have been the key guy. He would have ran it by me, he

1 would have ran it by our counsel, Ryan Tibbitts, our CFO,
2 Ken Nielson.

3 Q Was anyone else involved in dealing with Mr. Hunsaker
4 and with the proposed buyers?

5 A Well, there were a lot of people involved.

6 Q Who were they, Mr. McBride?

7 A Andy Nagel was involved. He's the director of
8 engineering. Alan Raymond is our vice president of North
9 America sales. Hans Bayer is vice president of
10 international sales.

11 Q Tell me about Hans Bayer, Mr. McBride.

12 A There's probably others.

13 Q Is he a capable man?

14 A Yes.

15 Q Is he honest?

16 A I believe so.

17 Q Is he trustworthy?

18 A I hope so.

19 Q Does he understand SCO's business?

20 A I believe he understands it best when it -- has to do
21 with the UNIX business.

22 Q Does he understand SCO's mobility business?

23 A I don't think he understands the mobile business that
24 well.

25 Q Isn't it a fact, sir, that Mr. Bayer is the vice

1 president of worldwide sales with responsibility for
2 overseeing, quote, "all aspects of direct and channel sales
3 of the company's UNIX and mobile products"?

4 A He's vice president over international sales.

5 Q Mr. McBride, is it not a fact that Mr. Bayer has
6 responsibility for overseeing all aspects of direct and
7 channel sales of the company's UNIX and mobile products?

8 A That's not my understanding.

9 Q So it's your testimony that Mr. Bayer has no
10 responsibility with respect to SCO's mobile products?

11 A I don't believe I said that.

12 Q I'm asking you that. Is it your testimony that Mr.
13 Bayer has no responsibility with respect to SCO's mobile
14 products?

15 A He has responsibility for the mobile products as it
16 relates to his area of the world.

17 Q So he has responsibility for SCO's mobile products, on
18 some level.

19 A For selling in the areas that he's in, but we don't
20 really market the mobile products that much outside of the
21 U.S. right now. So that's why --

22 MR. MARRIOTT: Your Honor.

23 THE WITNESS: -- he's fairly limited with respect
24 to his understanding of the mobile products.

25 MR. MARRIOTT: Thank you, Mr. McBride.

1 Your Honor, I'd move to strike the latter part of
2 the answer, but mostly, I want to be sensitive to the
3 Court's time. It's almost 4:30.

4 THE COURT: Thank you, I appreciate that. And I
5 also am sensitive to your, you know, questioning and -- but
6 I've got to take the call.

7 MR. MARRIOTT: I will survive.

8 THE COURT: Will five minutes make sense or is
9 this a good time to break for you?

10 MR. MARRIOTT: This is a fine time to break.

11 THE COURT: All right. Then, let's take -- I
12 don't know how long it will last, maybe 15 minutes. And
13 we'll take about a 15-minute recess. Thank you, everyone.

14 MR. SPECTOR: Thank you, Your Honor.

15 (Recess at 4:23 to 4:43 p.m.)

16 THE CLERK: Please rise.

17 THE COURT: Please be seated. All right. A
18 successful call, thank you. I thank everyone.

19 And you may --

20 MR. MARRIOTT: May I inquire?

21 THE COURT: You may.

22 MR. MARRIOTT: Thank you, Your Honor.

23 BY MR. MARRIOTT:

24 Q Mr. McBride, after considering a purchase of the
25 entire mobility business, Unxis discussed with SCO leaving

1 behind the mobility business, correct?

2 A That's correct.

3 Q And leaving behind -- leaving the mobile business
4 behind will not be a problem for new SCO, right?

5 A Well, I can't speak for them, but I -- they weren't
6 leaving the whole business behind. They were taking the
7 mobile server. We are keeping the applications.

8 Q Where we talked about Mr. Bayer before the break.

9 A Yes.

10 Q And he's a vice president with SCO, right?

11 A Yes.

12 Q With responsibility --

13 MR. SPECTOR: Objection. I don't believe the
14 record reflects that he's vice president of SCO, whatever
15 SCO. Are you talking about SCO Group? Are you talking
16 about SCO Operations? Are you talking about subsidiary? I
17 think the question is emphasized.

18 MR. MARRIOTT: Your Honor, I asked Mr. McBride
19 prior to the break whether Mr. Bayer was, and used the exact
20 language if I may, "vice president of worldwide sales for
21 SCO." And he said that that is, in fact, the case.

22 THE COURT: Yes.

23 THE WITNESS: No, I didn't say. I said that was
24 not the case.

25 MR. MARRIOTT: May I approach the witness, Your

1 Honor?

2 THE COURT: Yes.

3 MR. MARRIOTT: If I -- just because there's only
4 one copy, if I can --

5 THE COURT: That's fine.

6 MR. MARRIOTT: -- approach the witness?

7 BY MR. MARRIOTT:

8 Q I'm going to show you a printout from SCO's webpage.

9 Can you see that, sir?

10 A I see it, but I don't know what timeframe that is.

11 Q Well, I represent to you that it was printed out in
12 the last several -- in the last week.

13 A Okay. I don't know.

14 Q I'm sure we can get online and bring it up, if
15 necessary.

16 A Okay.

17 Q You see where that says, the executive -- SCO
18 executive profiles?

19 A Yes.

20 Q Just read to the Court what it says next to Mr.
21 Bayer's name. Is it Bayer or Bayer?

22 A Bayer.

23 Q Read to the Court what it says to Mr. Bayer's name.

24 A "As Vice President of Worldwide Sales, Hans Bayer is
25 responsible for overseeing all aspects of direct and channel

1 sales of the company's UNIX and mobile products."

2 Q That's fine. Thank you, sir. So leaving the mobile
3 business behind, that will not be a problem for new SCO,
4 right?

5 A You're talking about new SCO, the current debtor going
6 forward?

7 Q Yes. No, I'm talking about the proposed acquirer
8 here, Unxis.

9 A Well, it's imprecise to say it's being left behind.
10 Half of it's going forward, half of it's staying with SCO
11 Group, Inc.

12 Q Well, that's what Mr. Bayer told Mr. Norris, isn't it?

13 A Told him when?

14 Q Told him in connection with the negotiations of the
15 deal that's proposed for approval by the Court.

16 A I don't know what. I wasn't privy to what he told Mr.
17 Norris.

18 MR. MARRIOTT: Your Honor, may I approach?

19 THE COURT: Yes.

20 MR. MARRIOTT: Mr. McBride, why don't you grab
21 the binder behind you. It's Exhibit MX 37. Here you go.
22 Here is actually a copy of it.

23 Judge, may I just generally approach the on
24 each --

25 THE COURT: Yes, you may. Yes.

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BY MR. MARRIOTT:

Q All right. MX 37, Mr. McBride is an email from Hans Bayer to Eric le Blan and Steve Norris, right?

A Yes.

Q And you see in the first email on Page 1 where Mr. Bayer says to Mr. Norris and Mr. le Blan in the second paragraph, quote, "Leaving the mobile business behind will not be a problem at all for new SCO." See that sir?

A Yes.

Q And that's what Mr. Bayer told Mr. Norris and Mr. le Blan, right?

A Yes.

Q And SCO's management team was okay, were they not, Mr. McBride, with the buy --

MR. SPECTOR: Your Honor, I rise to object the questions and the answers that read the exhibit because the exhibit is what we've objected to as hearsay. So by reading it out loud, of course, it comes into evidence. So I object to that line of questioning, and if we want to take on the objection of hearsay, we can do that now. This is something that they wanted to do at the beginning. You said you wanted to hear it in context.

MR. MARRIOTT: Your Honor, I'm happy to have the argument now. I hope it won't count against my time.

THE COURT: No.

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2 MR. MARRIOTT: But what I would say is that I
3 think it might be useful to the Court to understand in full
4 the context of the document, what it says and what it
5 doesn't say in ruling on the objections.

6 There are three documents in dispute. The
7 objections that have been made are one, hearsay, and two,
8 relevancies. And I would submit, Your Honor that at least
9 with respect to relevance, Your Honor is going to need to
10 appreciate in full what's in the document in order to make
11 the ruling.

12 My suggestion would be that we proceed with my
13 being allowed to question in full the witness about the
14 exhibit. Your Honor can then, at an appropriate time with
15 the witness off the stand, hear whatever argument counsel
16 wants to make on this subject. If you find that the
17 document is inadmissible, the testimony can be stricken.
18 Otherwise, we're going to get, I'm afraid, bogged down in
19 this without the Court having the benefit of the fullness of
20 the document.

21 May we proceed in that way Judge?

22 THE COURT: I -- yes, I will accept your
23 suggestion.

24 MR. MARRIOTT: Thank you, Your Honor.

25 BY MR. MARRIOTT:

Q All right. SCO's management team, Mr. McBride, was

1 okay with the buyers leaving the FranklinCovey products
2 behind, right? Just -- Mr. McBride, I'll point you to the
3 document. If you can just try to answer the question
4 without that document, it might make it a little faster. If
5 I need you to refer to it, I'll point you to it. Let me
6 repeat the question. SCO's management team was okay with
7 the buyers leaving the FranklinCovey products behind, right?

8 A Yes.

9 Q And Mr. Hunsaker communicated that on behalf of SCO to
10 Mr. Norris and Mr. le Blan, right?

11 A I don't know.

12 Q Let me have you take a look, if you would, at Page 2
13 of MX 37. It's actually the third page in. This is a
14 series of emails, and at the bottom of Page 2, there is an
15 email from Mr. Hunsaker to Eric le Blan and Steve Norris,
16 copying Hans Bayer. Tell the Court, if you would, who Jeff
17 Hunsaker is, Mr. McBride?

18 A He's the president and COO of SCO.

19 Q You see where, in the first sentence of his note, he
20 says, Eric and Steve, referring to Mr. le Blan and Mr.
21 Norris, I just spoke with our attorneys in management team.
22 You see that, sir?

23 A Yes.

24 Q Okay. Now, take a look, if you would, down at the
25 paragraph that begins "lastly." Do you see that?

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A Yes.

Q See where it says, "Lastly, they," referring to our attorneys in management team, are, quote, "willing to carve off an amount for the FranklinCovey products (FCmobilelife and FC Tasks) for the purchase price. This would be 250K for these two products or 500K is SCO keeps Shout Postcard and HipCheck, as well." Do you see that?

A Yes.

Q And you agree with that?

A Well, it's not quite precise. There were more products that were left than that. But it's in the ballpark.

Q And you see where the next sentence it says, "Considering these products are not generating any revenue, they feel this is a fair compromise." See that?

A Yes.

Q And, in fact, that's an accurate statement, is it not?

A Yes. Well, it's not totally accurate because we are generating revenue from FC Tasks and from FCmobilelife, so it -- it's not totally correct.

Q We'll come back to that, but it is fair, is it not, that the products that SCO is retaining, right, the mobility products retained by SCO were, in the course of these negotiations, valued by debtors on the one hand, proposed buyer on the other hand, at \$500,000, right?

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A Yes.

Q You can set that document aside, if you would, please.
Now, SCO ultimately did retain certain mobility products,
right? You testified as to that on direct examination?

A Yes.

Q And the result was to decrease the purchase price,
right?

A Yes.

Q And SCO's keeping of some of the mobility products
reduced the purchase price again by \$500,000, right?

A Yes.

Q Now, the mobility business retained by SCO is part of
its plan of proposed rehabilitation, right?

A Yes.

Q And the portion of the mobility business retained by
SCO actually has no value for new SCO, right?

MR. SPECTOR: Well, who is new SCO? At least
that's a term that isn't in evidence.

MR. MARRIOTT: Your Honor, the term "new SCO," as
used by Mr. Bayer in the email that we just looked at.

BY MR. MARRIOTT:

Q Do you have that in mind -- that context in mind?
Exhibit 37, Mr. McBride.

A What page on 37?

Q First page. Mr. Bayer says -- first page, second full

1 paragraph of the email. Mr. Bayer says, "Leaving the
2 'mobile business' behind will not be a problem at all for
3 new SCO."

4 A I see what it says. I just don't know on this case if
5 Hans was talking to new SCO being the newly reorganized SCO
6 or the new SCO entity called Unxis because new SCO going
7 forward isn't called -- the UNIX business going forward is
8 called Unxis. The debtor going forward is the SCO Group,
9 Inc. So I don't know which organization he's referring to.
10 That's not a term that we typically use.

11 Q Given to whom he's speaking, do you think it's fair to
12 say that he's referring to Unxis, the proposed buyer who
13 would -- under the transaction, is contemplating leaving
14 behind portions of the mobility business?

15 A That's fair.

16 Q Okay. With that understanding in mind, Mr. McBride,
17 isn't it a fact that the portion of the mobility business
18 retained by SCO actually has no value for new SCO?

19 MR. SPECTOR: I object. If new SCO is Unxis,
20 then this witness is not competent to testify what the value
21 is to Unxis of this property. And this is all being derived
22 from someone who is a German employee of a subsidiary in --
23 on marketing of these products to somebody -- I -- Your
24 Honor, this is why I was objecting in the first place. Your
25 -- the question on the floor is whether he's agreeing that

1 Unxis has no use for mobility. I object.

2 MR. MARRIOTT: Your Honor, I'm entitled to ask
3 the witness whether he agrees with the proposition or not.
4 If he doesn't, he can simply say that. And I'm happy to --

5 THE COURT: Yes, I don't think the question
6 itself is objectionable. So I will overrule the objection.

7 MR. MARRIOTT: Thank you, Your Honor. May I
8 approach?

9 THE COURT: Yes.

10 MR. MARRIOTT: I won't ask that again during this
11 trial

12 BY MR. MARRIOTT:

13 Q Now, take a look, if you will, Mr. McBride, at MX 40.
14 Take a look on the second page. This is an email from Hans
15 Bayer to Eric le Blan and Stephen Norris dated June 5, 2009.
16 Do you see that, sir?

17 A Yes.

18 Q That's just before the last hearing before the Court.

19 MR. SPECTOR: Which exhibit number was that?

20 MR. MARRIOTT: 40.

21 MR. SPECTOR: 40. Okay.

22 MR. MARRIOTT: I want to make sure the Court has
23 an opportunity to get there. Do you have this, Judge?

24 THE COURT: I have it, yes. I'm reading it now.

25 BY MR. MARRIOTT:

1 Q All right. Take a look, if you would, Mr. McBride, on
2 the second page of the document, the third paragraph down
3 begins Point Five. Do you see that?

4 A Yes.

5 Q And my question to you, sir, was the portion of the
6 mobility business retained by SCO actually has no value for
7 new SCO, right?

8 A The question was what?

9 Q The portion of the mobility business retained by SCO
10 actually has no value for new SCO.

11 A And you're saying that's --

12 Q I'm asking you if that's right.

13 A I -- well, I don't believe that's totally correct.

14 Q All right. Well, that's what Mr. Bayer told Mr.
15 Norris, isn't it? Take a look at -- for Point Five, where
16 Mr. Bayer, vice president of SCO says, "This proposal to
17 leave Mobile behind with old SCO reflects my explanation of
18 Darl's personal situation. And honestly speaking, there
19 could not be a better way of getting rid of something that
20 actually has no value for new SCO." You see that?

21 A Yes.

22 Q And that's what Mr. Bayer said to Mr. Norris, the
23 principal here of Unxis, right?

24 A Yes.

25 Q The concept, Mr. McBride, of Mobile is a -- is a dream

1 of yours, is it not?

2 A I don't know that I came up with that in a dream.

3 Q Well. Thank you for that moment of levity. It is --
4 whether or not you came up with it in a dream, it is a weird
5 dream of yours, is it not?

6 A It is a product that the -- the concept of Mobile is a
7 product that I was the principal driver of, and the Mobile
8 product line includes the mobile server and the mobile
9 applications.

10 Q Okay. And my question was, is it or isn't it a weird
11 dream of yours?

12 A Like I said, it wasn't -- didn't come to me in a
13 dream, and if it did --

14 Q Well, that's what Mr. --

15 A -- it wasn't a weird one.

16 Q That's what Mr. Bayer told Mr. Norris, isn't it?

17 A Yes. And so the question is, do you want me to
18 interpret what Hans Bayer thinks is in my head, or do you
19 want me to tell you what is in my head.

20 Q I want to know what's in your head --

21 A I'm trying to understand what --

22 Q -- Mr. McBride.

23 A Yeah, so I wouldn't represent Mobile as a weird dream
24 of mine.

25 Q That, however, is what Mr. Bayer said to Mr. Norris,

1 right? He said, "The whole concept of Mobile is another one
2 of Darl's weird dreams where he thought he had found the
3 next big thing, but reality shows we have spent millions of
4 dollars into developing something which nobody needs and
5 wants. We have no customers and no revenue stream for our
6 mobile products. And again, he is chasing something which
7 isn't for real." That's what he told Mr. Norris, right?

8 A Yes.

9 Q Now, is it fair to say that the FranklinCovey products
10 are your beloved toy, Mr. McBride?

11 A No, I wouldn't call them that.

12 Q Okay. That's what Mr. Breyer [sic] -- Mr. Bayer told
13 Mr. Norris, isn't it?

14 A That's what it says somewhere in here, yeah.

15 Q Take a look at the first page, second to last
16 paragraph from the bottom. "Darl is starting to realize now
17 that he won't have any purpose in life any longer once the
18 company was sold, and this seems to give him big headaches,
19 as he'd have to find a new occupation where he most likely
20 won't be in the center of gravity any longer and won't have
21 his beloved 'toy,' FranklinCovey, any longer to play with."
22 Do you see that?

23 A Yes.

24 Q And that's what Mr. Bayer told the proposed buyers
25 here, correct?

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A Yes.

Q Now, SCO kept a portion of its mobility business, you've testified, as part of its proposed transaction, right?

A Yes.

Q And you did that because you believed it could help you win big in the courtroom and you were reluctant to give up your dream of having your day in Court, right?

A That's not correct.

Q Okay. That's, however, what Mr. Bayer told Mr. Norris, right?

A That's what's in this email.

Q Okay. The only thing that is real for SCO, Mr. McBride, is its UNIX business, right?

A That's not right.

Q Again, that, however, is what Mr. Bayer told Mr. Norris, right?

A That's what it says here.

Q Take a look at Page 2. See the paragraph that says, "the only thing"? "The only thing about SCO which is real for the UNIX business with its customers and partners and the employees generating cash." I apologize, I read that badly. Let me try that again. "The only thing about SCO which is for real is the UNIX business with its customers and partners and the employees generating cash. Legal and

1 Mobile are just Darl's hopes and dreams to win the jackpot
2 in the lottery drawing." See that?

3 A Yes.

4 Q There is, in fact, no money available, according to
5 Mr. Bayer, for the new company, correct?

6 A When you say there's no money available --

7 Q Well, take a look at the top of Page 2 where Mr. Bayer
8 says to Mr. Norris, quote, "Jeff," referring to Mr.

9 Hunsaker, "thinks that only a direct conversation between
10 either one of the two of you with Darl could resolve the
11 standstill, as he tells me that Darl won't speak to him any
12 longer, even if he mentions the deal to him. As Darl and
13 the BOD," referring, I assume, to the Board of Directors,
14 "and the BK," referring, I assume, to bankruptcy lawyers,
15 "simply thinks there is no money available to fund the new
16 company." See that?

17 A Yes.

18 Q And that's what Mr. Bayer told Mr. Norris, right?

19 A That's what's in here.

20 Q And you can set that exhibit aside, if you would,
21 please. Now, the grand total of SCO's mobility business,
22 Mr. McBride, as mobility revenue for fiscal year 2008 was
23 \$82,000, right?

24 A I don't know offhand.

25 Q Well, I mean -- ask you to refer, if you would,

1 please, to MX 31? This is an email from Jeff Hunsaker, vice
2 president of SCO, to Mr. Le Blan, one of the principals of
3 the proposed buyer here. Do you see that?

4 A Yes.

5 Q Take a look at the second page in that document, if
6 you would. It says, does it not, that the grand total of
7 SCO's Mobility revenue for fiscal year 2008 was 82K, right?
8 If you look down the table, in the far left column, it looks
9 about five rows, you see where it says "Mobility"?

10 A Yes.

11 Q Now, look across that column in the grand total, see
12 where it says \$82,000?

13 A Yes.

14 Q Okay. And in Q1, SCO's total revenue for its mobility
15 business was \$427, right?

16 A I don't know offhand. Oh, on looking on here.

17 Q Take a look in Q1.

18 A Yes, on Q1, there.

19 Q You see that?

20 A That's right.

21 Q Now, SCO's Mobility business accounted, in fact, for
22 only .53 percent of SCO's revenue during fiscal year 2008,
23 right?

24 A Yes.

25 Q And the mobility -- and that's for the entirety of the

1 mobility business, right? SCO is only retaining a piece of
2 that, right?

3 A SCO is retaining the piece that drives 100 percent of
4 these numbers.

5 Q So SCO is retaining .53 percent of its revenue by
6 retaining that portion of its mobility business, right?

7 A Well, when the UNIX business goes, it'll be worth a
8 lot more than .53 percent.

9 MR. MARRIOTT: Your Honor, I move to strike as
10 non-responsive.

11 THE COURT: So stricken, yes.

12 MR. MARRIOTT: Thank you.

13 BY MR. MARRIOTT:

14 Q Now, the UNIX portion of SCO's business, Mr. McBride,
15 is the only portion of that business that has run at
16 either at or near breakeven during the course of SCO's
17 bankruptcy, right?

18 A I'd have to look at this. There is probably a point
19 in time here where the mobile business was there on a
20 quarterly basis.

21 Q Well, your deposition was taken in this case, wasn't
22 it, sir?

23 A Yes.

24 Q And you testified under oath, right?

25 A Yes.

1 Q You've given a lot of depositions since your becoming
2 CEO of this company, right?

3 A Yes.

4 Q Were you asked this question, Mr. McBride? Did you
5 give this answer?

6 Question: "Would you agree that the UNIX portion of the
7 business is the only part of the business that has run
8 either at or near breakeven during the course of SCO's
9 bankruptcy?"

10 Answer: "Yes, I would agree with that."

11 Did you give that testimony, Mr. McBride, in response
12 to that question at your deposition?

13 A Yes, I did, and that was slightly different question
14 than the one that was asked here.

15 Q Let's take a look, Mr. McBride, at another exhibit, MX
16 34. Do you recognize this document, Mr. McBride?

17 A Yes.

18 Q Okay. MerchantBridge and Gulf Capital Partners put
19 together a presentation concerning the proposed acquisition
20 here, right?

21 A Yes.

22 Q And that presentation is reflected in MX 34, correct?

23 A Yes.

24 Q And in that presentation they included certain
25 business forecasts, right? Take a look at Page 8 if that

1 helps you.

2 A Yes. Uh-huh.

3 Q And in that presentation, they included certain
4 business forecasts, right?

5 A (No audible response.)

6 Q Take a look at page 8, if that helps.

7 A Yes. Uh-huh.

8 Q And those forecasts included an income statement,
9 right?

10 A Yes.

11 Q And that income statement showed revenue for the
12 mobility business, right?

13 A Yes.

14 Q And it showed actual revenue for 2008 of 100K, right?

15 A Okay.

16 Q Take a look, if you would, again here at page 8, Mr.
17 McBride [ph]. The presentation includes certain forecasts,
18 does it not?

19 A What page?

20 Q Page 8 for UX-04901.

21 A Okay. I'm there.

22 Q Do you see that?

23 A Yes.

24 Q Okay. The forecasted revenue for 2010 for the
25 mobility business is \$150,000, right?

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A (No audible response.)

Q If you look at the left column, right underneath those

--

A Okay.

Q -- dates, do --

A I see it.

Q -- you see where it says revenue?

A Yes. Yes, that's correct.

Q Okay. Take a look at the forecasted profit. If you go down that left column a little further --

A Right.

Q -- you'll see where it says mobility and then it says total cost of -- it says gross profit. Do you see that?

A Yes.

Q And then, under gross profit, there's a line that says mobility. Do you --

A Yes.

Q -- see that?

A Yes, I do.

Q So the forecasted profits, according to the proposed buyer here, or the mobility business, for 2010, are what, Mr. McBride?

A The mobility business for Unxis we're talking about now, right?

Q Yes, sir.

1 A The profits for the business that is going to Unxis is
2 \$1.3 million loss.

3 Q And for 2011, what is it?

4 A \$1 million loss.

5 Q And for 2012, what is it?

6 A \$1.2 million loss.

7 Q Okay. We talked -- you can put that aside, if you
8 like. We talked -- or you've talked, rather, in your direct
9 examination, about certain payments, right?

10 A Yes.

11 Q And in the course of your getting to the point where
12 you are with this proposed acquisition, you've had a number
13 of conversations with potential buyers of SCO and investors
14 of SCO, right?

15 A Yes.

16 Q And you had conversations with Mr. Norris? He
17 discussed those options with you, right?

18 A Yes, I did.

19 Q And you had such conversations with a Mr. Robbins
20 [ph], right?

21 A That's right.

22 Q And Mr. Robbins is a former partner of Mr. Norris's,
23 correct?

24 A Loosely. I don't know what their -- the extent of
25 their relationship. I know they had a business --

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Q He's a --

A -- relationship.

Q Loosely speaking, he's a former partner, right?

A Yes.

Q And SCO --

A Yes.

Q Since SCO filed for bankruptcy, you, personally, made a payment of \$150,000 -- withdrawn. You, personally, made a payment of \$100,000 to Mr. Norris, right?

A That's correct.

Q And you, personally, made a payment of approximately \$200,000 to Mr. Mark Robbins [ph], right?

A That's correct.

Q And SCO, a subsidiary of SCO, made a payment of \$100,000 to Mr. Norris, right?

A Correct.

Q For a total of about \$400,000, right?

A Yes.

Q Let me ask you, if I may, about -- a little bit about those payments.

A Sure.

Q The subsidiary of SCO made a payment of \$100,000, right?

A Yes.

Q And that payment was made in May or June of 2008,

1 right?

2 A Somewhere in there.

3 Q And SCO was -- taken the position in its papers before
4 this Court that that payment was for certain consulting
5 services related to BRICMEA, right?

6 A The merging market development program for the SCO
7 Mobile Products, which BRICMEA was a key part of that,
8 right.

9 Q Okay. And what exactly, Mr. McBride, did Mr. Norris
10 do to earn his \$100,000 in consulting services related to
11 emerging markets?

12 A I'd have to go talk to the people that were working
13 with him on that. I wasn't directly involved in that.

14 Q But sitting here today, you -- you're unable to tell
15 us precisely what it is Mr. Norris did, right?

16 A I know that there was a major business plan that was
17 put together between SCO and Company -- I can't remember if
18 it was D or E or F. If I saw the list, I could identify it.
19 One of the companies that we were talking to in the summer
20 of 2008, when we were working with Mr. Norris, there was
21 this idea of having a big, emerging market operating system
22 program going out in a market -- a program going into those
23 emerging markets. The \$100,000 that went into that from our
24 Japan operation was to help put that into real numbers so
25 that we could go raise money against that.

1 Q That was part of a real plan to get yourself out of
2 bankruptcy, right?

3 A Yes.

4 Q Okay. Now, Mr. McBride, Mr. Norris is not an expert
5 in the markets in which SCO's products compete, is he?

6 A I wouldn't say that he's an expert in it.

7 Q In fact, so far as you know, Mr. McBride, Mr. Norris
8 was unfamiliar with SCO prior to the time he was introduced
9 to you by Mr. Robbins, right?

10 A I -- yeah, I don't know that he was well steeped in
11 our technology.

12 Q He's not a software consultant, right?

13 A No.

14 Q He's not a hardware consultant, right?

15 A No. That's why he used other people to go do that
16 study. It wasn't Steve that did the study, personally.

17 MR. MARRIOTT: Your Honor, I'd move to strike as
18 non-responsive.

19 THE COURT: Yes, I would have that stricken.

20 BY MR. MARRIOTT:

21 Q Mr. McBride, you say that the payment -- SCO says that
22 the payment made here was on behalf of a Japanese
23 subsidiary, right, not on behalf of the Debtors?

24 A Yes.

25 Q Mr. Norris submitted an invoice --

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A Yes.

Q -- to SCO, did he not?

A Yes, he did.

Q And the invoice was not submitted to SCO's Japanese subsidiary, was it?

A Initially, it wasn't, and I think they came back and said this is for a Japanese subsidiary, and then it was redone to go there.

Q So the -- initially, the invoice was submitted to SCO in Lindon, Utah, right?

A I don't know the details. I think that that was -- that is correct. It was initially to SCO, and then eventually, it was redone and sent to the Japanese operation.

Q I'd ask you to take a look at NX-57. Do you see that, sir? It's an invoice dated July 23, 2009.

A I'm still looking for 57.

Q Should be a tab on the right.

A Yes, I see that.

Q All right. The invoice was submitted to you, was it not?

A Yes, it was.

Q In Lindon, Utah, right?

A Yes.

Q And the payment was approved, if you turn to the next

1 page in 57, it was approved by the company CFO, Mr. Neilson
2 [ph], right?

3 A Yes.

4 Q Mr. Neilson's not an officer of SCO's Japanese
5 subsidiary, is he?

6 A I'm not sure who the officers are over there these
7 days.

8 Q I'm sorry, sir? What was the answer?

9 A I'm not sure who is the officers. He might be.

10 Q BRICMEA, Mr. McBride, refers to what?

11 A BRICMEA?

12 Q Yes.

13 A Brazil, Russia, India, China, Middle East, Africa.

14 Q Okay. And the last I checked, Japan is not in the
15 area covered by BRICMEA, right?

16 A In SCO's organization structure, the Japanese
17 operations covers China. The Japanese company is, in fact,
18 a parent to the China operation.

19 Q BRICMEA: Brazil, Russia, India --

20 A China.

21 Q -- Middle East, China, Africa. Not Japan, right?

22 MR. SPECTOR: Objection, Your Honor.

23 MR. MCBRIDE: Japan was over --

24 THE COURT: Objection, Mr. McBride.

25 MR. MCBRIDE: -- our China operation.

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MR. MARRIOTT: I'll withdraw the question.

THE COURT: All right.

BY MR. MARRIOTT:

Q Mr. McBride, it -- take a look, if you would, at --
I'm going to withdraw that. Your Japanese operation sought
reimbursement for those payments, did they not?

A Sought reimbursement, meaning what?

Q Well, take a look at page 3 in Exhibit 57. SCO Japan
sent an invoice to SCO in Lindon, Utah, asking for payment
of three separate amounts, approximately -- or totaling
\$25,000 each, right?

A I'm not familiar with these documents.

Q Do you see the third page in, Mr. McBride? Do you see
that it says Japan LTD at the top, for -- yeah, LTD at the
top? Do you see that, sir?

A Yes.

Q Do you see where, in the description, it says SCO's
emerging market growth plan, consulting services for August
8 portion to Steve Norris, right?

A Yes.

Q So the payment was made by SCO Japan, and SCO Japan
sought reimbursement from SCO in Lindon, Utah, right?

MR. SPECTOR: Your Honor, I guess I can say it.
We have found we -- he testified to that, so I didn't -- we
found the reissued invoice, and we will want to call Mr.

1 Neilson back to talk about that, and he can talk about the
2 tax accounting on how those papers that Mr. McBride doesn't
3 know anything about what they mean and how they are handled.

4 MR. MARRIOTT: We can cover --

5 MR. SPECTOR: I just --

6 MR. MARRIOTT: Your Honor, we can cover that
7 elsewhere, but obviously, we object to the production of an
8 exhibit that's weeks late, in the middle of an examination,
9 in the middle of a trial. But we'll cover that when we get
10 to the next --

11 MR. SPECTOR: Well, it --

12 THE COURT: Very well.

13 MR. SPECTOR: -- be rebuttal, Your Honor.

14 MR. MARRIOTT: Rebuttal with respect to a
15 document that the Debtor failed to produce.

16 MR. SPECTOR: I believe we've produced it.

17 BY MR. MARRIOTT:

18 Q Mr. McBride, independent of the money that was paid to
19 Mr. Norris by way of SCO's subsidiary, you paid Mr. Norris
20 \$100,000 yourself?

21 A Yes, that's right.

22 Q And you say that that money was for purposes of
23 putting together -- his putting together a group of
24 investors, possibly to acquire some assets of the Debtor,
25 right?

1 A My payment to Mr. Norris was in response to a request
2 from Mr. Robbins, who was supposed to pay Mr. Norris money,
3 to give him a loan to pay Mr. Norris, and he said he would
4 pay me back within a few weeks, and so I responded to that
5 request for a loan.

6 Q So, Mr. McBride, the payments you made, was it
7 compensation from you to Mr. Norris, as SCO says in its
8 brief, or was it a loan to you -- from you to Mr. Robbins?
9 Which was it: compensation or a loan?

10 A It was -- I paid a loan to Mr. Robbins. I knew that
11 the money was going to Mr. Norris. In fact, it went
12 straight from -- I wired it from my bank account to his.

13 Q Wired your -- the payment directly from your bank
14 account to Mr. Norris's?

15 A Yes.

16 Q And you don't have a written agreement with Mr.
17 Robbins, with respect to that payment, do you?

18 A No, I don't.

19 Q You didn't keep any records with respect to that
20 payment, right?

21 A Well, I have records. I have bank records that I made
22 the payment.

23 Q Okay. You didn't produce any records to us in
24 connection with this litigation of that payment, did you?

25 A I thought I did produce that. I thought I produced

1 it.

2 Q You produced your bank records? Is that --

3 A Yeah.

4 Q -- your testimony?

5 A I did. In fact, I took --

6 MR. MARRIOTT: I'd ask Counsel to please point
7 that --

8 MR. SPECTOR: Your Honor, can --

9 MR. MCBRIDE: I --

10 MR. SPECTOR: -- we let the witness finish his
11 answer before Counsel asks his next question?

12 MR. MARRIOTT: It --

13 THE COURT: That's --

14 MR. MARRIOTT: -- wasn't a question, Your Honor,
15 but I will endeavor to respect --

16 MR. MCBRIDE: I --

17 MR. MARRIOTT: -- the witnesses and let him
18 finish --

19 MR. MCBRIDE: I produced that document. I put a
20 note on there that said please redact this so that my bank
21 account information isn't filed in a public setting. I
22 don't know what happened to it after that.

23 MR. SPECTOR: I will represent that I remember
24 seeing that email that directed our people -- I was in the
25 middle of a deposition with Mr. Neilson, and I remember

1 seeing that email, and I directed our people to make sure
2 that you redacted -- like he said, redacted the personal
3 information on that exhibit. So it -- I recall all of that.
4 I can't tell you, standing here today, which one of the
5 12,000 documents it was, but we produced it.

6 THE COURT: I think we ought to allow Mr.
7 Marriott to proceed with his examination.

8 MR. SPECTOR: He asked me, Your Honor.

9 THE COURT: Oh, you did ask him?

10 MR. SPECTOR: I didn't --

11 THE COURT: I'm sorry.

12 MR. SPECTOR: -- volunteer this thing.

13 MR. MARRIOTT: I'm not sure that I asked a
14 question that contemplated interruption, but in any event,
15 Your Honor, I'll be happy to --

16 MR. SPECTOR: You said we'll ask Counsel about
17 that. That's what was said, if you'd check the record.

18 MR. MARRIOTT: May I proceed, Your Honor?

19 THE COURT: You may.

20 BY MR. MARRIOTT:

21 Q Mr. McBride, is it your testimony that you made this
22 payment from your own personal funds to Mr. Norris without
23 any expectation of reimbursement by SCO?

24 A Yes.

25 Q Are you a wealthy man, Mr. McBride?

1 A Not as wealthy as you are.

2 Q I'd move to strike that.

3 A I'm sorry.

4 THE COURT: I think we better.

5 BY MR. MARRIOTT:

6 Q You also made payments of approximately \$200,000 to
7 Mr. Robbins, from your own personal funds, right?

8 A Yes.

9 Q And he's not a relative of yours, right?

10 A No.

11 Q Not a close friend?

12 A Used to be.

13 Q Not a friend presently, right?

14 A No.

15 Q He didn't pay you back, you say, right?

16 A Correct.

17 Q And you didn't take any action to get those moneys
18 back, right?

19 A That's wrong.

20 Q What action did you take, Mr. McBride?

21 A I filed a lawsuit.

22 Q And what's the outcome of that lawsuit?

23 A I received a judgment against, actually, his wife.

24 His wife wrote out one of the checks, so --

25 Q In what amount, sir?

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A \$109,000.

Q And what about the other \$91,000?

A We're still working on that.

Q Mr. McBride's filed -- Mr. Robbins has filed a lawsuit against you, hasn't he, sir?

A I've heard so.

Q Well, you've seen so, have you not?

A No, I haven't.

Q You understand, however, that he has filed a complaint against you for fraud and deceit, right?

A I don't know. I haven't seen. I've heard that he's filed something. I don't think that part of it was against me.

MR. SPECTOR: Objection, Your Honor. He has testified that -- I have seen it, and he misrepresents what it is that's against Mr. McBride.

MR. MARRIOTT: Your Honor --

MR. SPECTOR: I know it says those words in it, but there's other Defendants.

MR. MARRIOTT: Well, I can only deal with the words one has. May I approach, Judge?

THE COURT: You may. You may.

MR. MARRIOTT: Would you like to join me?

MR. SPECTOR: Oh, I thought you were going right to the bench. Well, yeah, let's go.

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2 MR. MARRIOTT: Mr. McBride, I show you what -- a
3 pleading entitled Pelican Equity, LLC against Robert -- I'm
4 sure I will slaughter the pronunciation, so I hope they'll
5 forgive me -- Robert Brazelle [ph], Steven Norris, Talus
6 Partners, Rhama [ph] --

7 A Rhama Schalker [ph].

8 Q -- thank you -- Darl McBride, Brian Kate [ph]. Do you
9 see that?

10 A Yes, I do.

11 Q This is the lawsuit that -- to which you testified
12 having some understanding, right?

13 A Yes.

14 Q And this lawsuit asserts a number of causes of action
15 against you, does it not?

16 A Again, I haven't read it, but my understanding is the
17 causes of action was against the people that were tied to
18 that organization, which I am not.

19 Q Take a look, if you would, at page 18, Mr. McBride.
20 See where it says first claim for relief?

21 A Yes.

22 Q See where it says violation of the Computer Fraud and
23 Abuse Act?

24 A Yes.

25 Q Do you see the end of that where it says against the
individual Defendant? Do you see that?

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A Yes, I do.

Q Do you see page 19 where it says second claim for relief, misappropriation of trade secrets against the individual Defendant? Do you see that?

A Yes.

Q Page 23, unfair competition against all Defendants, do you see that?

A Yes.

Q Page 25, tortuous interference against all Defendants, do you see that?

A Yes.

Q Page 33, fraud and deceit against all Defendants, do you see that?

A Yes.

Q You paid Mr. Robbins --

MR. SPECTOR: Well, Your Honor --

MR. MARRIOTT: -- \$300,000.

MR. SPECTOR: -- I rise only to say I don't see the relevance of it. I move to strike it. But if it's going to come in, we're going to have to spend some time talking about it. Remember, this witness has never seen the document.

MR. MARRIOTT: He just saw the document, Your Honor. The question's simply asking what the --

MR. MCBRIDE: I didn't read it, though.

1 MR. MARRIOTT: -- document says. I'm happy to
2 have the Court have a copy to do with what you want. It
3 isn't --

4 THE COURT: I'm not going to strike it, and
5 perhaps it can be handled on cross-examination.

6 MR. MARRIOTT: All right. You -- thank you,
7 Judge.

8 BY MR. MARRIOTT:

9 Q You said, Mr. McBride, that you loaned Mr. Robbins --
10 withdrawn. You loaned Mr. Robbins \$300,000 because you say
11 you wanted him to be a backstop, right?

12 A That was one of the reasons.

13 Q Okay. What were the other reasons?

14 A At the time, I viewed him as a friend, and he asked
15 for a loan, told me that he'd pay it back in a matter of --
16 in one case, a matter of weeks; other case, a matter of
17 days.

18 Q When you loaned him the \$300,000 with the partial
19 intent of it being there because you wanted him as a
20 backstop, you meant by that that if the SNCP deal, the
21 Steven Norris Capital Partners deal, that you were
22 discussing with Steven Norris Capital Partners didn't go
23 through, he would come forward and he would -- that he would
24 put upwards of \$5 million into SCO, right?

25 A That's what he represented to us.

1 Q Okay. So it's your testimony, then, that you loaned
2 \$300,000 to Mr. Robbins so he'd be available to be a
3 backstop to contribute \$5 million potentially to SCO, right?

4 A That was potentially one of the outcomes.

5 Q Now, SCO asked the Court earlier in these bankruptcy
6 proceedings to authorize a payment of \$150,000 to York
7 Capital, right?

8 A Yes.

9 Q And SCO said that it felt that it was its moral
10 obligation to see that York Capital was paid for its efforts
11 in attempting to do a deal with SCO, right?

12 A Yes, that's right.

13 Q But prior to IBM and Novell [ph] bringing to the
14 Court's attention the payments that we've just been
15 discussing, those payments were not disclosed by Debtors to
16 the Court, right?

17 A I don't believe they were.

18 Q Mr. McBride, under the PSA, purchase and sale
19 agreement, that's proposed here, SCO is to hold a certain
20 patent for a period of time and then upon the elapsing of
21 that time, that patent goes to the proposed buyer, right?

22 A Yes.

23 Q And that's the so-called java patent 6931544, right?

24 A That's correct.

25 Q That's valuable intellectual property, is it not, Mr.

1 McBride?

2 A I believe so.

3 Q And what's your best estimate of the value of that IP?

4 A Well, we're hoping to get somewhere in the mid-six-
5 figures, maybe up to a little over a million.

6 Q And that -- the purchase and sale agreement provides
7 that if you don't get that money by a date certain, that the
8 -- this valuable IP will automatically transfer to Unxis
9 [ph] without further consideration, right?

10 A Yes, that's right.

11 Q Is it fair to say, Mr. McBride, that some of SCO's
12 employees are fed up with your attempt to protect the
13 litigations about which you've testified?

14 A I can't speak for SCO employees.

15 Q Well, that's what Mr. Bayer told Mr. Norris, isn't it,
16 Mr. McBride?

17 A Do you want to point me to something?

18 Q Do you know whether that's what Mr. Bayer told Mr.
19 Norris?

20 A I -- I'm not sure what he told him.

21 Q Take a look at MX-39 [ph] if you would, please.

22 MR. SPECTOR: Your Honor, this is, again, a
23 hearsay objection, as I've had all along, and I'm not saying
24 it every time, because I know the Court's going to let me
25 ask it to strike all of this, if it turns out that I'm

1 right.

2 THE COURT: That's correct.

3 BY MR. MARRIOTT:

4 Q CMX-39, Mr. McBride, this is an email from the bottom
5 of XM-39 from Mr. Bayer to Eric LeBlanc [ph], copying Steven
6 Norris, Jim Kelly.

7 A Yes.

8 Q Do you see that?

9 A Yes.

10 Q Take a look on the second page at what looks like the
11 third full paragraph down there. See where it says, "I can
12 only tell you that this motion has upset all employees I
13 have spoken to today. They all want the MB/GCP deal to
14 happen and are massively fed up with Darl's attempt to
15 protect the litigation." Do you see that?

16 A You say that's the bottom of --

17 Q Yeah, sorry. It's the -- it's page 2 --

18 A Yeah.

19 Q -- and it's the third -- the beginning of the first
20 full, third paragraph.

21 A Oh, okay. I see it now.

22 Q You see that, right?

23 A Yes.

24 Q And in fact, some of SCO's -- some of the members of
25 SCO's own management team believe that these litigations are

1 out of touch with reality, right, Mr. McBride?

2 A I can't speak for them.

3 Q Well, take a look at the first sentence, if you would,
4 of the first full paragraph. Do you see where it says, "I
5 still hope that Darl comes to grips with reality over the
6 next few days, i.e. that he finally sees and admits the
7 ancient battle over Linux is long over." Do you see that?

8 A Yes.

9 Q You can put that aside, if you would please, Mr.
10 McBride. Now you've received, have you not, sir, a
11 competing bid here from an organization with which Mr.
12 Charlie Hale [ph] is affiliated?

13 A Yes.

14 Q And you received that on July 23, right?

15 A Yes, that's right.

16 Q And the email indicated that an entity called LNS
17 Acquisition was making an offer to compete with the Unxis
18 offer, right?

19 A Yes.

20 Q And that email attached two documents: a Hale Global
21 SCO SPA redline versus the Norris agreement --

22 A Yes.

23 Q -- and a Hale Global SCO SPA clean document, right?

24 A Yes.

25 Q That's not your first communication with Mr. Hale,

1 right?

2 A No, it's not.

3 Q You've testified earlier that you had extensive
4 dealings with Mr. Hale, right?

5 A That's right.

6 Q He was affiliated with York Capital [ph], correct?

7 A Yes.

8 Q And you had discussions with him the days filing --
9 following the filing of the Chapter 11 Petition, right?

10 A Yes.

11 Q And you work as an investment group based in New York
12 City, correct?

13 A Yes.

14 Q And Mr. Hale was head of the technology group at that
15 time at York, right?

16 A That was my understanding.

17 Q And he spent, you said, I think, a lot of time -- I
18 think your testimony was that you were working around the
19 clock with him on that deal, right?

20 A Yes.

21 Q And he has devoted a lot of time and effort to
22 understanding SCO's business, correct?

23 A Yes.

24 Q The LNS [ph] offer to acquire substantially -- is to
25 acquire, substantially, all of SCO's assets, right, Mr.

1 McBride?

2 A Yes.

3 Q And that would include its Unxis business and its
4 mobility business, right?

5 A Yes.

6 Q And the amount of the proposed offer is \$6 million and
7 some, right?

8 A Yes.

9 Q And that figure -- and Unxis offer, by contrast, is
10 for \$5.25 million, right?

11 A Yes.

12 Q And that number, however, is -- that figure is
13 misleading, though, is it not, the \$5.25 million?

14 A Misleading in what way?

15 Q Well, it's misleading as to what's, in fact, being
16 paid for the assets being transferred, right?

17 A I'm not sure where you're going with that.

18 Q I'm asking you whether it's true or not. Is it true
19 that the \$5.25 million price for the assets being
20 transferred is a misleading number to affix to that
21 transaction.

22 A Not that I'm aware of.

23 Q Let me direct your attention, Mr. McBride, to -- and I
24 apologize, I only have one copy. I'll just -- if it's okay,
25 I'll just bring it up here and show you. You see this as an

1 email, Mr. McBride, MX-29? The second -- it's a chain of
2 emails. The second one there is an email from Mr. Spector
3 to Leslie Bayles [ph]. Who's Leslie Bayles, Mr. McBride?
4

5 A She's an attorney for Ryan Cave [ph].

6 Q And she copies on there Paul Aberon [ph] and Frank
7 William Kaplan [ph]. Who are they, sir?

8 A They are attorneys for Berger Singerman.

9 Q And Mr. Spector says, in the first line, I'm stepping
10 in for Paul. I believe in paragraph five or six, or maybe
11 one of the boxes, "Frank pointed out that we said that the
12 value of the consideration was (definitely 5.2 million), but
13 that is misleading for the Novell JGT," which I assume means
14 judgment, "is reversed. The true past consideration would
15 be 2.4 million." Do you see that, sir?

16 A Yes.

17 Q Mr. McBride, have you read, in its entirety, the
18 proposal that you've received now from L&S [ph] as a
19 competing bid?

20 A I've been briefed on it. I've read through it. I
21 can't say that I've read every word.

22 MR. MARRIOTT: I have no further questions, Your
23 Honor.

24 THE COURT: Thank you. Mr. Lewis.

25 MR. LEWIS: Thank you, Your Honor. My co-counsel
tells me I have two hours left.

1 THE COURT: All right.

2 XXX EXAMINATION

3 BY MR. LEWIS:

4 Q Mr. McBride, I'm going to kind of dart around here and
5 there, so -- for the most part, except for a specific series
6 of questions. Don't get confused by the fact that I'm not
7 talking about the same thing I was just talking about.

8 A Okay. Fair enough.

9 Q Okay. So let me start, first, with the press release.
10 Do you recall the press release: the 10,000-unit press
11 release?

12 A Yes.

13 Q Okay. Now, do you have any -- how long a period did
14 it take for the Debtors, for Franklin Covey to sell -- or
15 for there to be downloaded 10,000 units on the Apple iStore?

16 A The -- well, first of all, there weren't 10,000 units
17 in the Apple iStore. There were 10,000 units that came from
18 Apple iStore, Skils [ph] online store, and Blackberry's
19 online store. So that's where the 10,000 -- to be clear.

20 Q All right. I appreciate the clarification. And --

21 A Okay.

22 Q -- how long did that take?

23 A I don't know exactly when the downloads started, but
24 substantially, it kicked in gear in the early part of this
25 year.

1 Q The early part of this year?

2 A Yeah.

3 Q Do you have any idea of, for example, what the
4 download history is for the top applications on the iStore
5 for the iPhone?

6 A In any particular category, or just in --

7 Q Any category --

8 A -- general?

9 Q -- at all.

10 A I know that when we were at number 13 in the
11 productivity category, we were a little over 100 downloads a
12 day, so I don't know what number one in that category
13 would've been. I don't know how high it would be.

14 Q So you don't really know whether 100 is close to the
15 top --

16 A I know it's --

17 Q -- of the top 13.

18 A -- 13.

19 Q Right, but --

20 A I know it's 13.

21 Q -- you don't know whether if 100 units -- I mean, the
22 --

23 A I don't know what the reach is from 100 to -- I don't
24 know if 200's number one or 2,000's number one. I don't
25 know.

1 Q You don't know where the mean is or the median --

2 A No.

3 Q -- in this kind of deviation or any --

4 A They're kind of quiet, or they don't cover those stats
5 very much.

6 Q So, do you have any sense of what the typical margin
7 is for SCO on such a download?

8 A It depends on the product. You know, we get different
9 price points on different products. The range is probably
10 from a few bucks up to 20-some-odd bucks.

11 Q Okay. What does SCO sell, either directly or from
12 Franklin Covey on the iStore? What products?

13 A So far, we have one product in the iStore.

14 Q And what's the selling price of that product?

15 A Yeah, apple store, I should say. The selling price on
16 that product is 5.99.

17 Q And what's the margin on that product?

18 A We -- let's see. Apple takes 30 percent, and then
19 once that is gone, then we keep 60 percent of the remainder
20 between us and Franklin Covey.

21 Q And how much do you -- and what does Franklin Covey
22 get, and what do you get of that remaining 60 percent?

23 A I don't have the exact number in front of me, but it's
24 60 percent of 30 percent of 5.99.

25 Q Okay. I'm lost. I'm sorry. Let's just start --

1 Apple gets --

2 A Apple gets the first 30 percent.

3 Q -- 30 percent, and of the remaining 60 percent, how
4 much do you get?

5 A We get 60 percent.

6 Q You get 60 percent of the 60 percent.

7 A No, of the 70 percent.

8 Q Seventy percent; forgive me. So you get --

9 A It comes out to a couple bucks and some --

10 Q A couple bucks.

11 A -- change.

12 Q Okay.

13 A It's maybe 2.40, 2.50, somewhere in that range.

14 Q Okay.

15 A On that product. Now, we have other products. Like I
16 say, there's other products where, you know, it -- the price
17 is \$20 to \$30. I think we have one for \$29 that we don't
18 share with Apple, and in that case, you know, we're just
19 splitting it up. We're getting 60 percent of 29 bucks.

20 Q Okay. And have you ever looked to see what sort of
21 ratings these products get on the online stores from users?

22 A Yes.

23 Q And what have you found?

24 A I've found that the -- when the task manager first
25 came out, it was -- there was a lot of really good ratings:

1 five-star ratings. Then some people were using it for a
2 while, and they -- the tasks were -- if you had too many
3 tasks, the things went slower, so the ratings would go down.
4 And then, when we'd release a new fix, then it'd come back
5 and up the score up, so it's kind of moving target,
6 depending on how they see the product at any point in time.

7 Q Okay.

8 A It's generally ranged between two-and-a-half to four
9 stars --

10 Q Out of five?

11 A -- depending on --

12 Q I'm sorry. Forgive me.

13 A Yes, out of five.

14 Q Thank you. I didn't mean to interrupt. I apologize.
15 Now you've testified earlier about the York transaction. Do
16 you recall that testimony?

17 A Yes.

18 Q And you were not very happy with the York people, as I
19 recall from your testimony, is that right?

20 A Well, let's split that up. The people themselves --
21 Charlie Hale is a delightful person. I enjoy talking to
22 him, but in -- with respect to the deals and the deal-making
23 that came through, every time we went down the path very
24 far, it felt like he was reaching too deep into SCO's
25 pockets for our comfort.

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Q So, he was a hard negotiator?

A Hard to the point that we didn't feel like we were getting a good deal.

Q Okay.

A For SCO's shareholders.

Q Now, let me ask you a general question about your practices as the CEO of SCO.

A Yes.

Q And the question has to do with your general practice with respect to pleadings, these kind of things, that the Debtors file in this bankruptcy case.

A Yes.

Q And is it your general practice to read those and review them and approve them before they're filed?

A I tend to rely on counsel and my CFO to go through the detailed part of it and then brief me on it, so I can't say that I've read every one that's been filed.

Q Okay. So even -- so you don't necessarily approve them before they're filed, notwithstanding that someone else does most of the preparation for them, is that fair?

A I may approve them, but I may not read all of them. I rely on professionals to give me advice.

Q Okay. I've got insufficient copies here. It's not -- it's a rebuttal exhibit, and it is the Notice of Debtor's Motion for authority to pay an expense reimbursement to York

1 Capital Management. I think it's Docket 367. And --

2 THE COURT: I won't need it, and you may
3 approach.

4 MR. LEWIS: I'm just going to read something from
5 it, Your Honor.

6 THE COURT: Okay.

7 MR. LEWIS: And if I may approach the witness.

8 THE COURT: You certain may; yes, Mr. Lewis.

9 MR. LEWIS: Thank you.

10 BY MR. LEWIS:

11 Q Now, I would point, please, Mr. McBride, to the --
12 one, two, three -- it looks like the fourth page. It begins
13 with paragraph number 3.

14 A Number 3?

15 Q Yeah, paragraph number 3 starts with --

16 A Yeah.

17 Q -- starts with the word unfortunately.

18 A Yes, I have --

19 Q Do you see that?

20 A Yes, I have it.

21 Q Okay. And this reads: "Unfortunately, the
22 negotiations between SCO and York did not reach a mutually
23 satisfactory conclusion. The transaction failed, and the
24 Court never entered an order approving the transaction or
25 any of the documents contemplated the transaction."

1 Paragraph 4: "SCO believes that as a business and moral
2 matter, SCO should make the \$50,000 payment to York under
3 the terms sheet, which it did finalize, or the \$150,000
4 payment to York under the terms of the asset purchase
5 agreement, which was virtually completed at the time that
6 the SCO and York abandoned the transaction." Do you see
7 that?

8 A Yes.

9 Q Now, this is a pleading filed on behalf of SCO. Do
10 you recall reading and approving this pleading, this motion

11 --

12 A I don't remember --

13 Q -- to compensate York?

14 A I don't remember reading these -- this motion before
15 it was filed.

16 Q Have you ever heard about this motion?

17 A I remember this as an issue, yes.

18 Q Okay. And you talked about -- and you approved the
19 idea of --

20 A Yes, I did.

21 Q -- filing this motion?

22 A Yes.

23 Q Okay. Now, do you recall that, on June 15, you
24 testified that the SCO board had approved the Unxis
25 transaction?

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A Yes.

Q Did I get that right? I'm --

A Unxis is, I think, the --

Q Unxis.

A -- way you say it.

Q I'm sorry.

A Yeah.

Q We've been debating amongst ourselves.

A Just don't call it --

Q Today's --

A -- Unxis.

Q Today's been the day we're -- you know, we're all --

A Yeah.

Q -- advised. You recall that testimony. You said that the board had approved that specific transaction. Do you recall that testimony?

A Yes, I do.

Q Okay. Now, I'd like to show you a document that's been previously used today. It's the board minutes of June 22. It may still be up there. Do you see those?

A Do you know the exhibit number?

Q It's not a -- oh, yes, it is actually. It's Exhibit 4.

A 4?

MR. LEWIS: It's the Debtor's Exhibit 4. SCO #4.

1 It looks like -- may I, Your Honor?

2 THE COURT: You may.

3 MR. LEWIS: Thank you. I'm going to hand the
4 witness another copy of this exhibit, Your Honor.

5 THE COURT: All right.

6 BY MR. LEWIS:

7 Q Okay. I'm going to ask you, Mr. McBride, to look at
8 paragraph number 3. It is on top, I think, of the second
9 page. Do you see that?

10 A Yes.

11 Q And isn't that a ratification by the board of the
12 purchase agreement on June 22?

13 A Yes.

14 Q Okay. And I would like to ask you to look at what is
15 SCO's Exhibit #3.

16 MR. LEWIS: And Your Honor, these are the minutes
17 of the June 11 --

18 THE COURT: Yes.

19 MR. LEWIS: -- 2009 board meeting.

20 THE COURT: June 11 or June 22?

21 MR. LEWIS: June 11.

22 THE COURT: June 11.

23 MR. LEWIS: Exhibit #3 is --

24 THE COURT: I'm sorry.

25 MR. LEWIS: -- June 11.

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THE COURT: Thank you.

MR. LEWIS: And I'll wait, Your Honor, until you have that handy.

THE COURT: Right here. Okay.

BY MR. LEWIS:

Q And if you look at page 2 of the minutes, Mr. McBride, and paragraph number 2.

MR. SPECTOR: With regard to this exhibit, Your Honor, there are names in here that correspond with some of the letters, so I would ask that if we're going to honor confidentiality, we do so verbally in Court and also the document be --

THE COURT: Is it possible to avoid, Mr. Lewis --

MR. LEWIS: I think it is, Your Honor.

THE COURT: -- any questions --

MR. LEWIS: And if I find that I'm not able to ask the question without disclosing names, I will stop, and we'll figure out a way to handle that.

THE COURT: Okay.

MR. LEWIS: Thank you. Thank you, Mr. Spector, for reminding me.

BY MR. LEWIS:

Q Part of paragraph 2 says, "The remaining members of the board directed management to continuing pursuing the deals described above."

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A Yes.

Q And then it goes on to say with the exception of some -- one of the transactions, which the board doesn't really want to pursue anymore. Do you see that?

A Correct.

Q So there were no deals approved by the board as of June 11, which was four days before the June 15 hearing, right?

A They had given us authority to go after a deal that was going to represent the interests of the -- you know, all of the parties: the shareholders, the creditors, et cetera.

Q But they hadn't approved the Unxis deal, had they? They didn't approve that until June 22.

A They ratified it. They gave us authority to go cut a deal with one of those remaining three. They took one off. They gave us the authority to go do a deal with one of those three. We did the deal with Unxis. Then we came back and had it ratified later.

Q And you had it ratified, because the specific agreement had not been yet approved, isn't that right?

A That's correct.

Q Okay. But that's not what you testified to on June 15. You testified this particular deal. I can read you your testimony, if you'd like.

A Well, I think I remember saying two things there. I

1 said that the deal was approved, and when they challenged --
2 I believe it was Mr. Levin [ph] was challenging me, I
3 believe I said in that hearing that day that the board had
4 given us the latitude to cut a deal with one of the
5 company's, and that's what we did. And so, in my mind, the
6 board had approved the -- whatever deal we came up with.

7 Q Yes, this is a question by Mr. Levin, I think. This
8 is page 75 of this transcript, and it begins at line 15:

9 "Q I didn't ask whether this agreement was within the
10 latitude of what the board gave you; I asked whether the
11 board approved this particular agreement.

12 "A Yes, they did."

13 MR. NORMAND: Your Honor, is that a question or
14 the publication of a purported admission?

15 MR. LEWIS: Is that --

16 MR. NORMAND: There's no question --

17 BY MR. LEWIS:

18 Q Was that your testimony?

19 A My testimony is that the board had given us latitude
20 to cut a deal, and based upon that latitude, I felt like
21 that the deal that we had cut was approved by the board.

22 Q That particular deal?

23 A The deal with Unxis was approved by the board, because
24 we had the latitude to cut the deal.

25 Q But you nevertheless had it ratified after the fact?

1 A We went back and ratified it, based on what the
2 written agreement was, but the deal itself, I believed, was
3 approved by the board.

4 Q When you say the deal, you mean the basic terms, or do
5 you mean all the particulars, all the terms? The document?

6 A We had represented to the board, on that call, the
7 material terms in all of the deals we were discussing.

8 Q And that's what you believe they approved on whatever
9 occasion that was --

10 A They had given us authority to cut a deal in one of
11 those three areas, based on what representations we made to
12 them.

13 MR. LEWIS: May I approach?

14 THE COURT: You may, certainly, Mr. Lewis.

15 MR. LEWIS: I'm going to show the witness

16 MX-54 --

17 THE COURT: Okay.

18 MR. LEWIS: -- which is the asset purchase
19 agreement between Novell and Santa Cruz operation.

20 MR. MCBRIDE: Okay.

21 BY MR. LEWIS:

22 Q And I'm not -- I'm going to direct your attention to
23 something very specific in a moment, but in general, what --
24 do you recognize --

25 A Yes, I do.

1 Q -- this document?

2 A Um-hum.

3 Q And this is the asset purchase agreement --

4 A Yes.

5 Q -- between Novell and Santa Cruz.

6 A The infamous one.

7 Q Yes. That's it. That -- I think we'll all confirm
8 that one, Mr. McBride. We won't cross-examine you on that
9 issue. Now I'd like to call your attention to Section 4.16,
10 which appears on page 24.

11 A Okay.

12 Q That section's entitled SVRX Licenses.

13 A Yes.

14 Q And this section obligates the counterparty to this
15 agreement to collect certain license revenue, as you
16 understand it, from SVRX licenses and remit them and has
17 some other state obligations, then, is that right?

18 MR. NORMAND: Your Honor, I just want to object
19 on the grounds that opposing counsel objected earlier when
20 Mr. McBride was speaking to his understanding of the terms
21 and nature of certain agreements, so I think there's a way
22 for him to ask questions around this, but to the extent he's
23 asking what obligations or action imposed, I don't think
24 that's an appropriate way of asking it.

25 MR. LEWIS: That's a fair objection, Your Honor.

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THE COURT: Yes.

MR. LEWIS: I'll rephrase the question.

THE COURT: All right, Mr. Lewis.

BY MR. LEWIS:

Q Mr. McBride, you've read through this agreement probably any number of times, is that right?

A Yes, I have.

Q In fact, you could probably write it by memory.

A It comes with Tylenol attached.

Q Is it your understanding that under Section 4.16, the counterparty to this agreement is required to collect certain license revenues and provide certain audit reports? Is that your understanding of the way this section works?

MR. SPECTOR: Your Honor, I rise for the same reason. I was trying to ask him the same questions, and the objection was sustained when I asked him about what obligations were owned from SCO or from the other party to Novell and what obligations were owing for Novell to the other party. The objection was sustained when I asked it. Why is it not sustained when he asks?

THE COURT: Well, you know, I don't recall the specific ruling of this specific question, frankly, but I think that it's -- his -- Mr. Lewis is asking for his understanding.

MR. LEWIS: Yes, that's --

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MR. SPECTOR: All right.

MR. LEWIS: -- the question. I don't think we've had that one before.

THE COURT: I can't say for sure, but I -- if I got it wrong before, I'll get it right this time.

BY MR. LEWIS:

Q Is it your understanding that the counterparty to this agreement would have certain obligations to fulfill to Novell under Section 4.16 with respect to the collection and remission of revenue -- license revenues?

A I don't view it that it's our obligation. I do -- we have an opportunity to collect five percent of those royalties by collecting them, but if we don't want to collect them, then it's Novell's business to go out and take 100 percent, so I don't view it as an obligation.

Q All right. And looking at this document, in Section 4.16, you also -- is it also your understanding, upon reading it, that Novell can object to the assignment to any of the SVRX licenses? Your understanding: I'm not asking for a legal opinion.

A I believe, to get the full understanding of 4.16, you really have to read amendment 2, because it's modified, and again, there are modifications in amendment 2 that relate to this section.

Q Okay. And how about the section -- how about 4.16

1 with respect to the reassignment of licenses? You see -- do
2 you believe -- is it your understanding that there was some
3 obligation on the part of the counterparty to reassign
4 licenses?

5 MR. SPECTOR: A continuing objection, Your Honor.

6 THE COURT: Understood.

7 MR. LEWIS: I'm sorry. I missed the answer, or
8 was it just an objection?

9 MR. SPECTOR: He didn't -- I objected, and it's a
10 continuing objection. The Court's not ruled on it yet.

11 MR. LEWIS: Okay.

12 MR. SPECTOR: Mr. McBride, that means you can
13 answer the question, at this point, sir.

14 MR. MCBRIDE: Okay. Again, 4.16, to get to the
15 true understanding of it, really has got to be overlaid with
16 amendment 2.

17 BY MR. LEWIS:

18 Q Okay. Now have you had any discussions with the
19 buyer, Unxis, about the disposition of Section 4.16 of the
20 asset purchase agreement, what's going to happen to it?

21 A No.

22 Q Have you had any discussions with the buyer, Unxis,
23 about what's going to happen -- whether the buyer -- whether
24 Novell can object to the assignment of the SVRX licenses?

25 A No.

1 Q Okay. Do you have any understanding as to whether
2 anybody has had such discussions with the buyer?

3 A I think some people have talked to them about it, but
4 I'm not sure what the nature of the discussions were.

5 Q Now you testified, I think, earlier today, that the
6 reason the -- in your opinion, the reason that the Steven
7 Norris deal fell apart was this inaccurate report in the
8 newspapers about having to collect -- having to pay over 95
9 percent of the royalties?

10 A That was a key contributor, no doubt.

11 Q Okay. And when did that newspaper report come out, do
12 you recall?

13 A Some time in the spring of '08.

14 Q Or was it -- do you recall there was a hearing on this
15 sale, this proposed transaction with Mr. Norris on the plan
16 and the disclosure statement?

17 A Yeah, I don't remember the details of the times.

18 Q You don't recall whether the report came out before or
19 after that hearing?

20 A I don't remember precisely.

21 Q Okay.

22 A I just remember it was in the same general timeframe.

23 MR. LEWIS: Okay. Your Honor, I want to read to
24 the Court from the transcript of the hearing on April 2 of
25 2008. This was the hearing that was set on the SNCP [ph]

1 transaction. And this is counsel for the Debtor on page 8
2 and at line 19:

3 "The reason we did not get the definitive documents
4 in, in time, is not because we hadn't prepared them. It was
5 the deal was changing while we were drafting them. Both
6 sides, the buyer and the seller, came to an agreement
7 informally while we were drafting the documents we had, that
8 they'd rather restructure the deal in a totally different
9 way."

10 There's no mention here, Your Honor, of --

11 MR. NORMAND: Your Honor, is this a question --

12 MR. LEWIS: Yes.

13 MR. NORMAND: -- or a break in the examination?

14 MR. LEWIS: Yes, Your Honor.

15 BY MR. LEWIS:

16 Q Were you present when -- were you present at this
17 hearing?

18 A I think I've been to all the hearings.

19 Q And did you hear your counsel say that?

20 A If I was here, I heard him say it.

21 Q And did you believe it was correct when you heard him
22 say it?

23 A Yes.

24 Q Okay.

25 A Would you like an explanation of that, or should we

1 just leave it at that?

2 Q I think Mr. Spector can --

3 A Save it for cross?

4 Q Sure.

5 A Okay.

6 Q You've got this down, huh?

7 A I'm trying to.

8 MR. LEWIS: All right. Your Honor, I have no
9 other questions at the moment. Thank you very much. Thank
10 you --

11 THE COURT: Thank you --

12 MR. LEWIS: -- Mr. McBride.

13 MR. MCBRIDE: Yes. Thank you --

14 THE COURT: -- Mr. Lewis.

15 MR. MCBRIDE: -- Mr. Lewis.

16 THE COURT: Mr. Harrington [ph]? I think Mr.
17 McMann [ph] owes you something. I'm not sure what it is.

18 MR. HARRINGTON: I'll be very brief, Your
19 Honor --

20 THE COURT: Yes, sir.

21 MR. HARRINGTON: -- although I think I have, you
22 know, two hours and 25 minutes left on my time.

23 THE COURT: Well, actually, the -- I only gave
24 your office 30 minutes, I think, or something like that, but
25 that's okay. You take whatever time you need.

1 MR. HARRINGTON: Well, Jim said I would have
2 plenty of time.

3 THE COURT: Okay.

4 XXX EXAMINATION

5 BY MR. HARRINGTON:

6 Q Did you direct your counsel to give notice of this
7 sale to -- and I'll refer to the entities as numbers one
8 through four that were referred to on cross, and other than
9 the Norris and Merchant Bridge [ph] entities, the entities
10 referred to from A through G?

11 MR. SPECTOR: Your Honor, what this witness told
12 his counsel is privileged, but I can tell you that we did
13 make efforts to ensure that all prior entities that we knew
14 of were served. Some of them -- I think one of them we
15 couldn't find any longer. They may not have existed. It
16 might've been a -- but we did take efforts to include within
17 our -- I think we did a supplemental notice. We did a
18 supplemental notice of service, certificate of service, with
19 the additional parties after the original sale order went
20 out. I don't know if counsel knew that, but --

21 MR. LEVIN: Your Honor, was that certificate of
22 service filed with the Court?

23 MR. SPECTOR: I'm sure it was.

24 THE COURT: Mr. Spector?

25 MR. SPECTOR: I -- well, I -- I'm -- the records,

1 but I believe it was. We'd have to check the docket, but we
2 made -- I remember in the production, if there's emails
3 about -- there's lots of emails going back and forth. I
4 remember asking: what's the address of these guys? What's
5 the address of those guys? And we made a concerted effort
6 to get an additional matrix, additional service list for
7 those parties, because it did come up at the June 15
8 hearing.

9 BY MR. HARRINGTON:

10 Q Did you make any other efforts to contact any of those
11 prior buyers prior to signing up this -- the agreement with
12 the Norris Group?

13 A I'd have to go back and look at that list again, but
14 yeah, we went out and tried to contact as many people as we
15 could that would -- may have been interested in the
16 business.

17 Q And how did you go about doing that? Did you call
18 them directly?

19 A I think the telephone was -- would've been the main
20 way of trying to contact them.

21 Q And did you do that directly?

22 A It would've been myself or maybe Hunsaker.

23 Q Which entities did you call? And again, using the, I
24 guess, codes that you had before?

25 A Well, I've got to see the names again so I can

1 resurrect them. I mean, let me just think. So we did have
2 follow-on discussions with A.

3 Q And this is after?

4 A (No audible response.)

5 Q At what point in time did you have the follow-on
6 discussions?

7 A It was some time within the last couple of months.

8 Q Okay.

9 A B, we did talk to B, but they had already moved on, so
10 that wasn't an option. C was the one that got sold off, so
11 they weren't an option, so we didn't re-contact them. A lot
12 of the other ones were already -- they were new contacts
13 coming into the pipeline at that point in time.

14 Q And did you --

15 A There was a large technology company that we -- wasn't
16 even on this list, that didn't ever result in a material
17 discussion, but there was one large technology company that
18 we must have talked to a half-dozen times, asking if they
19 would be interested, because we thought it was a logical
20 choice, but they -- we contacted them again; they rejected
21 it.

22 Q Earlier, you testified that one of the sole reasons --
23 or two of the sole reasons were for the -- that you
24 preferred the Norris deal or it had benefits for employees
25 and customers, is that true?

1 A It -- not just those. It had employees, it had
2 customers, it had creditors, and it had shareholders. Those
3 are the big four we were -- I was trying to protect.

4 Q And those were the -- originally, though, you said the
5 primary beneficiaries were the employees and the customers,
6 correct?

7 A I -- if I said that, I was trying to say it in the
8 context of I've always viewed the Norris deal as taking care
9 of all four of those.

10 Q And when you say creditors, you're not including
11 Novell and IBM.

12 A No, that's not true. Well, I don't view IBM as a
13 creditor. I view Novell as one of them, but we may have
14 differences on that. I mean, the point is, whether they're
15 a creditor or not, I mean, they obviously have standing or
16 they wouldn't be in this courtroom. My view on that was
17 that we liked the Norris deal because it took care of
18 everybody in the SCO universe that needed to be taken care
19 of. It -- in the case of Novell, again, I don't understand
20 all the technicalities, whether -- what kind of creditor
21 they are, but obviously they have some interest in this
22 because of the judgment that we're trying to get reversed
23 right now. But the Norris deal allowed for paying them and
24 getting them taken care of. The Norris deal allowed for
25 paying off pre-Petition creditors in full, not in -- what

1 Charlie was trying to do is in very small part. It took
2 care of employees and --

3 Q And when you --

4 A -- the customers.

5 Q And when you say what Charlie was trying to do, are
6 you referring to his original deal?

7 A I was speaking of, in this case, the latter deal that
8 came.

9 Q But you said you hadn't reviewed that entire APA in
10 the latter?

11 A Well, I didn't say I hadn't reviewed it; I said I
12 hadn't read every word of it. I was talking -- in the
13 Charlie deal, there's Charlie 1, Charlie 2, and Charlie 3.
14 Okay. Charlie 2 and Charlie 3, both of those were pretty, I
15 should say, negative with respect to creditors. Again, it
16 was this idea that -- I've never heard of creditors coming
17 out of bankruptcy getting paid in full. That's ridiculous.
18 We don't have to pay them off. We'll get some percent on
19 the dollar, pay them, and we'll move on. And our approach
20 from day one was always to pay off the pre-Petition
21 creditors at 100 percent, take care of the Novell judgment
22 to the extent that it didn't get reversed, and at the same
23 time, try and get a deal on the table where the SCO
24 employees and customers would have a future home, and
25 preserve our litigation claims, which is what a lot of the

1 shareholders care about.

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

4 THE COURT: Thank you, Mr. Harrington. Mr.
5 Spector?

6 XXX EXAMINATION

7 BY MR. SPECTOR:

8 Q How does the article, that talked about the 95 percent
9 of the SCO revenue going to Novell, impact on the comments
10 made in Court that you heard Mr. Lewis talk about?

11 A Well, Mr. Lewis' comment, as I recall, I'll try and
12 paraphrase it, said the April 2 hearing we represented that
13 the Norris SNCP deal was being restructured. And that's a
14 true statement. The -- again, when we started out with
15 SNCP, it wasn't a signed transaction. It was a memorandum
16 of understanding, which is a long ways away from a signed
17 deal. So we had a memorandum of understanding, which was a
18 generalized, let's go try and do this. And as we got into
19 this discussion with the group, a very credible group out of
20 the Middle East, they wanted to take a different approach
21 towards the transaction, and that was causing us to
22 restructure the plan relative to what the original MOU
23 called for.

24 Q So when we got out of Court after we thought we were
25 trying to restructure the deal, what happened?

1 A Well, then in the middle of the restructuring and
2 trying to get it like they wanted it to be is when this
3 article came out, and they were totally freaked out by it.

4 Q Tell us how amendment -- well, were there any
5 amendments to the Novell APA with the Santa Cruz operation?

6 A Yes.

7 Q Tell us how amendment #2 affects Section 4.16.

8 A The --

9 MR. MARRIOTT: Your Honor, I just object, subject
10 to what the prior conversation about this being limited to
11 his understanding.

12 THE COURT: Correct.

13 MR. SPECTOR: Which is all I ever wanted the
14 first time.

15 THE COURT: The witness's understanding.

16 MR. MARRIOTT: And to the document itself. I
17 don't think that's been offered into evidence.

18 MR. SPECTOR: We don't need the document in
19 evidence, Your Honor. The question with Mr. Lewis went into
20 what's his understanding of 4.16 and he gave an answer, and
21 he said subject --

22 THE COURT: When --

23 MR. MARRIOTT: I withdraw the objection, Your
24 Honor. It's in evidence.

25 THE COURT: Yes, it is. Yes. Thank you.

1 MR. SPECTOR: Well, whether it is or it isn't,
2 Your Honor chooses whether to read it or not as well.

3 BY MR. SPECTOR:

4 Q But the question I have on the floor was how does
5 amendment #2 impact your answers to Section 4.16, in your
6 understanding?

7 A Well, in my understanding, there were clarifications
8 in amendment 2 around what the parties were supposed to do
9 in certain circumstances. And again, when you read 4.16 and
10 you read amendment 2, one of the take-aways that you get
11 from that is that this is not an obligation of SCO. This is
12 a thing that if SCO wants to get 5 percent, then just keep
13 collecting. And to the extent that you don't want the 5
14 percent and you don't go collect, then Novell has the rights
15 to go directly to those customers. We're out of the
16 picture. So from that standpoint, I just don't view that we
17 have an obligation with respect to SVRX collection.

18 Q Mr. Lewis, I believe, or my -- I'm sorry. Somebody
19 cross-examined you and asked you to look at Exhibit #29, and
20 I have it over here. That was an email from me to Ms.
21 Bayles, do you recall that?

22 A Yes.

23 Q Okay. I'm just going to ask you --

24 THE COURT: Which exhibit number is that, Mr.
25 Spector?

1 MR. SPECTOR: I thought it was 29. Am I wrong
2 about that? Oh, yes. Here it is. Second one down, Exhibit
3 #29. It's a chain of emails.

4 BY MR. SPECTOR:

5 Q Just read, for the Court, the time on that, the date
6 and time of that email.

7 A The date of that email to Leslie Bayles was Monday,
8 June 22 at military time 1951.

9 Q 7:51 p.m.?

10 A Yes.

11 MR. SPECTOR: Your Honor, the record will show
12 that the actual motion wasn't filed until 11:34 p.m. That
13 email is part of the negotiations of what it, this document,
14 ought to say.

15 MR. LEWIS: Your Honor, is that testimony by
16 Counsel or what?

17 MR. SPECTOR: I would ask the Court to draw the
18 inference.

19 MR. LEWIS: Is it argument, Your Honor?

20 MR. SPECTOR: I'll strike.

21 THE COURT: All right.

22 MR. SPECTOR: All right.

23 BY MR. SPECTOR:

24 Q Shawn Cutler [ph].

25 A Yes.

1 Q You testified that he was involved in the mobility
2 business for SCO. He still --

3 A Yes.

4 Q -- is today.

5 A Yes, that's right.

6 Q If he goes over to Unxis --

7 A Yes.

8 Q -- with the server --

9 A Yes.

10 Q -- who takes over the jobs he was doing outside of
11 doing the server? Let me strike that. What is his role at
12 -- with regard to mobility at SCO today?

13 A He is basically over the marketing programs.

14 Q Over the marketing programs of what?

15 A Of all of our mobile business.

16 Q Both server and application.

17 A Correct.

18 Q Okay. Is there some plan for the reorganized SCO to
19 replace Mr. Cutler when he goes to work for Unxis?

20 A Not initially. The initial plan is to run this thing
21 at a level where we can generate profits. As we get more
22 deals done and that business grows, then yes, eventually we
23 will bring someone into that role.

24 Q Now, when you testified on direct, you acknowledge
25 that at the beginning of the case, when this Chapter 11 was

1 filed, mobility was a startup. It really was -- hadn't
2 marketed at all, right?

3 A Right.

4 Q That was in September of '07.

5 A Right.

6 Q And in '08, you had some revenues, apparently?

7 A Yes.

8 Q In '09, do you have more revenues?

9
10 MR. MARRIOTT: Your Honor, I don't want to -- if
11 I may object, Counsel is leading his own witness.

12 MR. SPECTOR: I am.

13 MR. MARRIOTT: We've had it happen, and I've
14 tried to say nothing so far, but I think I'd object to the
15 leading. If we could just go back to the regular --

16 MR. SPECTOR: Yeah.

17 MR. MARRIOTT: -- course --

18 THE COURT: All right.

19 MR. SPECTOR: I am. And I was doing that for the
20 interest of time.

21 THE COURT: Sure.

22 MR. SPECTOR: I didn't think it was
23 controversial, and --

24 THE COURT: Understood.

25 MR. SPECTOR: -- I'll adapt to that.

BY MR. SPECTOR:

1 Q The -- what revenue -- is the revenue in 2009 greater
2 or less than it was in 2008?

3 A I expect it'll be greater.

4 Q Okay. What's the name of the person in charge of the
5 subsidiary in Japan?

6 A Makoto Aso [ph].

7 Q Do you know if he had any review over the -- if you
8 know, and if you don't, don't get it from somebody else. Do
9 you know if he had any review over the marketing -- merging
10 markets proposal?

11 A I'm not sure what extent he was involved in that. He
12 was over his -- it was his region impacted by it, and he had
13 money and funds for it. I'm not sure what extent he was
14 involved in the actual study, overseeing of it.

15 Q We talked about the patent.

16 A Yes.

17 Q The motion for the sale of the patent has been filed,
18 and do you expect that java patent will be sold before the
19 deadline and it has to be turned over to Unxis?

20 A Yes.

21 Q Okay. And the company -- did you previously sell a
22 patent in this case?

23 A Yes, we did.

24 Q Okay. And are you dealing with the same people?

25 A Yes.

1 Q Do you have any -- well, strike that. And if the
2 patent doesn't sell by that deadline -- what is it, the end
3 of the year?

4 A Yes.

5 Q What's the view of SCO whether there's any value in
6 that patent?

7 A Well, if we aren't able to sell it and get a
8 reasonable value out of it, then we won't believe that there
9 is a lot of value there.

10 MR. SPECTOR: Okay. One other thing I want to
11 point out, Your Honor, and this is not through testimony, if
12 you look at the motion for sale, it doesn't say 5.4 million,
13 it says up to 5.4 million, and I wanted to connect those
14 dots.

15 BY MR. SPECTOR:

16 Q Let's talk about Hans Bayer.

17 A Okay.

18 MR. SPECTOR: And this part, Your Honor, also
19 goes to the issue of the hearsay objections.

20 THE COURT: Okay.

21 MR. SPECTOR: It all came in already, but I'd
22 like to go back.

23 BY MR. SPECTOR:

24 Q Is Mr. Bayer an officer or director of SCO Operations
25 or SCO Group, Incorporated?

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A No.

Q Okay. How do you explain the website screen-print that they showed you?

A I don't know. I don't know when that was put on there. It's not -- I don't know.

Q Is it --

A I can't do that.

Q -- accurate?

A Well --

Q Well, what -- well, strike that. What's the name of the German subsidiary?

A It's -- probably has a GMBH in it somewhere.

Q At the end, but what does it say in the beginning?

A SCO.

Q Um-hum. Is he an officer or director of the SCO GMBH?

A I would expect that he is.

Q Okay. Well, what -- all right. It -- do you know his title, his actual title?

A I don't. I don't.

Q What is his area that he's in charge of?

A He's in charge of -- my understanding is he's in charge of international sales.

Q And he's in charge of international sales from which entity?

A Well, he operates out of the German entity.

1 Q And does he have any authority to speak for SCO Group
2 or SCO International on matters such as sales of assets of
3 the company?

4 A No.

5 Q Does he have any authority to speak about sale of
6 mobility assets?

7 A No.

8 Q What is his major background?

9 A He's a sales person.

10 Q And his -- so his business is to sell to the public or
11 to a segment of the public?

12 A Yes.

13 Q Does he do any strategic work with financiers or merger
14 partners? Is that his area of expertise?

15 A No.

16 Q Is he authorized by SCO to make statements about legal
17 positions or financial positions?

18 A No.

19 MR. SPECTOR: Your Honor, I've got case law to
20 support this, but the general point I want to make is an
21 officer of the subsidiary company has no authority just
22 because of that office to speak on behalf of the parent
23 company. Moreover, the -- to be an admission -- this is --
24 only comes in as admission, because everything, as Your
25 Honor well knows, is all hearsay, and there's double-hearsay

1 in a lot of that. And the only way it can come in is that
2 it's not hearsay at all, because it's an admission. And
3 that's obviously what I'm going to hear. But an admission
4 to come and -- an admission of a party, it has to be someone
5 authorized to make that statement. And the authority is
6 delimited by case law to people who are authorized to speak
7 on that topic for the company. So a salesman, I'm not
8 saying that Mr. Bayer was just a salesman, but if a salesman
9 says something that is very detrimental to his employer on
10 an area that's not in his area of expertise or authority,
11 that is not an admission of the parent, of the corporation
12 that he works for. And we'll -- if any of this is
13 controversial, I do have case law to support. So it's my
14 opinion, Your Honor -- or not opinion: my opinion doesn't
15 count.

16 THE COURT: Your argument.

17 MR. SPECTOR: It's my view, Your Honor, that the
18 testimony that we've heard at length about Mr. Bayer said
19 this to so-and-so and somebody told him about something, all
20 of that is hearsay, and all of that is not -- cannot be
21 considered an adoptive admission or any other form of
22 admission by SCO Group or SCO, Incorporated, and I ask that
23 the entire line of testimony be stricken. And of course, if
24 we had a jury, this would be a problem, having heard all
25 this, but I trust Your Honor knows how to do this.

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THE COURT: Yes, Mr. Marriott --

MR. MARRIOTT: Well, I gather --

THE COURT: -- any response?

MR. MARRIOTT: -- we're done with the
examination.

THE COURT: Oh, I don't --

MR. SPECTOR: That's the --

THE COURT: Are you done --

MR. SPECTOR: No, I'm not done with the redirect.
I'm just -- I'm assuming that was voir dire on that. I'm
going to let them take a chance -- take their chance on
that. I was just being -- do you want to --

MR. MARRIOTT: Are you finished inquiring him on
that?

MR. SPECTOR: I'm finished inquiring on the voir
dire on the objection for the hearsay grounds.

MR. MARRIOTT: It's not clear to me whether you
were passing the witness --

MR. SPECTOR: No, I'm not passing the witness. I
was stepping aside --

THE COURT: I think --

MR. SPECTOR: -- because --

THE COURT: I think --

MR. MARRIOTT: I didn't understand Your Honor to
be inviting --

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THE COURT: Mr. Spector is --

MR. MARRIOTT: -- voir dire.

THE COURT: -- renewing his --

MR. SPECTOR: My objection.

THE COURT: -- objection.

MR. SPECTOR: And request to strike that line of testimony, and I just figured I'd step aside and let you respond.

MR. MARRIOTT: Would you like to do it now, Judge?

THE COURT: Why don't we do it now? One other thing, the gentleman sitting back -- do you see that white button back there? If you will push that, I'm hoping the air-conditioning will come on.

MR. MARRIOTT: May I approach, Your Honor?

THE COURT: Yes.

MR. MARRIOTT: I -- with Mr. Jacob's [ph] permission, I hand Your Honor his Blackberry, which calls up SCO's webpage --

THE COURT: Yes.

MR. MARRIOTT: -- and I invite the Court to review what it says about Mr. Bayer's current title and responsibility, which is exactly what the witness agreed the website printout that he was shown said.

MR. SPECTOR: We're not contesting -- we're not

1 saying Mr. Marriott misread that or misrepresented what it
2 said. I'd just --

3 MR. MARRIOTT: The witness -- the witness --

4 MR. SPECTOR: -- ask the witness --

5 MR. MARRIOTT: I'm sorry. Go ahead.

6 MR. SPECTOR: I'd just ask the witness whether he
7 agreed with what it says on the website.

8 MR. MARRIOTT: The witness said he didn't know --

9 THE COURT: Oh, I'm sorry. What's --

10 MR. MARRIOTT: Your Honor, the witness said --
11 suggested that perhaps the page was out of date, and I think
12 we can see, and Your Honor can see back in chambers, that
13 that is currently what the website says. Your Honor, those
14 documents, the three documents, which are in dispute, are
15 plainly, unquestionably relevant. The only serious -- the
16 only objection even attempted here as to those documents
17 with any seriousness is hearsay, and it is, at the end of
18 the day, Your Honor, not a serious objection. And it isn't
19 a serious objection. It isn't a correct objection for at
20 least the following reasons.

21 First of all, Your Honor, the documents aren't hearsay
22 if the statements about which the witness was questions were
23 admissions. The statements were plainly admissions. The
24 statements were made on behalf of a vice-president of SCO, a
25 person who holds himself out as a vice-president of SCO, a

1 person who, by the very text of the documents, was acting on
2 behalf of SCO in negotiating with the buyers in this
3 proposed transaction. You didn't hear any evidence from Mr.
4 McBride, and I'm happy to inquire if necessary, as to the
5 punishment of Mr. Bayer for communicating and dealing with
6 the proposed buyers in this way. He hasn't been
7 disciplined. There's no evidence that he's been
8 disciplined, Your Honor. The evidence is those -- as those
9 documents made claim, that he was carrying out his duties,
10 that he was acting on behalf of the company in helping to
11 bring about that proposed transaction. Moreover, one of the
12 documents, Your Honor, is not from Mr. Bayer, it's from Mr.
13 Hunsaker, who is another vice-president of the company, who
14 plainly is affiliated with the SCO Group, the Debtor in this
15 action.

16 THE COURT: Well, for -- let me ask this
17 question. For example --

18 MR. SPECTOR: Sure.

19 THE COURT: -- in one of the emails, Mr. Bayer
20 says that all of the employees think such and such and so on
21 and so on. The employees. Now, that's clearly hearsay.
22 How could he even speak for the employees -- what the
23 employees think? That's one example. I was troubled by
24 these emails, because I don't know -- I just don't know
25 their context. I don't know really their evidentiary value,

1 frankly, because this was one man's view.

2 MR. MARRIOTT: Your Honor, this man was --

3 THE COURT: And he's a -- and he is a vice-
4 president of their European operations, not an employee in
5 the United States.

6 MR. MARRIOTT: Your Honor, he holds himself out,
7 and the website holds him out, as a representative of the
8 company, without distinction to the German subsidiary or
9 SCO. He represents himself to the world, we would submit,
10 as being an employee and a representative of SCO. And in
11 any event, he was representing -- he was acting as an agent
12 of the company in connection with the proposed transaction,
13 which is at issue. And in acting as an agent, Your Honor,
14 of the company, in that regard, it makes no difference
15 whether he is technically an employee of the subsidiary or
16 he is technically an employee of the SCO Group.

17 With respect to -- at an absolute minimum, Your Honor,
18 he -- there was apparent authority on his part to be having
19 the conversations he was having with the buyer about the
20 state of the negotiations, about the value that was being
21 placed on the products being sold and the products not being
22 sold. Plainly, Your Honor, to the extent he talks about
23 what other witnesses thought, there may be different weight
24 which Your Honor would wish to accord to those statements,
25 and that is obviously Your Honor's discretion, as the finder

1 of fact in this particular proceeding. But we would submit,
2 Judge, there's no question they were admissions, because he
3 was acting on behalf of the company as its agent, and in the
4 course of his duties, made those representations. And Mr.
5 Hunsaker, again, in any case, was plainly a representative
6 of SCO.

7
8 Furthermore, Your Honor, at -- one of the issues in
9 this case is the good faith, or lack of good faith, of the
10 Debtors. And we would submit, Your Honor, that those
11 documents plainly go to that question; and therefore, if
12 they aren't in, Your Honor, for purposes of truth, and we
13 believe they should be, therein we would submit, Your Honor,
14 as to state of mind. Furthermore, there is an exception, as
15 Your Honor well knows, to the hearsay rule, that concerns --
16 that is effectively a catchall that says where there are
17 sufficient indicia of reliability, even if the statement is
18 hearsay, even if the statement is hearsay, even if it's not
19 an admission, even if it isn't otherwise permissible in
20 evidence, where there's a sufficient indicia of the
21 reliability of the statements made, whether they were in
22 fact made, that the evidence comes in. And there can't be
23 any question here that Mr. Bayer didn't make those
24 statements. There's no suggestion by Counsel for the
25 Debtors that he didn't actually make the statements. He
did, Your Honor. He is under the control here of the

1 Debtors. He is an employee of Debtor. Whichever entity
2 they want to say he's with, he is in their control. They
3 could've, without trouble, had Mr. Bayer come and explain
4 those emails in Court, and they made the election not to do
5 that, Judge, and they could've done that, and they didn't do
6 that. And there's no reason whatever to think that these
7 documents are irrelevant or unreliable, except that they
8 don't like what the documents have to say. And it would be
9 for Your Honor, based upon what the documents actually say
10 and the context in which you can put them, as you read them
11 in their full, to decide what weight they have. But we
12 would submit, Your Honor, for those reasons, the documents
13 are, and ought to be, admissible into evidence.

14 Thank you, Judge.

15 THE COURT: Yes.

16 MR. SPECTOR: Just two more questions I can ask
17 him to finish that record, and he -- that Counsel's raised.

18 BY MR. SPECTOR:

19 Q First of all, I'm going to show you Exhibit 37 as an
20 example. What's -- what does it say after Mr. Bayer's name
21 on that email?

22 A This is the one of June 9. It's the one we're talking
23 about. It says Hans Bayer, Vice-president, EMEA

24 Q What is EMEA?

25 A It stands for Europe, Middle East, and Africa

1 Q Okay. I'm going to show you the very last entry on
2 section -- on Exhibit #37.

3 MR. SPECTOR: What is that? Was 39 also -- or
4 used? Was 39 another one of those that was --

5 MR. MARRIOTT: Yes.

6 BY MR. SPECTOR:

7 Q Okay. Let me show you 39. #39, at the very end of
8 this, you'll see another entry for Hans Bayer, again vice-
9 president EMEA Turn the page over and see what Mr. Bayer is
10 affiliated with, calls himself affiliated with. What does
11 it say?

12 A So the address that he puts is the SCO Group, GMBH,
13 and then he goes on to give his address, and the website is
14 www.SCO.DE, which is our German website.

15 Q So he signs his name -- so he signs his affiliation as
16 EMEA and the SCO Group, GMBH.

17 A Correct.

18 Q Not the SCO Group, Incorporated or the SCO Group
19 Operations --

20 A Correct.

21 Q -- I mean the SCO Operations. So now, they asked, was
22 he reprimanded. Was Mr. Bayer reprimanded?

23 A Yes.

24 Q Who reprimanded him?

25 A I did.

1 Q How severely?

2 A You'll have to ask Cohns [ph].

3 Q Okay. Did Mr. Hunsaker partake in that?

4 A No.

5 Q Okay. That was you then?

6 A Yes.

7 MR. SPECTOR: Okay. Your Honor, both of those
8 issues that Counsel raised, you know, holding himself out as
9 -- he held himself as what he was: EMEA GMBH, both of which
10 are designations for a foreign entity and not the Debtors,
11 and he was reprimanded for stepping out of line for this.
12 So I think we've made the record we need to make to exclude
13 these exhibits and the line of questioning that followed.

14 MR. MARRIOTT: Your Honor, I --

15 THE COURT: You rest on the argument.

16 MR. MARRIOTT: -- stand by what I've said.

17 THE COURT: All right. Well, I am going to
18 sustain the objection and strike that testimony. I think
19 that, to the extent these documents were offered for the
20 truth -- for their truth or as an admission, they simply
21 don't meet the tests. And I also think that they're highly
22 prejudicial, and they're -- the prejudice far outweighs
23 their relevance.

24 MR. SPECTOR: Thank you, Your Honor.

25 BY MR. SPECTOR:

1 Q Those exhibits are out, there's a generalized
2 discussion about Mr. Bayer generally.

3 A Yes.

4 Q Did Mr. Bayer ever express different views about his
5 support for the mobility platform?

6 A Yes, he did.

7 Q And how was he -- do we have -- well, did he do that
8 in emails that we have as exhibits?

9 A Yes.

10 Q Those are some of the exhibits we brought?

11 A Yeah. Numerous, yes.

12 Q What about the lawsuits? Did he express opinions
13 different than what you heard today about the lawsuits?

14 A They're 180 degrees different.

15 Q What about your management of the company? Has he
16 expressed different views about the management of the
17 company?

18 A Yes, he's been very supportive.

19 Q SCO -- how is SCO Group's liquidity? Does it have a
20 lot of funds?

21 A No.

22 Q And it hasn't for some -- quite some time, correct?

23 A Correct.

24 Q Is there a competition for funds between the mobility
25 -- strike that. I'm leading. How is it that the mobility

1 side of the SCO tree and the UNIX [ph] side of the SCO tree
2 get funded?

3 A Well, we determine how much we're going to allocate
4 for certain technology and developments, and then we spread
5 them accordingly.

6 Q Okay. And is Mr. Bayer affiliated with one part of
7 the company more so than another?

8 A Yes, absolutely.

9 Q Which one is that?

10 A UNIX.

11 Q And you said before that mobility really isn't sold
12 overseas, those products?

13 A No, we tried to early on, then we just decided we had
14 to settle down and hunker down and make it be successful in
15 the U.S., and then we would go overseas later.

16 Q Okay. So is it fair to say he's an advocate for
17 further funding for UNIX over other operations in the SCO
18 business?

19 A Yes, that would be fair.

20 Q Did you hear the testimony from Counsel, I guess, the
21 statement before that Mr. Bayer says that everybody's in
22 favor of the -- now this may have been stricken and I'm
23 sure, but everybody in the company is in favor of the going
24 forward with the Unxis deal?

25 A Yes.

1 Q I think it was called the MBGCB deal.

2 A Yes. Uh-huh.

3 Q Is it -- do you share that viewpoint?

4 A Yes, absolutely.

5 Q Well, do you understand that the import of these --
6 Counsel's question is that there was complaints that you
7 were standing in the way of that deal?

8 A Yes.

9 Q Okay. And they were irritated by your standing in the
10 way of this great deal with Unxis?

11 A Yes, they were.

12 Q We have to turn, then, to Mr. Norris and Mr. Robbins.

13 A Okay.

14 Q How did you know Mr. Robbins?

15 A I originally met him a number of years ago, eight or
16 ten years ago. I was coaching youth football. I was little
17 league coach, and his son was on the team. His son and my
18 son became friends --

19 Q So your --

20 A -- and so --

21 Q -- relationship originally was a family relationship?

22 A It started off as a family relationship, and then over
23 time, our kids ended up being good friends, and then over, I
24 don't know, a couple years, a year-and-a-half or two, he
25 started to want to get more friendly with his -- he and his

1 wife and me and my wife.

2 Q All right. Did the -- who introduced you to Mr.
3 Norris?

4 A Mr. Robbins.

5 Q And at that time, did you have some understanding
6 about their relationship?

7 A I knew they'd been in some previous dealings, but I
8 didn't know exactly what it was.

9 Q And once you got introduced to Mr. Norris, did Mr.
10 Robbins have anything to do with the SNCP [ph] deal?

11 A Not materially. He was involved a little bit early
12 on, but it really started to morph pretty quickly away from
13 him and to Steve.

14 Q What was this testimony about his verbally agreeing
15 to, I think you used the term, backstop \$5 million DIP loan?
16 Tell us about that.

17 A Well, Mr. Robbins held himself out as somebody who was
18 a very wealthy individual, had showed me one time a balance
19 sheet, a personal balance sheet that he was worth nearly
20 \$200 million, and he didn't know what to do with all his
21 money. And so he, you know, was -- basically, at the point
22 in time we had this bad ruling out of the Utah Court. We
23 were friends at that point in time. We kind of tracked it
24 for a while. We went through the York deal. And there was
25 a point in time there where he said, well, hey, let me see

1 if I can come and help you, because I have -- you know, I
2 have a lot of resources. That was the way he represented
3 it. At the end of the day, that representation was, sort
4 of, like the Bernie Madoff, Jr. representation that it turns
5 out he ended up being fraudulent in a lot of his business
6 dealings. He was running a Quamsi scheme. And he
7 ultimately took a fraud judgment. Then when he wouldn't
8 report to court, they issued an arrest warrant for him, and
9 he's been on the run ever since January of '09. And so --

10 Q Did -- well, let me stop that. I mean, they're --

11 A I'm sorry.

12 Q -- going to say this is a run-on narrative, and I
13 wouldn't blame them.

14 A Okay. Well, you asked what I thought about him, so I
15 was trying to give --

16 Q Well --

17 A -- a picture.

18 Q -- actually, I -- I'm not sure that was my question,
19 but you said earlier that you had a judgment against him,
20 and you're working on getting more?

21 A Yes.

22 Q Okay. Are you in -- how -- what, if anything, are you
23 doing to try to collect that judgment?

24 A We're working through the judgment process as far as
25 trying to attach his various properties.

1 Q Do you have any relationship with Mr. Robbins
2 whatsoever, other than as an adversary?

3 A No.

4 Q Okay. Did you ever have any business relationship,
5 formal or otherwise, with Mr. Robbins?

6 A No.

7 Q You loaned him money.

8 A Yes, I did.

9 Q Why did you do that?

10 A Well, again, at the period of time we're talking
11 about, he came in and represented that, you know, he had
12 this massive empire he was sitting on; he had a lot of
13 money. And he introduced me to Steve Norris. Steve came in
14 and started working on our deal. And then shortly after the
15 deal is when Mark Robbins hit me up and said hey, I need a
16 quick spot loan for a week or two for 100,000, which you
17 know, was a big gulp for me and Mrs. McBride, but we did it
18 on the representation that it was going to be -- get paid
19 back soon. And that --

20 Q This was a short-term loan?

21 A Short term, yeah.

22 Q Just to tide him over for a short period of time?

23 A Yeah, the -- it was just a cash-flow issue, as he
24 described it. And so the point was we're moving, barreling
25 down the road with Mr. Norris. It all seemed good. And his

1 representation to me was, yeah, he owed this money. He owed
2 money to Norris, but he just wanted me to give him a loan
3 for a short period of time.

4 Q Well, how did this come about that this money was
5 going to Mr. Norris instead of Mr. Robbins, who was --
6 needed the cash?

7 A Well, Mr. Robbins got his by other means, you know,
8 soon after that. He got another 200,000 and that --

9 Q All right. Let's start with the first one.

10 A Okay. The -- well, the first one was he had
11 represented to Mr. Norris that he was going to pay him
12 money. And at the end of the day, this is the guy who
13 represented to everybody around him how rich he was and how
14 wealthy he was, but he was using a credit card to fly around
15 on a corporate jet and act like he was a big shot, when the
16 reality was he didn't have any money.

17 Q All right. So why is it -- how did it come about that
18 you loaned him \$100,000 by paying it to Mr. Norris? What
19 was the res gestae of that deal?

20 A Well, so he came to me and said, look, I've
21 represented to Mr. Norris that I'm going to pay -- I was
22 going to pay him for these fees, because he was -- he had a
23 deal with him not just on our deal but other deals he was
24 doing with him where he had -- obligated to pay --

25 Q This was where Robbins had deals with Norris and

1 Robbins --

2 A Yes.

3 Q -- owed money to Norris?

4 A Yes.

5 Q Okay.

6 A And so he had obligations to pay Norris, and he asked
7 me if I would, again, just loan him the money for the period
8 of a week or two, because he'd get it right back to me. So
9 I viewed it as a pretty innocuous thing at the time.

10 Q If you realized how big an issue that came to be in
11 this case, would you have done that?

12 A Not in a million years. It's not -- before we get to
13 this case, the McBride family home case has been a disaster
14 since we went through this, and I have to tell you, this
15 whole thing of him representing that he had all this money,
16 it was a short-term loan, he was going to pay me out, not
17 just on the 100- but on the full 300-, has been a major
18 problem at home and at work.

19 MR. MARRIOTT: Your Honor, could I just inquire
20 where we are on time since I know we have additional
21 witnesses?

22 THE COURT: I think we've all gone so far over
23 time, at this point, but --

24 MR. SPECTOR: I -- my other witnesses are not
25 nearly as lengthy as these. I have Mr. Hunsaker's

1 declaration.

2 THE COURT: Right.

3 MR. SPECTOR: And it is fairly limited in scope.
4 This is not limited, and we have Mr. Norris to testify, and
5 his is very limited in scope. So we have to have Norris.
6 He has to leave. Even if we have to go out of order, we
7 have to use Mr. Norris, but --

8 THE COURT: Understood.

9 MR. SPECTOR: -- I'm almost done with my
10 redirect.

11 THE COURT: All right. Because I understand why
12 the Robbins/Norris issue came up. I -- well, I don't --
13 I'll be anxious to hear why it's so important --

14 MR. SPECTOR: Well --

15 THE COURT: -- to the --

16 MR. SPECTOR: -- you know, I heard in their
17 papers why, but I -- if we're going to -- some Courts like
18 to have a little colloquy, why are we talking about this at
19 this point in the case. I won't, because we don't have
20 time, but --

21 THE COURT: Right.

22 MR. SPECTOR: -- we'll get to that.

23 BY MR. SPECTOR:

24 Q This was all taking place in the context of a deal
25 with which company? Let me strike that. This was in, when,

1 May? When was this loan made? That's a better question.

2 A The span of the 300,000 spread from February to about
3 May.

4 Q Well, there's only 100,000 that ever went to Mr.
5 Norris, right?

6 A Yes.

7 Q Okay. That meaning the 100,000 --

8 A Yes.

9 Q -- you loaned to Mr. Robbins by giving it to Mr.
10 Norris?

11 A Yes, that's right.

12 Q Okay. And when did this take place?

13 A That was in -- Robbins hit me up in February of --
14 that would've been '08, and I think the actual wire went to
15 him two weeks later. That was probably in the first or
16 second week of March.

17 Q And that was about the time, was it, that the SNCP
18 deal was crumbling?

19 A Well, it was transitioning from the MOU to the way the
20 new buyers wanted to do this, so that we were in the
21 transition mode then.

22 Q And did you ever have any notion of asking SCO Group
23 or SCO Operations, or anybody at SCO, to reimburse you for
24 the \$100,000 you loaned to Mr. Robbins to give to Mr.
25 Norris?

1 A No, I asked for advice as to whether it was okay, but
2 I never asked for any reimbursement from anybody at SCO.

3 Q You had no intention of ever asking for reimbursement
4 from the company?

5 A No.

6 Q Now, if Mr. Norris got this money and it's not tied to
7 SCO in any way, in other words, were you paying Mr. Norris
8 for anything that he was doing for SCO in this \$100,000
9 transaction?

10 A No.

11 Q As opposed to SNCP getting \$100,000 for a marketing
12 study from the Japanese entity, that -- you weren't paying
13 him for something?

14 A Yes.

15 Q Okay. Let's turn to the -- one more thing about this.
16 Why -- what did the article say that was of concern to Mr.
17 Norris and his investors in this SNCP deal?

18 A Yeah, the big headline came out that said that 95
19 percent of the UNIX royalties had to go to Novell as the
20 result of a recent Court ruling, which is --

21 Q And that --

22 A -- patently false.

23 Q Has that issue been resolved --

24 A Yes.

25 Q -- to a large extent? By what?

1 A Well, first of all, it was false to begin with, but
2 the bigger thing that happened is in the July 16, 2008
3 ruling from Judge Kimball, he affirmed our ownership rights
4 of UNIX, confirmed the extent that there were any royalty
5 issues ever tied from SCO back to Novell for UNIX where --
6 that those had expired in 2002, and that we -- basically, it
7 was clear saving for the UNIX business with respect to any
8 royalties. Nothing would be owed to Novell.

9 Q Do you have deals with Mr. Norris, besides through his
10 Unxis company and you being the CEO of SCO?

11 A No, I don't.

12 Q Does Talus Company [ph], do you have any interest in
13 that?

14 A No, I don't.

15 MR. SPECTOR: Your Honor, I believe you've
16 received a copy of the complaint. I would -- if you
17 haven't, I'll give you my copy of the complaint. I would
18 ask, Your Honor, if it has any impact at all on Your Honor,
19 to read the entirety and see what it is Mr. Robbins -- or
20 it's not Mr. Robbins who's suing him. It's this company
21 that -- oh, I forget the name of it. Pelican something.

22 THE COURT: Yes.

23 MR. SPECTOR: You'll see exactly what they say in
24 the factual allegations, say that -- and Mr. McBride doesn't
25 know this, but you'll see what it is they say Mr. McBride's

1 role was, and you'll -- notwithstanding anybody can put in a
2 complaint against all Plaintiffs -- I mean against all
3 Defendants, but you should see, if it's going to have any
4 weight at all, exactly what it is they said Mr. McBride's
5 role was at -- in that was. So if you don't have it, I will
6 see that you get it.

7 THE COURT: I don't believe I did receive it.

8 MR. SPECTOR: All right. I have it here before
9 the --

10 THE COURT: I think there's only one copy.

11 MR. MARRIOTT: I can give you a copy, Your Honor.

12 MR. SPECTOR: I would like it if you could.
13 Sure.

14 THE COURT: Thank you. Thank you, Mr. Marriott.

15 BY MR. SPECTOR:

16 Q Are there any other deals with Mr. Norris and Mr.
17 Robbins that you should tell the Court about that -- secret
18 or otherwise?

19 A No.

20 Q Okay. Do you have any deal to go and work for the
21 acquiring company, Unxis?

22 A No.

23 Q Any discussions about you going to work with Unxis?

24 A No.

25 Q Do you have any intentions to go to work with Unxis?

1 A No, I -- my desire is to get the SCO Group turned
2 around and work here another ten years.

3 Q Any kickbacks to you from anybody for -- from Unxis,
4 from SCO, for anybody involved in these transactions?

5 A No. In fact, that's the irony of the whole deal is
6 that I'm the one that was paying the money out, and I'm the
7 one who's under attack for that.

8 MR. SPECTOR: That's all I have, Your Honor.

9 THE COURT: All right. Thank you. Recross? Any
10 follow-up cross?

11 MR. MARRIOTT: I'd ask to have one minute, Your
12 Honor.

13 THE COURT: Sure.

14 MR. MARRIOTT: I have no further questions.

15 THE COURT: All right. Mr. Lewis?

16 MR. LEWIS: No, Your Honor, thank you.

17 THE COURT: All right. I think, then, Mr. -- may
18 Mr. McBride --

19 MR. SPECTOR: Yes, he may --

20 THE COURT: -- be excused?

21 MR. SPECTOR: -- step down.

22 THE COURT: You may step down. Thank you, Mr.
23 McBride.

24 MR. SPECTOR: Your Honor, we have Mr. Hunsaker.
25 We have Mr. -- what's his name -- Norris.

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THE COURT: Does anyone wish to have a break?

MR. SPECTOR: I would.

THE COURT: All right. There is a soda machine downstairs. I don't know if anyone mentioned this to you. Feel free to bring them in, bring in a soft drink or something like that. What do you want? Ten minutes?

MR. SPECTOR: Sure.

THE COURT: Ten minutes. Thank you.

(Recess at 6:44 p.m.)

AFTER RECESS

(Call to Order of the Court at 6:57 p.m.)

THE COURT: Thank you. Please be seated.

Mr. O'Neal [ph]?

MR. O'NEILL: Yes, Your Honor. Good evening. I'd just like to respond to a question Mr. Harrington [ph] raised before, and I did have an opportunity to speak with him --

THE COURT: On the service --

MR. O'NEILL: -- regarding the service.

THE COURT: Yes.

MR. O'NEILL: And I wanted to confirm for the Court that we did, in fact, serve an interested-parties list regarding the sale, and that certificate of service is at Docket No. 821. And because of confidentiality, it doesn't list the identity of the parties. The certificate of

1 service just indicates that 20 interested parties were
2 served. And I indicated to Mr. Harrington that, subject to
3 appropriate confidentiality, if he needed that information,
4 we could certainly share it with him. But I just wanted to
5 address that point so that Your Honor knew.

6 THE COURT: Thank you, Mr. O'Neal.

7 MR. O'NEILL: Thank you.

8 THE COURT: Thank you.

9 MR. SPECTOR: The Debtors call Steven Norris to
10 the stand.

11 THE COURT: All right. Mr. Norris?

12 MR. SPECTOR: And I don't believe she -- Ms.
13 Bayles [ph], due to her appearance, but Ms. Bayles is here
14 to --

15 MS. BAYLES: Good evening, Your Honor.

16 THE COURT: Good evening, Your Honor.

17 MS. BAYLES: Leslie Bayles, on behalf of Unxis,
18 Inc.

19 THE COURT: All right.

20 MS. BAYLES: And Mr. Spector's going to let me
21 sit on this side of the --

22 THE COURT: Absolutely. You certainly may. Mr.
23 Norris, if you'll just remain standing while you're sworn.

24 THE CLERK: State your full name and spell your
25 last name, for the record.

1 MR. NORRIS: Steven L. Norris, N-o-r-r-i-s.

2 STEVEN NORRIS SWORN

3 THE COURT: You may proceed.

4 DIRECT EXAMINATION

5 BY MR. SPECTOR:

6 Q Good evening, Mr. Norris.

7 A Good evening.

8 Q I'm going to quickly go through your pedigree, but you
9 don't have to go quickly when I -- just because I do. Where
10 were you educated, sir?

11 A I went to three different universities. I went to the
12 University of Alabama, where I got a bachelor of science. I
13 also got a JD degree there. I got an LLM from New York
14 University. And I was a fellow at Yale Law School.

15 Q What were the years of these degrees?

16 A I was afraid you'd ask that. I graduated from college
17 in 1972, from law school in 1975, from NYU in 1976, and I
18 was in -- at Yale in 1977.

19 Q Tell us about your employment after you concluded your
20 studies.

21 A I worked for about three years for a law firm in
22 Washington, D.C. called Cohen and Uritz [ph].

23 Q And then what?

24 A And then, I left the -- I left that firm and went to
25 work for the Marriott Corporation, where I worked from

1 approximately late 1980/early 1981 until 1987.

2 Q And what was your job description there?

3 A When I went to Marriott to work for Mr. Marriott, I
4 was a director of taxes. When I left, I was vice-president
5 for tax, and I worked on a variety of transactions and
6 everything.

7 Q What did you do after that?

8 A I started a private-equity firm in Washington, D.C.

9 Q What was the name of that firm?

10 A The name of that's called The Carlisle Group.

11 Q Tell the Court something about The Carlisle Group.

12 A Well, The Carlisle Group grew out of an idea that
13 David Rubenstein and myself had to establish outside of New
14 York City a Blackstone, if you will, type private-equity
15 firm. I think it's now the -- one of the -- it's the first-
16 or second-largest firm in the world today, in terms of
17 private equity, depending on how you measure.

18 Q And there's -- did there come a time that you left the
19 -- Blackstone Group -- strike that, The Carlisle Group?

20 A The day I left, I was a senior advisor through 1996.

21 Q And what did you do after 1996?

22 A I set up another firm that was called Apiant Group
23 [ph], which I ran for approximately three years.

24 Q What did that firm do?

25 A Essentially the same sorts of thing, slightly

1 different kind of transaction. We focused a bit more on
2 transactions in foreign markets, but it was a private-equity
3 firm. We also did some real estate.

4 Q And when did you leave that firm?

5 A I actually sold that firm in the late 1990s and formed
6 another partnership in Washington with a gentleman who was
7 in the real-estate business, called Washington Investment
8 Partners.

9 Q All right. And how long were you with that firm?

10 A I was there until -- effectively until 2005, although
11 I still have an interest in some residual interests in some
12 of the -- some of their investments.

13 Q What have you done since then?

14 A In the last couple of years, I primarily acted as an
15 independent consultant in connection with private-equity or
16 real-estate transactions with a focus on working with a
17 number of groups, primarily from the Middle East and their
18 U.S. and European investment strategy and things related
19 thereto.

20 Q Tell the Court something about your investment
21 experience, business investment experience.

22 A Well, I think I've seen, over the last 20-some years,
23 investments of virtually every kind, from real-estate
24 investments to private equity to buy-outs. I've had the
25 great honor to work on the first recapitalization, Your

1 Honor, of Citibank. I worked on a number of major
2 investments in public companies: Disney being one, Four
3 Seasons being another, a variety of buy-outs in virtually
4 every industry, and as I say, a number of different kinds of
5 real-estate investments.

6 Q Did you ever do any public service?

7 A Yes, I was appointed by the -- I was asked to -- by
8 the president of the United States to serve on the federal
9 retirement board, and I was confirmed by the U.S. Senate to
10 that position.

11 Q That's the thrift-savings board where Your Honor --
12 where His Honor has probably a 403-B, like I do?

13 A I certainly hope so. It's a good plan. We've spent a
14 lot of time to implement it.

15 Q Who or what is Unxis?

16 A Unxis is really a company that was formed for the
17 purpose of making an acquisition of the UNIX business from -
18 - in the SCO Group.

19 Q And who are the constituent members?

20 A Well, there's two shareholders at the present point in
21 time. There's a company called Gulf Capital Partners -- of
22 which I'm the chairman, which is a recently formed, private-
23 investment company, capitalized primarily with partners from
24 the Middle East -- and a company called Merchant Bridge --
25 which is a London-based merchant bank, which is run by a

1 former head of Carlisle International.

2 Q We're going to take them one at a time. How well
3 capitalized is Gulf Capital Partners?

4 A Today, we are in formative stages, but we have a
5 committed capital from our investment -- from our investors
6 in the range of \$10 million.

7 Q Okay. Do you know -- if you know, how well
8 capitalized is Merchant Bridge?

9 A To be frank, sir, I don't know the precise
10 capitalization, but it's a classic English-style merchant
11 bank. And I'm informed that they have substantial drawing
12 lines and access to the capital, not only of their firm but
13 some of their investors on a co-investment basis.

14 Q Tell us what you know about Merchant Bridge as an
15 entity.

16 A Well, Merchant Bridge is a well-regarded entity with a
17 -- they've had a focus primarily on investments in the
18 Middle East, and recently have been in the Vanguard on
19 investments in Iraq. They're working on, for example, a
20 major, new concrete facility in the western part of Iraq, so
21 they have quite a bit of experience in the Middle East.

22 Q How long have they been in business?

23 A I think Merchant Bridge was formed in about 1998.

24 Q And do you know the principles of Merchant Bridge?

25 A I know the -- two principles quite well.

1 Q Who are they?

2 A Well, I mentioned earlier Basal al Raheem [ph], who
3 was, for a time, the co-head of Carlisle International. And
4 the other principle partner there -- and I use partner in
5 the generic sense -- is a gentleman whose name is Eric
6 Leblanc [ph].

7 Q And did you have any prior dealings with Mr. Leblanc?

8 A No, I actually met Eric for the first time when I was
9 introducing a potential investment in SCO, in approximately
10 August of last year.

11 Q Do you know who at Merchant Bridge carries the
12 technical knowledge about businesses like SCO?

13 A Well, that would be Eric Leblanc.

14 Q Well, is there anybody else there that interfaced with
15 technical people on the SCO side?

16 A Yes. They have a very accomplished young analyst.
17 His name is Raif Alotta [ph]. I think he's in his mid-20s,
18 and he already has, I'm told, more than two patents.

19 Q Well, what, if any, relationship do you have with the
20 Merchant Bridge -- with Merchant Bridge or its principles?

21 A Well, I've only had a social prelateship over the last
22 decade or so with Basal al Raheem, and Eric is totally a
23 professional-partnership arrangement that we've put in place
24 for purposes of effectuating this transaction.

25 Q When did Merchant Bridge and Gulf Capital Partners

1 become interested in SCO?

2 A Well, Gulf Capital Partners, as I mentioned, was more
3 recently formed, but the initial meetings with Merchant
4 Bridge took place in August and then in the fall of last
5 year, 2008.

6 Q How did it come to the attention of Merchant Bridge?

7 A I brought it to Basal's attention and told him that I
8 thought it was something that he ought to take a hard look
9 at.

10 Q And after the -- there -- I take it there was an
11 introductory meeting, at some point?

12 A Yes, that was in August where one of the
13 representatives from the company's overseas operation and
14 myself met with Mr. Leblanc for about a two-hour lunch
15 meeting.

16 Q How did these talks go?

17 A Well, they went extremely well.

18 Q What happened after those introductory talks went
19 well?

20 A Well, we had a series of follow-on meetings. Darl
21 McBride and myself and Jeff Hunsaker and Hans Bayer and then
22 Andy Nagel [ph], we had a series of meetings throughout the
23 fall, beginning in October, where there was a set of
24 representatives, and then later on in November, where there
25 was a broader set of representatives. And I think it was in

1 the November meetings where they actually introduced the
2 engineering team, led by Mr. Nagel.

3 Q How intense were the discussions between the techies?

4 A I will say that they speak a totally different
5 language, and there was quite intense discussions between
6 Eric, Raif [ph], the two Merchant Bridge representatives,
7 and Andy, and even -- and Jeff Hunsaker. And I must say,
8 for most of that, I was probably concentrating somewhere
9 else.

10 Q What transpired after these November discussions had
11 concluded?

12 A Well, we began to work seriously with the company on
13 an effort to put together some kind of an investment. At
14 the time, we were thinking in terms of a -- forming a
15 company, as we ultimately did, that would make an investment
16 in the business, the UNIX business. But it was very, very
17 complicated, because we wanted to be sure that we had no
18 continuing involvement whatsoever in the litigation and the
19 controversy that's really germane to this whole proceedings.

20 Q Well, why are you -- why were your group -- why was
21 your group interested in acquiring the UNIX business?
22 What's your goal?

23 A Well, the goal is pretty simple. There's three
24 operating systems, to be frank, and about -- the market,
25 depending on how you define it, Your Honor, is somewhere in

1 the neighborhood of \$8 to \$10 billion a year. Probably
2 about 40 percent of that is Microsoft. There is a big piece
3 of the market that, for a variety of reasons, would prefer
4 not to deal with Microsoft. There are two other operating
5 systems, the both of which we think are fine and terrific
6 systems. One is Linux, supported by IBM. We think that's a
7 very fine system. It has a lot of applications to a lot of
8 people, as witnessed by the rather considerable sales and
9 revenues. If you just look at Red Hat's revenues last year,
10 its consulting alone \$750 million in the last quarter. But
11 we also think that there's an opportunity for the UNIX
12 system, particularly in the emerging markets. It's a secure
13 system, you know. In the run-on since 9/11, people are
14 increasingly concerned about cyber security. I mean, Your
15 Honor's probably seen the stories about, probably, the
16 Koreans but maybe the Chinese hacking into the Defense
17 Department. People are much more, I think, thinking in
18 terms of certain advantages to proprietary systems. And so
19 we saw a unique opportunity to acquire an operating system
20 that has -- is well known for its reliability and take a
21 particular interest into the emerging markets.

22 Q Now you touched upon a concern about separating the
23 UNIX business from the litigation.

24 A Yes, sir.

25 Q I take it, then, Unixis and its constituents have no

1 interest in pursuing litigation that SCO is now pursuing.

2 A That's correct.

3 Q And I take it you -- did you -- did Merchant Bridge
4 and Gulf Capital Partners do any due diligence with regard
5 to that litigation before it decided to purchase this
6 company's UNIX business?

7 A Yes, we did. We had a decent feel for most of the
8 technology issues, but the -- some of the copyright, the IP
9 issues, were very complex. The -- frankly, the opinions
10 that are out there could be read both ways. You could make
11 a plausible argument that IBM should win and a plausible
12 argument that SCO should win or Novell should win. And yet,
13 we felt that if you could separate that out, you had a very
14 viable business, so we've spent an enormous amount of time
15 and, I must say, a fair amount of money on IP lawyers to
16 sort of give us the view as to how that could be done.

17 Q Did there come a time that the talks in late 2008 came
18 to an end, or at least a hiatus?

19 A Yeah, it came to a hiatus principally because, in my
20 view, we were running up against roadblocks in exactly how
21 we would define the assets to be acquired. It was very
22 important to us that what we were acquiring were free and
23 clear, and that a very complicated thing to do.

24 Q At some point, did SCO decide to go a different way?

25 A They did. We were actually quite disappointed, but

1 they did.

2 Q What -- and when was that, if you recall?

3 A That was some time around the early part of this year,
4 2009. We were actually hoping that we could reach an
5 agreement toward the end of last year, in December, but that
6 -- we weren't able to do it.

7 Q Well, when SCO went that other way, did you take any
8 action?

9 A Well, we didn't go away. We continued to try to have
10 an active and constructive dialogue. We continued to feel
11 that we could find a way through the morass of the
12 conflicting points of view dealing with the IP, and so we
13 kept at it.

14 Q But I take it, since you're here supporting the sale,
15 you continued negotiations some time after the plan was
16 filed in January of '09.

17 A We did. We've continued negotiations right up until a
18 few minutes before His Honor had the last hearing.

19 Q What's the structure of the deal that was discussed
20 from January of 2009, or thereabouts, through now?

21 A To be frank, sir, the basic structure really didn't
22 change much. We sort of -- as I said, we were very clear
23 that we didn't want to have anything to do with litigation,
24 the merits of that notwithstanding on either side of it. We
25 simply wanted to acquire the rights to the operating

1 platform, to the operating system. So that basic structure
2 really continued throughout the negotiations. I personally
3 didn't take -- was not involved in the detailed
4 negotiations, but in terms of the -- that basic strategy
5 really didn't change much.

6 Q Now you said you did the due diligence on the
7 litigation with Novell in reference to checking on what
8 intellectual property Unxis could get from SCO.

9 A Right.

10 Q Can you tell us whether Unxis is satisfied that it's
11 getting everything it needs to run its business?

12 A Well, we started from the premise that Judge Kimball,
13 in his ruling, I believe it was last summer, had said that
14 SCO had all of the necessary rights and assets, if you will,
15 to conduct the business that it had therefore been
16 conducting. We also took some comfort, or I believe the
17 lawyers did, out of the fact that this business had been
18 sold to a -- from Santa Clara corporation to --

19 Q Santa Cruz.

20 A -- Santa Cruz to Caldera some years earlier without
21 any objection, so we felt comfortable that we could, indeed,
22 acquire what we needed for, what I call, the short term.
23 Longer term, these systems will merge and migrate, and it
24 becomes less of an issue.

25 A So we felt comfortable that we could indeed acquire

1 what we needed for what I call the short term. Longer term,
2 these systems will merge and migrate and it becomes less of
3 an issue.

4 Q Now, to run the business, I assume you're going to
5 have to have a lot of the contracts that SCO currently is
6 party to; is that right?

7 A That's correct.

8 Q Have you or your representatives directed the debtor
9 to assume and assign hundreds, if maybe more, contracts?

10 A There's been long and painful, I think, discussions
11 over all that. My -- I'm informed by my lawyers and
12 counsel, and by my business partners, that the contract that
13 we've entered into conveys to us everything that's
14 necessary.

15 Q How much is Gulf Capital Partners invested so far in
16 this deal?

17 A You mean in the deal that's currently being discussed?

18 Q Yes.

19 A Well, the investment's a bit tricky We're responsible
20 for our share of the expenses, which are probably, to date,
21 are in the range of a half a million dollars of accrued
22 costs for legal counsel, IP analysis, and so on. And then,
23 of course, we have at risk a deposit of \$250,000.

24 Q And getting into the counsel business did you have any
25 difficulty finding counsel to help you negotiate with our

1 team?

2 A I did. The first group of lawyers that I wanted to
3 retain -- not that we didn't retain excellent counsel, we
4 did. There was actually two firms that I have historical
5 relationships with that have conflict of interest with one
6 or the other of the parties to certain of the litigation.

7 Q And what effect did that have on the pace of the
8 negotiations with SCO?

9 A Well, it slowed it down. We spent probably three
10 weeks or four weeks trying to get counsel that was not
11 conflicted. We were fortunate in finding counsel that I had
12 a historical relationship with, but it was a tedious -- it
13 was a task, to be frank, Your Honor.

14 Q How committed are you personally in seeing that this
15 deal gets concluded?

16 A Well, I can tell you that I spent nine hours in the
17 waiting room today, and I'm sure Your Honor is equally tired
18 of today's proceedings.

19 We're very committed. I personally have had a lot at
20 stake in this. There is, as you know, sir, a lot of
21 controversy around the various aspects of the litigation
22 that gave rise to these proceedings, and people have strong
23 feelings on either side of it. And so, by venturing forth
24 into the SCO morass, I found myself the victim of not daily
25 anymore but virtually weekly bloggers with the various

1 conspiracy and other theories that are amusing but not
2 something that you would go into lightly. But still, I
3 believe that this is something that's worth doing.

4 Q So you've suffered the barbs of the bloggers. You
5 suffered nine hours in a Delaware waiting room. You've paid
6 hundreds of -- or obligated yourself for hundreds of
7 thousands of dollars. And I take it your answer is that
8 you're very committed to this deal.

9 A I am committed. I must say, too, that on the
10 conspiracy theories, it's most interesting to me that
11 somehow we're in cahoots with Bill Gates. Why in the world
12 he would need us is not so clear to me, Your Honor, but it's
13 something that we read about.

14 Q How soon can Unix close this deal if Judge Gross were
15 to sign an order today authorizing the Debtors to close it?

16 A We're committed to move as rapidly as possible.
17 There's some time periods provided for in the agreement.

18 To be quite honest, this has been a complicated
19 situation and none of us knew what Your Honor might rule.
20 And, therefore, we've had to wait and see, and there have
21 been objections voiced by various of those. And so we've
22 been in a position of not knowing exactly what we would be
23 faced with.

24 But suffice to say that we're committed to moving as
25 rapidly as possible. It's not a lot of money. And we feel

1 that this can be done certainly within the time frame set
2 out in the Purchase and Sale Agreement.

3 Q Does Unix have funds to close this deal as quickly as
4 possible as you've indicated?

5 A Well, Unix itself at the current time has access to
6 capital through Gulf Cap and through Merchant Bridge. We
7 also have had -- just this week, we now have received a
8 binding commitment, subject to the judge's order, for about
9 a million dollars. We've gone out to interested investors
10 because we think it will make a better company.

11 Q Well, let me just -- now that you've opened that door,
12 I take it you're not at liberty to discuss who these
13 individuals are?

14 A I'd be more than happy to, in some kind of a protected
15 way, discuss who potential investors that we're talking to
16 would be, but I wouldn't be prepared, unless compelled, to
17 put on the public record simply because it ends up on
18 someone's blog.

19 Q Now, there's two parts to this. Correct me if I'm
20 wrong. There's the take-out portion, that is at the closing
21 with SCO, with a 2.15 either letter of credit or cash that
22 would go to SCO --

23 A That's correct.

24 Q -- and a 2.85 million dollar letter of credit against
25 which Novell judgment would be covered.

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A That's correct.

Q Come hell or high water, no investors besides Merchant Bridge and Gulf Capital Partners, is this deal going to close for those funds?

A We have the resources to not only the combination of those two but to put in the initial working capital that we would require for probably operating the company somewhere in the range of a year.

Q And speaking of working capital, is that the major focus of your fundraising at this point?

A Yes, it is. I mean, our plan, Your Honor, is to try to raise about \$10 million initially, approximately 6 million of which would be used for working capital. And the bulk of that would be used for marketing and for engineering.

MR. SPECTOR: I'll pass the witness at this time, Your Honor.

THE COURT: All right. Thank you.

CROSS EXAMINATION

BY MR. REYNOLDS:

Q Good evening, Mr. Norris.

A Good evening.

Q You mentioned that you recently received a binding commitment for \$1 million. Is that from an investor has signed a Subscription Agreement, for example?

1 A It's actually from two investors.

2 Q Two investors totaling 1 million.

3 A One million, yes.

4 Q I see.

5 And have they signed documentation with Unix?

6 A They have.

7 Q They have.

8 And how long ago was that?

9 A I think that probably took place on Friday of last
10 week.

11 Q Other than those two documents, which we haven't seen,
12 that total a million dollars, are there any other binding
13 commitments from any other sources that you have at this
14 time?

15 A No.

16 Q Under the Purchase and Sale Agreement, I believe even
17 as amended, Unix is required to provide a \$2.15 million
18 letter of credit within five business days of the approval
19 of the sale order by this court or they could do so at
20 closing.

21 Do you understand that?

22 A I understand that, yes.

23 Q And that could be -- if the Judge were to approve the
24 sale order today, that could be five business days from
25 today.

1 You understand that?

2 A I understand that.

3 Q What is the capitalization of Unix?

4 A Today?

5 Q Today.

6 A Probably about \$10,000.

7 MR. SPECTOR: Your Honor -- I'm sorry; that the
8 question assumed -- the one before. The question before
9 assumed a fact not in evidence, which is untrue, about it
10 being five days from today is what he asked. I believe the
11 contract says five days from a final order. Final order --

12 THE COURT: In other words, after the 10-day
13 appeal period.

14 MR. REYNOLDS: That's -- so five business days
15 from the entry of the order, which may not be five days.
16 Like it would not be five from today. It would be some
17 period longer, but not too far off, if the Court would enter
18 the order shortly.

19 BY MR. REYNOLDS:

20 Q Did you understand that?

21 A I do.

22 Q And you said the capitalization of Unix is
23 approximately \$10,000?

24 A That's correct.

25 Q And you understand that Merchant Bridge and Gulf

1 Capital Partners are not signatories to the Purchase and
2 Sale Agreement.

3 A I understand that.

4 Q Do you have any documents in writing that obligate
5 Merchant Bridge or Gulf Capital Partners to fund this
6 transaction in any way?

7 A I don't -- I don't believe so.

8 Q Do you understand that there are certain contracts
9 that are to be assumed under the Purchase and Sale Agreement
10 by Unix?

11 A I do.

12 Q And have you personally familiarized yourself with the
13 contents of those contracts?

14 A No.

15 Q Isn't it true, Mr. Norris, that Unix itself, which you
16 said was created only recently for this transaction,
17 obviously has no business track record of any kind?

18 A That's true. It's a new company.

19 Q And have you taken any steps at this point,
20 Mr. Norris, to obtain office space in connection with this
21 transaction?

22 A To obtain office space?

23 Q Office space, yes.

24 A No.

25 Q Have you taken any other steps in terms of preparing

1 for the future with this transaction?

2 A We've created an outstanding senior management team.
3 We spend an enormous amount of time on strategic planning,
4 on assessing markets, and on conversations with very well
5 capitalized investors who we believe will make outstanding
6 shareholders. We haven't spent too much time on renting
7 office space yet.

8 Q There's a gentleman named Mr. Jim Kelly (ph), correct?

9 A That's correct.

10 Q And is he someone whom you've already offered a
11 position to?

12 A He is.

13 Q Do you have an agreement with him?

14 A I think he and Mr. Labla (ph) have been having
15 discussions about the finalization of such an agreement.

16 Q Other than Mr. Kelly, whom we just mentioned, have you
17 taken steps to retain anyone else?

18 A Yes, we actually have also recruited a gentleman. His
19 name is Kevin Cheatam (ph), who would be chief financial
20 officer. He was associated with me and Mr. Kelly in another
21 portfolio company that we successfully built with George
22 Sorells (ph) some years ago. He would be CFO. And Jim
23 Kelly has also recruited -- had substantive conversations
24 with a gentleman who would be the general counsel.

25 We've had ongoing and fairly detailed conversations,

1 Eric has, with Mr. Hunsaker, who would come over with
2 Mr. Bayer, who would come over with the engineering team
3 that would come over. So we spent quite a bit of time
4 discussing how we would see the operating management being
5 formed. And also, we've spent some time thinking about, and
6 actually had conversations with one of the leading cyber
7 security experts of the United States about joining our
8 board.

9 Q Have you yourself, Mr. Norris, ever run a software
10 company?

11 A No, no. I'm not an operating officer, sir.

12 Q Now, do you recall that you gave deposition testimony
13 in this matter in Los Angeles on July 17th?

14 A I recall that.

15 Q And you understand you were under oath during that
16 examination?

17 A I understand, sure.

18 Q And if you recall, at that time, you mentioned
19 that -- and there was a presentation that discussed this,
20 that you were seeking minimum investments in investors of
21 \$2.5 million in connection with this joint venture.

22 A You're referring to a presentation we put together for
23 prospective investors, I believe.

24 Q Okay. But that is what the presentation asked for.

25 A I think that's probably what it did ask for.

1 Q But you've now arranged for investments of about half
2 a million dollars each; is that right?

3 A Well, typically speaking, in private equity context,
4 you have an offer, and you always have the discretion to
5 take investments of a smaller or larger amount if you choose
6 to, and that's simply what we've done.

7 Q Is the answer to my question yes?

8 A Could you repeat your question?

9 Q That although you had asked and you had planned for
10 investments of a minimum of 2.5 million from investors in
11 the presentation we discussed in the deposition, that you
12 have, in fact, since then accepted investments of
13 approximately half a million dollars.

14 Is that right?

15 A Two investments at a half a million dollars.

16 Q But is that correct?

17 A That's correct.

18 THE COURT: May I excuse you just for a moment,
19 Mr. Reynolds?

20 MR. REYNOLDS: Yes?

21 THE COURT: If you could speak a little more into
22 the microphone.

23 MR. REYNOLDS: Oh, I'm sorry, Your Honor. Yes,
24 of course.

25 THE COURT: Good.

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MR. REYNOLDS: Sorry about that.

BY MR. REYNOLDS:

Q Mr. Norris, you understand there's a \$250,000 deposit that's been put in escrow, pursuant to the Purchase and Sale Agreement, correct?

A I do.

Q Isn't it true that you're not sure where that money came from?

A No, that's not true.

Q Did you recall testifying in your deposition, when I asked you whether you knew where the actual \$250,000 that was deposited in escrow in connection with the transaction came from, and you responded, "Probably the internal sources of Merchant Bridge." And I said, but do you actually know where it came from and you said "No"?

A Well, the internal sources of Merchant Bridge I stand by it. Where internally they arranged for it, I don't know.

Q Have you yourself contributed any money toward that?

A No.

Q I'd like to move on to a different topic if I may, Mr. Norris, and that is Mr. Robbins was mentioned earlier today in your -- well, maybe before you were --

A No, I haven't been here. I've been outside.

Q -- before you came in.

Do you know who Mark Robbins is?

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A I do.

Q Okay. Who is he?

A Mark Robbins is a Utah-based -- a Utah-based business entrepreneur.

Q Isn't it true that he was, at least at one point, your business partner?

A No.

Q Were you involved in an organization called Peninsula, in which --

A Yes.

Q -- he was also involved?

A He was, but it wasn't his individually. He had an entity that was owned -- interest in that company.

Q Isn't it true that Mr. Robbins introduced you to Darl McBride?

A That's true.

Q And isn't it true that you never heard of SCO prior to the November or December 2007 when Mr. Robbins introduced you to Mr. McBride?

A I think that's true.

Q Now, did there come a time when Mr. Robbins was working with you in connection with a possible transaction involving the assets that are now the subject of the Purchase and Sale Agreement?

A An entity that he formed.

1 Q Okay. And did this end up appearing as a memorandum
2 of understanding in approximately February of 2008?

3 A Yes, it did. There was a memorandum of understanding
4 between an entity formed by Mark Robbins and myself.

5 Q And at the time of the Memorandum of Understanding, is
6 it true that you considered yourself a kind of sponsoring
7 investor who was helping SCO Debtors to raise capital?

8 A The time frame again?

9 Q Around the time of the Memorandum of Understanding,
10 which is February 2008.

11 A Yeah. I was asked by Mr. McBride, with the
12 encouragement of Mr. Robbins, to act as a kind of sponsoring
13 investor in a plan that they planned to and then did file.

14 Q And isn't it true that after that point, you received
15 a payment of \$100,000 from Mr. McBride?

16 A I think that that's -- actually, received the money
17 through Mark Robbins, but I knew it came from Mr. McBride.

18 Q Did you have an agreement with Mr. Robbins that
19 related to that money?

20 A No.

21 Q Did you have an agreement with Mr. McBride in
22 connection with that money?

23 A No.

24 Q And do you recall testifying on July 17th in response
25 to the following question.

1 "Is it fair to say that you were paid this \$100,000,
2 not pursuant to any written agreement?" That's on page 63.

3 And you answered, "That's correct. There is no
4 written agreement. I have no agreement with Darl or didn't
5 sign an agreement with Mark. It was simply on account of
6 the fact that I had been working on this reorganization, and
7 I was not prepared to continue to do it without, you know,
8 some kind of expense covered or compensation. So I looked
9 at it as basically a, you know, a fee, part of a fee to
10 continue to try to help a company put together their plan of
11 reorganization."

12 Do you recall testifying to that effect?

13 A I think that's a fair characterization.

14 Q And do you recall also testifying in response to the
15 question, "Why did you make no effort to have this payment
16 documented in the form of an agreement as you've done in the
17 past and other situations?"

18 And your answer was, "By that time, I was already
19 embroiled in a situation, and I basically said, 'Look, if
20 you guys want me to continue to work on this, you're going
21 to have to provide some cover for this,' and it was in that
22 context. There was nothing really to agree to. I just
23 simply said, 'Look, I need to get some compensation for all
24 this time and effort or I'm not going to continue to go
25 forward with it.' So it really wasn't any more complicated

1 than that."

2 Now, do you recall testifying to that effect?

3 A Yes, I do. I stand by that.

4 Q So isn't it true that the \$100,000 you got from
5 Mr. McBride was in connection with your work for the SCO
6 getters in terms of their reorganization plan and helping
7 them to raise capital?

8 A I don't think there's any controversy over that, not
9 in my mind.

10 Q Right.

11 Another question. If I could point your attention,
12 Mr. Norris, to Exhibit 57 of the Movants. It's in that
13 binder.

14 MR. REYNOLDS: May I approach, Your Honor?

15 THE COURT: Yes, you sure may.

16 BY MR. REYNOLDS:

17 Q So looking at Exhibit 57 of the Movants' exhibits, do
18 you see the first page there?

19 A I do.

20 Q Is it -- that invoice came from you?

21 A I believe it was sent on my behalf.

22 Q And is it not direct to Darl McBride of the SCO Group
23 at its Lindon, Utah address?

24 A Yeah, I think that's where we were told to send this
25 invoice, but this had nothing to do with the payment that

1 came from Mr. McBride, as I'm sure you'll point out.

2 MR. REYNOLDS: Your Honor, if we can take a short
3 break? Is that possible?

4 THE COURT: How much time do you need?

5 MR. REYNOLDS: One minute, Your Honor.

6 THE COURT: Oh, certainly. I'll remain here,
7 then, if you want to step out of the room for a moment or
8 whatever.

9 (Recess from 7:36 p.m. to 7:37 p.m.)

10 MR. REYNOLDS: Thank you, Your Honor. We have no
11 further questions.

12 THE COURT: All right.

13 MR. REYNOLDS: Thank you, Mr. Norris.

14 THE WITNESS: By the way, Your Honor, could I
15 note that the date on this is incorrect.

16 THE COURT: The date on -- what's that?

17 THE WITNESS: On this invoice. It's a typo, I
18 suppose, but it says July 23, 2009.

19 MR. REYNOLDS: That is, Your Honor, how the
20 document was provided to us. I'm not, obviously, aware of
21 the source of it. Sometimes those kind of things when
22 they're printed off the system have the date when they were
23 printed out, and that may well explain that.

24 THE COURT: Thank you.

25 MR. REYNOLDS: We got this document from

1 Mr. Norris' counsel, who represented that she obtained it
2 from SCO, after asking SCO for documents relating to these
3 payments. We, as far as I know, have no record of receiving
4 this document. We're the ones that follow it from SCO
5 itself. So there's no Bates number on it, and that's why.

6 THE COURT: I see. Thank you. Thank you,
7 Mr. Reynolds.

8 Any redirect?

9 MR. SPECTOR: Is there anybody else on your team?

10 THE COURT: Oh, I'm sorry. Mr. Lewis. I
11 apologize.

12 MR. LEWIS: No, Your Honor. I have no questions.
13 Thank you.

14 THE COURT: Mr. Harrington?

15 MR. HARRINGTON: No, Your Honor.

16 THE COURT: I apologize.

17 (Debtor's Exhibit D-34 marked for identification.)

18 REDIRECT EXAMINATION

19 BY MR. SPECTOR:

20 Q I show you what's been marked as Exhibit D-34.
21 Can you identify that document, sir?

22 A Yes. This is actually a copy of the document that was
23 pointed out before but has I think probably the correct date
24 in '08.

25 Q Take a look at the addressee. Is the addressee the

1 same?

2 A No, it's not the same.

3 Q And do you know who paid the invoice?

4 A So far as I know, it was paid from one of the foreign
5 subsidiaries.

6 Q Do you remember my asking you some questions at your
7 deposition? Pardon me. Would you just read into the record
8 who the addressee is on there?

9 A SCO Japan Limited, a subsidiary of the SCO Group.

10 Q Thank you.

11 MR. SPECTOR: I'm going to offer Exhibit D-34

12 THE COURT: Any objection?

13 MR. REYNOLDS: No. This is the first time I'm
14 really focusing on this document, Your Honor. I note that
15 it has the same invoice number as the one that's been marked
16 as Movants Exhibit 57, and I'm not sure of the origin of the
17 document. Other than what I'm aware of now -- I'll have
18 questions about it, but we have no objection right now.

19 THE COURT: No objection. It's admitted.

20 (Debtor's Exhibit D-34 received in evidence.)

21 BY MR. SPECTOR:

22 Q Mr. Norris, isn't it a fact that after you issued the
23 prior invoice that had the wrong date and the Utah address,
24 that you were asked to issue a new invoice to the Japanese
25 entity?

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MR. REYNOLDS: Objection to leading, Your Honor.

MR. SPECTOR: Yes, it's cross examination -- oh, it's not.

THE COURT: No, no. I'm sorry.

MR. SPECTOR: No, that's right. Never mind. Sorry about that. I was going to cross examine --

THE COURT: It's quite all right. It's late and it's been a long day for you.

MR. SPECTOR: I'm sorry. I withdraw that question.

BY MR. SPECTOR:

Q Are you aware of the origin of this document, sir?

A I believe it was the document that was sent by my office in connection with the consulting fee that was paid for the emerging market analysis.

Q Thank you. Was there such an analysis done?

A Yes. It actually formed the basis of a lot of our thinking about this whole transaction. We looked at China. We looked at the Middle East. We looked at Russia. We looked at the fact that they have pending, enormous expenditures for infrastructure and so on and secure systems, and we felt that this would be something that would be of interest in these kinds of markets.

Q Do you remember my asking you at the deposition just a few questions at the very end?

1 At the very end of the deposition, I don't know, it
2 was seven hours, that I say, "I'll be short but brief"?

3 A I recall you saying that judgment, too.

4 Q And was I a man of my word on that occasion if by no
5 other occasion?

6 A You certainly were.

7 Q Okay. Do you remember what it is I asked you at that
8 point?

9 A You should probably refresh my memory.

10 Q Did I ask you --

11 A I remember short but brief.

12 Q Okay. Did I ask you whether you received any money
13 whatsoever from the Debtors, SCO Operations or SCO Group?

14 A So far as I know, absolutely not.

15 Q Did you sign any consulting agreements with SCO Group
16 or SCO Operations?

17 A No.

18 Q And, in fact, you were there to buy the company with
19 others; is that right?

20 A That's correct.

21 MR. SPECTOR: That's all I have, Your Honor.

22 MR. REYNOLDS: Very briefly, Your Honor and Mr.
23 Norris.

24 THE COURT: Of course.

25 CROSS EXAMINATION

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BY MR. REYNOLDS:

Q Isn't it true, Mr. Norris, that you made no mention of
SCO Japan in your deposition on July 17th? Just yes or no?

A Isn't it true -- could you repeat that?

Q Yes. Isn't it true that you made no mention of SCO
Japan in your deposition on July 17th?

A To be frank, I don't know how to answer that yes or
no. I made no mention of Japan.

Q Very well. And, in fact, isn't it your testimony that
you told me in deposition that it was SCO Germany with which
you were operating in connection with this consulting
arrangement; isn't that right?

A I did.

Q Have you ever met an individual by the name of Makato
Aso (ph)?

A Never.

Q Do you understand him to be an employee of SCO Japan?

A I have no idea who he is?

Q Have you ever been to SCO's Japan office?

A Never.

MR. REYNOLDS: No further questions, Your Honor.

THE COURT: All right.

FURTHER REDIRECT

BY MR. SPECTOR:

Q To what do you attribute the discrepancy?

1 A Because the head of the international operations was
2 Mr. Bayer, and Mr. Bayer was in Germany. And I'd had quite
3 a bit of dealings with Mr. Bayer. He had attended most of
4 the strategy meetings that we had. And I simply recalled it
5 as having been an arrangement entered into with one of his
6 groups, and I thought Germany.

7 Q Would that be the same individual that other people
8 have called Bayer, Hans Bayer?

9 A That's correct.

10 THE COURT: Bayer?

11 THE WITNESS: Yes, sir.

12 BY MR. SPECTOR:

13 Q And do you know what areas of the globe your study
14 covered?

15 A Yeah, we looked at the -- we did not look -- it was
16 initially to talk about the BRIC areas. We didn't really
17 look at all of Brazil. We looked at China. We looked at
18 Russia, primarily because there had been a very recent and
19 lucrative contract with a big Russian bank, and we spent
20 quite a bit of time in the Middle East, Qatar, Saudi Arabia,
21 Bahrain and Dubai.

22 Q So I guess since Russia is mostly in Asia, you did
23 very little work in Europe.

24 A We did very little work in Europe.

25 Q So Russian, Middle East, which is some parts of it

1 perhaps in Asia, but nothing in Europe.

2 A No, we --

3 Q And China you said as well.

4 A And China.

5 Q Right, okay.

6 MR. SPECTOR: I have nothing further.

7 THE COURT: All right.

8 Nothing further, Mr. Reynolds?

9 MR. REYNOLDS: No. Thank you.

10 THE COURT: Thank you very much, Mr. Norris. You
11 may step down, sir, and thank you for your testimony.

12 THE WITNESS: Thank you, Judge.

13 MR. SPECTOR: Your Honor, we have one more
14 witness, and I'll be short and brief, since I put it in my
15 declaration.

16 THE COURT: All right.

17 MR. SPECTOR: Thank you, Mr. Norris.

18 We'll ask for Mr. Hunsaker.

19 Do you want to just plow ahead with him and be
20 done?

21 THE COURT: I'm ready.

22 Mr. Marriott, are you ready, sir?

23 MR. MARRIOTT: I'm ready, Your Honor, if you are.

24 THE COURT: I am.

25 I know it's a long day, but it's difficult to get

1 everyone here together, you know, with schedules being what
2 they are, particularly this time of year. So I think it's
3 best that we try to complete it.

4 MR. SPECTOR: I couldn't agree with Your Honor
5 more.

6 THE COURT: Mr. Harrington, you would be in the
7 office reviewing some new case anyway.

8 MR. SPECTOR: The Debtors call Jeff Hunsaker.

9 THE COURT: Mr. Hunsaker, if you'll remain
10 standing, while we have you sworn, sir.

11 JEFF HUNSAKER, DEBTORS' WITNESS, SWORN

12 THE COURT: Thank you.

13 DIRECT EXAMINATION

14 BY MR. SPECTOR:

15 Q Good evening, Mr. Hunsaker.

16 A Good evening.

17 Q I'll be reciting a little mantra here, and if you
18 don't understand, just say so.

19 Do you adopt your declaration?

20 A Yes.

21 MR. SPECTOR: I turn the witness to cross.

22 THE COURT: Yes. Thank you.

23 MR. MARRIOTT: Good evening, Mr. Hunsaker.

24 THE WITNESS: Good evening.

25 MR. MARRIOTT: Your Honor, I have no questions of

1 this witness; only objections. And I can make my
2 objections, Your Honor, without the witness. So, as Your
3 Honor wishes, I have no questions.

4 THE COURT: Even if I overrule the objections,
5 you won't have?

6 MR. MARRIOTT: I will not, Your Honor.

7 THE COURT: Okay.

8 Mr. Lewis, any questioning from you?

9 MR. LEWIS: I have none, Your Honor.

10 THE COURT: All right.

11 Mr. Harrington?

12 MR. HARRINGTON: None, Your Honor.

13 THE COURT: All right. Then, Mr. Hunsaker, after
14 waiting out there all day --

15 THE WITNESS: I feel like leftover meatloaf.

16 THE COURT: I hear you. I'm sorry.

17 MR. SPECTOR: That's a long time to wait for zero
18 questions.

19 THE COURT: Yes, don't be sorry, Mr. Hunsaker.
20 Thank you. You can now sit in one of the soft chairs.

21 MR. MARRIOTT: Your Honor, let me just simply lay
22 out the objections --

23 THE COURT: Sure.

24 MR. MARRIOTT: -- and from our perspective, Your
25 Honor can rule on them now or you can rule on them as you

1 consider this in further detail.

2 THE COURT: Sure.

3 MR. MARRIOTT: But we would submit that the
4 Hunsaker declaration and, therefore, the adopted testimony,
5 is irrelevant. The gist of the testimony, Your Honor, is
6 that the conversion of this case from Chapter 11 to
7 Chapter 7 would have a disruptive effect on SCO's customers.
8 The testimony is, Your Honor, in all significant parts. And
9 for that purpose, I refer Your Honor to paragraphs 8, 9, 10,
10 11, 16, 17, 18, 20, 21, 22, 25, 26, 27 and 28, based, Your
11 Honor, on speculation.

12 THE COURT: Yes.

13 MR. MARRIOTT: It is based on hearsay, what some
14 customers supposedly told Mr. Hunsaker and what, therefore,
15 informs his views. It is not based on personal knowledge,
16 and we think that is plain from the face of the document,
17 Your Honor.

18 It also in at least one spot, paragraph 10, is
19 based on what we would submit is improper lay opinion
20 testimony. It is more far afield, Your Honor, the testimony
21 that Your Honor has already ruled out of bounds, and we
22 would ask you to, therefore, disallow it.

23 Thank you, Judge.

24 THE COURT: Thank you.

25 MR. MARRIOTT: Your Honor, if I may, I'm being

1 whispered to.

2 THE COURT: Yes, sir?

3 MR. MARRIOTT: The relevance to conversion, Your
4 Honor, is that the effect on customers is not a relevant
5 consideration for the Court in making that decision.

6 Thank you, Your Honor.

7 THE COURT: Mr. Spector?

8 MR. SPECTOR: Anything else?

9 This is a primarily a hearsay objection, Your
10 Honor, and I'm not surprised it came. And this is one of
11 the few things that got prepared on.

12 We have case law, surprisingly, on this very
13 point. The issue is can a -- Mr. Hunsaker is far more than
14 a salesman. Let's put it in the context of that.

15 Can a salesman talk about what he knows on his
16 job when a salesman job is to interact with his customers to
17 find out what they want and go back, anticipate their needs,
18 fill their needs, and so forth.

19 The whole job -- well, a lot of people's jobs
20 depend on communications. And, of course, anytime you talk
21 about communications, oh, my goodness, it's got to be
22 hearsay. Two circuits have said otherwise, and I'll cite
23 for the Court the cases.

24 Central Illinois Light Company v. Consolidation
25 Coal Company, 349 F.3d, 488 at 492 and 493, Seventh Circuit

1 2003.

2 Let me tell you about that one before I cite the
3 other one.

4 The court held that a salesman testimony
5 regarding his customers' unspoken business consideration was
6 not hearsay. Specifically, the court stated, "It is the
7 business of a salesman to know what alternatives his
8 customer's exploring. That is something within a salesman
9 personal knowledge rather than being hearsay." That's also
10 at 492 and 493, as I said.

11 Cited with approval by that court was a case of
12 Kansas City Power Light Company -- funny, they're both light
13 companies -- v. Ford Motor Credit Company, 995 F.2d, 1422
14 and 1432, Eighth Circuit 1993 decision.

15 In that case, the court was faced with the
16 consideration of whether to let certain testimony in from
17 the company's CEO and CFO regarding how they believed the
18 governmental agency was likely to react to a decision not to
19 redeem certain stock. And this was subject to a hearsay
20 objection.

21 The court affirmed the trial court's admission of
22 that, stating that based on this witness' years of
23 experience dealing with that governmental agency, the
24 witness had personal knowledge as to the agency's likely
25 reaction to any action taken by Power Company.

1 So I cite those two cases, and I have one more,
2 at least one more.

3 I cite for Your Honor a case from the -- I
4 believe this is the Third Circuit Court of Appeals. I
5 believe that's around here someplace.

6 THE COURT: Yes.

7 MR. SPECTOR: Wilhelm v. Commonwealth of
8 Pennsylvania. That's cited at 118 F. Appeals 611. This is
9 not a published decision in Westlaw -- it's in Westlaw I
10 guess, but not Federal Reporter. And it's decided
11 December 21, 2004.

12 They said there that the acting commissioner had
13 sufficient personal knowledge to testify about a employee's
14 capability to hold a press secretary position proposed for
15 reinstatement. And the case goes on to talk about personal
16 knowledge of one person about what the other person does in
17 conformance with their job.

18 And one other case is a district court case from
19 the district of Delaware. It's the case of Tracinda
20 Corporation v. Daimler Chrysler AG, very famous case. And
21 that was decided March 30, 2005, and cited at 362 F.Supp.
22 487.

23 I cannot quote to you the relevant provision of
24 that because it's quite long, and I didn't get to finish it.
25 But it said statements made by the CEO of the German

1 manufacturer that were printed in a newspaper article were
2 not hearsay. And I'll have to get to the rationale, and
3 I'll leave that for Your Honor -- and so forth.

4 Let me get the -- I had a little blurb on it, and
5 I probably misplaced it.

6 But those are the cases I cite for the support of
7 the idea that someone like Mr. Hunsaker, who you will see in
8 the early stages of the declaration lays out in detail the
9 basis of his knowledge and how it's important to his job as
10 the COO and his other positions, more than COO, but his
11 position mainly as sales and distribution chief, to know
12 what the company sells to the customers, what they use them
13 for, what their needs will be in the future so they can go
14 back. And he testifies about he has decide what
15 distribution -- what new upgrades to ask for from the
16 engineers and the like.

17 All of that gives him the expertise, personal
18 expertise, to testify on the topics he's raised.

19 Regarding the relevance, Your Honor, I've argued
20 in the response, and I'm not going to re-argue, the case is
21 there, that this court should take into consideration the
22 public interest, and the public has a say in this. And
23 several of the customers that you see in the declaration are
24 of public interest, some of them as you -- well, I'm not
25 going to say it out loud.

1 That could be very relevant to this court's
2 decision as to what to do on the conversion motion. And the
3 response covers that. There are some cases on that there.
4 And so, I urge the Court to overrule the objection.

5 MR. MARRIOTT: Your Honor, just briefly, and then
6 with Your Honor's permission, Mr. Levin would like to
7 address one quick point.

8 The objections were not limited to hearsay and
9 relevance, Your Honor --

10 THE COURT: Understood.

11 MR. MARRIOTT: -- I say on that and nothing
12 further. And the situation here is much more far afield
13 than the situation in the cases to which Mr. Spector
14 referred. I think, Your Honor, the Court's prior ruling on
15 related issues effectively compels the relief we're
16 requested.

17 Thank you, Judge.

18 THE COURT: All right. Thank you.

19 MR. SPECTOR: I don't know -- if I missed an
20 objection, I'll address it if I can be reminded if there was
21 another one besides hearsay relevance.

22 THE COURT: Well, there was --

23 MR. SPECTOR: Competence?

24 THE COURT: -- not based on personal knowledge,
25 therefore --

1 MR. SPECTOR: Oh, I think that's the same thing,
2 I think covered that.

3 THE COURT: Speculation.

4 MR. SPECTOR: The witness has a basis to testify
5 on what he's testified. Some of that is factual. This is
6 what this customer uses for. This is an experience I went
7 through when McDonald's wanted to change platforms. This is
8 not speculation. A lot of this factual, historical factual
9 information.

10 MR. MARRIOTT: Your Honor, I didn't identify and
11 we don't object to those paragraphs that relate solely to
12 the witness' background and description of his job.

13 THE COURT: Right.

14 MR. MARRIOTT: It's the conclusions that are then
15 sought to be drawn from that experience, which conclusions
16 are based upon hearsay, speculation and improper opinion
17 that we otherwise object to.

18 I will yield to Mr. Levin.

19 THE COURT: All right. Thank you.

20 Mr. Levin?

21 MR. LEVIN: Your Honor, thank you for allowing a
22 second lawyer to argue on this.

23 On the relevance point, Your Honor, our position
24 is that if the effect on customers is relevant to a
25 conversion motion, then this court would be ruling that the

1 creditors, and perhaps even the shareholders of this estate,
2 if there is enough value for them, must, despite the failure
3 of this debtor, comply with the requirements of Chapter 11,
4 and despite meeting the grounds for conversion or dismissal
5 under 1112, the creditors must continue to fund the
6 customers so that they will not be interrupted.

7 Now, at some point, the money runs out. And at
8 that point, the customers will be out of luck. It doesn't
9 seem to be the law that the creditors are required to stand
10 by to protect the customers until the money runs out when a
11 conversion motion is brought, when there's still a little
12 bit of money left for the creditors. That's why I think
13 this testimony is irrelevant to the conversion motion, Your
14 Honor.

15 THE COURT: All right. Thank you, Mr. Levin.

16 MR. SPECTOR: All I'll say about that is it goes
17 to the weight. I believe the Court is not only authorized
18 to, but I think is, in circumstances like this, required to.
19 And I'll remind the Court that this case law that says on
20 the motion for conversion, one of the unusual circumstances
21 is whether the company is invested with a public interest,
22 whether there be effects other than to the internal affairs
23 of the company, which is why this is entirely relevant to
24 this proceeding.

25 I have the cases here, Your Honor, and what I

1 would suggest because of the lateness of the hour -- and of
2 course I've given it to you and you can pull it up yourself.
3 But I could give it you if you want to read it now.

4 I would suggest, since this is a bench trial, and
5 I believe you've already read all of these declarations
6 anyway, that you reserve decision on that until you've read
7 the case law and researched that support that I've offered.

8 You've got the predicate there in your hands in
9 the form of the declaration, and we've offered you some law
10 to help you guide it. And you can rule it out after you've
11 done that or you can rule it in after you've done that.

12 THE COURT: Well, I think I --

13 Mr. Levin, I was about to say I think I can
14 reserve decision here because cross-examination is not going
15 to be dependent upon what my ruling will be.

16 Mr. Levin, yes?

17 MR. LEVIN: I understand, Your Honor.

18 The only final point I would make in reply to
19 what Mr. Spector said is that if this business is invested
20 with the public interest, and if the public deems that it is
21 important that it continue, the Fifth Amendment provides for
22 just compensation for that, not that the creditors' coffers
23 just have to be drained because this business is invested
24 with the public interest.

25 THE COURT: Thank you.

1 MR. SPECTOR: Is Your Honor then going to adopt
2 my suggestion?

3 THE COURT: Yes.

4 MR. SPECTOR: Thank you.

5 The next thing I want to bring in is the
6 deposition transcript of Rene Beltran. Mr. Beltran was
7 deposed in Los Angeles, I believe, on Wednesday, whatever
8 that was, the 14th, I guess it was -- 15th, Wednesday the
9 15th. He is a resident of California, well outside the
10 jurisdiction of a 100-mile deposed.

11 THE COURT: Yes.

12 MR. SPECTOR: And his deposition was taken by IBM
13 on behalf of all of the Movants. I'll offer that.

14 What exhibit is that? Exhibit 27, Your Honor.

15 (Debtor's Exhibit 27 marked for identification.)

16 It was also listed on their exhibit list as well,
17 which is -- you know what? Everything's in evidence. What
18 am I doing?

19 MR. MARRIOTT: No, Your Honor, it's not evidence.
20 That was one of the exhibits that was omitted when I moved
21 the admission of the exhibits. And we removed that exhibit
22 from our exhibit list. The witness was not called live as
23 counsel originally said that the witness would be called
24 live. The deposition was taken for purposes of being able
25 to cross-examine the witness.

1
2 So we didn't move for the admission of that
3 exhibit, and, indeed, we object to the admission of that
4 exhibit because what counsel -- what happened here, Your
5 Honor, is that the document was not, by the Court's
6 deadline, identified as a potential exhibit, despite the
7 fact that the deposition had been taken. And counsel never
8 pointed out the specific provisions that they sought to
9 introduce to give us an opportunity to make line-by-line
10 objections where appropriate to that testimony.

11 This witness' testimony, Your Honor, is, we
12 think, subject to the same objections that I laid out with
13 respect to Mr. Hunsaker, and I won't undertake to do that
14 now, except he's a customer vendor. And, frankly, I think
15 it's probably fair to say his testimony is a little less
16 objectionable than is Mr. Hunsaker's, but it is, we think,
17 in substance, subject to the same objections. And because
18 the deposition testimony was not designated line-by-line
19 because it was untimely submitted, we didn't go through and
20 lay out line by line objections for Your Honor because, as I
21 say, it was submitted past the deadline.

22 So we would object to that, to the introduction
23 of that testimony.

24 MR. LEWIS: Your Honor --

25 THE COURT: Mr. Lewis?

MR. LEWIS: -- I join the objection. In

1 particular, Mr. Beltran was originally listed as a witness
2 in the witness list that we were given in exchange. And I
3 was actually the person who was going to be responsible for
4 cross examining him, the lead person on this side of the
5 podium. Then the last witness list that we got omitted him,
6 and didn't say, bump, we're going to try this deposition;
7 just omitted him. It omitted several people.

8 Now, all I can say is, at that point, I stopped
9 preparing for Mr. Beltran. And as counsel has indicated,
10 we've done nothing towards commenting on his transcript, or
11 marking up his transcript, or objecting to anything. I just
12 think that under these circumstances -- and although counsel
13 acknowledges that Mr. Beltran's testimony may be one
14 relevant in one sense in that it's a personal experience as
15 an end user; on the other hand, he's one end user amongst
16 however many there might be.

17 It seems kind of asking a lot for the Court to
18 draw an inference from the very particular to the general
19 based upon that testimony. It seems that testimony is more
20 for effect than it is for substance.

21 MR. SPECTOR: If there's anything about this case
22 that is similar to the sport of fencing, this would be the
23 one.

24 Here it is they're objecting to the deposition
25 they took, but -- and there is a little dance going on, and

1 we're both doing it. We're both guilty of it, Your Honor.

2 Let me give you the full context so you can
3 appreciate it. And if you rule it out, you know, it's not
4 going to be the end of the world; I've got to tell you that.
5 But you ought to know the whole context.

6 First of all, Mr. Marriott's presentation
7 correct, is actually correct. Mr. Lewis' I believe is
8 incorrect, with all due respect. We didn't remove
9 Mr. Beltran from the list of witnesses until we filed the
10 list of witnesses, which was, I believe -- all the days run
11 together. Whenever our deadlines -- sometime fairly
12 recently. We always had him listed. And then after the --

13 Here's what happened. They served him with a
14 subpoena to attend his deposition, and I have his subpoena
15 here. It's attached with the production. I want Your Honor
16 to see the production.

17 Mr. Beltran's deposition explains who he is and
18 what he's about, what his company is. I think it's a two-
19 or three-man operation in the Los Angeles area. He had -- it
20 was way, way overbroad, which is something he raised, and it
21 was well understood. Counsel, Mr. Marriott and I were
22 working on trying to narrow it down.

23 But we looked into filing a motion for a
24 protective order. We didn't have standing to do that. So
25 we asked Mr. Beltran if he didn't want to do it, go get a

1 lawyer. He says, I can't afford lawyer. I'm not hiring a
2 lawyer to be a third-party witness. So he showed up without
3 any documents to speak of. And they went ahead -- in fact,
4 it wasn't until the end of the deposition that they said,
5 oh, by the way, we're giving the documents to bring, and the
6 colloquy really takes place at the very end of the
7 deposition.

8
9 And so they took a whole deposition without
10 dealing with this. And then counsel who took it was
11 asked -- I don't know anything about what we're asking for,
12 but we'll object to it if you don't deliver it. Mr. Beltran
13 then says, well, I don't want to get in trouble. I'm not
14 coming over to De La Rue if I'm going to get in trouble over
15 this. And so we said, okay, forget it, we won't call you,
16 because they said they were going to object to him; forget
17 it.

18 Then we see Beltran's on their -- the deposition
19 transcripts, on their list of exhibits. Okay? We said,
20 oh, my goodness, we ought to object. And Your Honor on that
21 call said, no, he's outside the 100-mile limit; he can bring
22 it in.

23 So then we amended ours and said, okay, we'll add
24 him, too, the Beltran deposition. And then today, they
25 withdrew -- in light of my "objection," they withdrew
the -- so there's been a real minuet here, Your Honor.

1 I will, again, offer the transcript bare raw and
2 the subpoena, and Your Honor can do justice. If you rule it
3 out, we'll live with it. If you think otherwise, we
4 encourage you to read it. There are some things in there
5 he says, which is why they wanted to list it, that really
6 doesn't go our way, but we're offering it anyway.

7 THE COURT: Mr. Lewis?

8 MR. LEWIS: Your Honor, on July 23rd at 9:29 in
9 the morning, Mr. Marriott got an e-mail with a copy to me,
10 and a copy to the happiest man on the face of the earth, to
11 Mr. McMahon (ph) which says our witnesses will be Darl
12 McBride, Jeff Hunsaker, Ken Nielsen, Ryan Tibbitts, Frank
13 Caplan, Steven Norris.

14 We do not plan to call Rene Beltran. That's what
15 it says. And based upon that, I stopped preparing for
16 Mr. Beltran. I stopped reading his deposition. I just
17 stopped. And I think that under these circumstances, it is
18 not appropriate to try to admit Mr. Beltran's deposition.
19 He should have been here live to either cross-examine, or
20 his deposition should have been teed up early enough for us
21 to deal with it if it was going to be offered on the grounds
22 that he was unavailable. You may recall, we had that
23 discussion about Mr. Norris and availability during our
24 conference call.

25 So I would suggest, Your Honor, especially given

1 the marginal value of this anyhow, that the Court rule this
2 deposition out.

3 MR. SPECTOR: I want to apologize to Mr. Lewis,
4 and I'm feeling all tired, and it's late. I misunderstood
5 what he had said before. I thought he was saying he was
6 prepared to take the witness at deposition on the 15th.

7 THE COURT: Oh, no.

8 MR. SPECTOR: And that's what I was responding
9 to.

10 THE COURT: He was going to cross examine here.

11 MR. SPECTOR: I had no idea that he was -- I
12 didn't understand that in his comments, so I apologize for
13 misunderstanding that.

14 But if the witness -- Mr. Lewis and Novell were
15 invited to the deposition. They could have come and taken
16 it. It was called by IBM, not by us. He doesn't get to
17 cross examine the transcript anyway. So I don't think that
18 changes anything.

19 MR. LEWIS: Your Honor, I get to comment on a
20 transcript in advance of its being submitted. That's the
21 way it normally works. People submit their objections to
22 whatever testimony there's going to be. I have not had a
23 chance to do that.

24 MR. MARRIOTT: And if it's done right, Judge, we
25 get to go line by line, word for word, and decide whether we

1 have objections.

2 THE COURT: Yes.

3 MR. MARRIOTT: And we didn't have that
4 opportunity here, Judge.

5 THE COURT: Because, in other words, they would
6 be designating which portions of the deposition?

7 MR. LEWIS: Exactly.

8 THE COURT: All right.

9 MR. LEWIS: And, yes, we're all under a lot of
10 pressure here, but there still is a fundamental sense of
11 fairness that if we just literally don't have a chance to
12 prepare, when the circumstances could have provided
13 otherwise, we should not have to face that.

14 THE COURT: Well, from what I'm hearing, frankly,
15 is probably much to do about nothing. So I am going to,
16 just to sort of end these proceedings, I'm going to rule out
17 the deposition at this point.

18 MR. SPECTOR: Understood.

19 MR. LEWIS: Thank you, Your Honor.

20 THE COURT: Yes.

21 MR. SPECTOR: Now, we do have other exhibits. I
22 want to go through my list to make sure that they were
23 admitted.

24 THE COURT: Yes, please.

25 MR. SPECTOR: And if you'll give me a minute just

1 to do that. I've got to find them.

2 (Pause)

3 MR. MARRIOTT: You're a patient man, Judge.

4 THE COURT: Oh, I don't know. Just on the
5 outside.

6 MR. MARRIOTT: It's 8:15.

7 MR. SPECTOR: Your Honor, very few.

8 THE COURT: I didn't think there were very many.

9 MR. SPECTOR: There's a bunch, but we don't
10 really need to put them in.

11 THE COURT: Okay.

12 MR. SPECTOR: We had a bunch of e-mails from Hans
13 Bayer showing his support going our way, so that was
14 covered.

15 Exhibit Number 30 is a demonstrative exhibit of
16 claims reduced since September 14, 2007. It was part of
17 Mr. Tibbitts' declaration. It was attached I believe.

18 THE COURT: Oh, it was attached to it? Okay.

19 MR. MARRIOTT: Your Honor, my only problem here
20 is the list of Debtors' exhibits which I have only goes to
21 26.

22 MR. SPECTOR: Yes. I sent e-mails -- I did like
23 you guys did. I added by e-mail.

24 Let me ask you -- we can make this a little
25 faster.

1
2 If by his declaration coming in, the exhibits are
3 in with it, and we don't have to separately go through
4 these.

5 MR. MARRIOTT: Your Honor, I understand that
6 that's the way it works.

7 MR. SPECTOR: All right.

8 MR. MARRIOTT: If they think it's in, then better
9 or worse, when you cross that bridge.

10 THE COURT: But I don't have that exhibit
11 anywhere.

12 MR. SPECTOR: It should be attached to
13 Mr. Tibbitts' -- it's not?

14 THE COURT: To Mr. Tibbitts' -- oh, wait a
15 minute. I'm missing some pages to that.

16 MR. SPECTOR: And see, I didn't know that that
17 was an automatic pass-through.

18 THE COURT: I may need to get another copy of
19 that from you.

20 MR. SPECTOR: May I approach?

21 THE COURT: You may. Here it is. Okay.

22 Thank you, Mr. Spector. Thank you, sir.

23 MR. MARRIOTT: Your Honor, maybe I can speed this
24 up. With at least with respect to that exhibit, IBM has no
25 objection to it being -- so long as it's understood that
that exhibit -- I think it's plain on its face -- makes no

1 mention of and does not include any reference to any IBM
2 claims related to its counterclaims. Subject to that
3 understanding, we have no objection to that.

4 MR. SPECTOR: I believe it says this is the list
5 of -- strike that. That's a list of
6 reduced -- demonstrative claims reduced. IBM's wasn't
7 reduced.

8 THE COURT: Exactly.

9 MR. SPECTOR: The other one is 16.

10 Was that part of his declaration?

11 Well, you know, we don't need that. Never mind
12 16. We won't waste the time on that.

13 We ask the Court to take judicial notice of the
14 briefs in the SCO case in the United States Court of Appeals
15 with the Tenth Circuit.

16 MR. MARRIOTT: No objection.

17 MR. SPECTOR: And --

18 MR. MARRIOTT: Your Honor, it goes to the merits,
19 so with the understanding Your Honor is not coming to the
20 merits and not looking at those for purposes of making any
21 determinations to the merits since they became arguments of
22 either side.

23 THE COURT: Right.

24 MR. MARRIOTT: They're in the public record and
25 Your Honor is going to look them up, but I don't that

1 they're properly introduced into evidence.

2 MR. SPECTOR: Right. I asked judicial --

3 THE COURT: I know that they are, and I don't
4 know that --

5 MR. MARRIOTT: If the suggestion is you can take
6 judicial notice of their existence, as to that we have no
7 objection. As to the content and accepting the arguments,
8 it's to that we object, and I think Your Honor's already
9 ruled on that.

10 MR. SPECTOR: I'm not asking Your Honor to waive
11 them and value one argument against another.

12 THE COURT: Okay. They're not being admitted for
13 the merits of the arguments but rather just for the fact
14 that they are on file and when they're on file, I assume.

15 MR. MARRIOTT: I gather.

16 (Debtor's Exhibit 27 received in evidence.)

17 MR. SPECTOR: I believe we've got all we need in
18 there, Your Honor. And if you want to take a break, we can;
19 otherwise, I'll go right to the closing argument.

20 MR. MARRIOTT: I have only one brief observation.
21 I have no intent, Your Honor, to re-argue the Court's
22 rulings with respect to the three disputed exhibits, except
23 to ask that the Court consider reconsidering that in view of
24 the testimony that we heard from Mr. Norris about his
25 dealings with Mr. Bayer. And on that I say nothing further,

1 except, Your Honor, I think it bears on that question.

2 THE COURT: Mr. Spector?

3 MR. SPECTOR: I'm sorry?

4 THE COURT: I've been asked to reconsider my
5 evidentiary ruling on those e-mails from Mr. Bayer.

6 MR. SPECTOR: Well, I'd ask you not to, Judge.
7 We would have other exhibits that will be coming in and
8 further redirect, then.

9 THE COURT: Yes. I think that I'm going to have
10 to stand by that ruling.

11 Yes, Mr. Levin?

12 MR. LEVIN: Your Honor, before Mr. Spector
13 launches into final argument, I might ask if he rests.

14 THE COURT: That's a fair question, and I should
15 have asked it myself. Do you rest?

16 MR. SPECTOR: I'd love to.

17 THE COURT: All right.

18 And do the Movants rest?

19 MR. LEVIN: Your Honor, I would just ask the
20 Court's indulgence to permit a brief statement from
21 Mr. Christopher Donoho of the firm of Lovells, who -- I made
22 a representation in my opening statement, and I don't want
23 to let it be hanging. So I would ask the Court to permit a
24 brief statement on that subject before we rest.

25 THE COURT: And Mr. Donoho represents LNS; is

1 that correct?

2 Mr. Donoho, please? I'll hear from you.

3 MR. DONOHO: Good evening, Your Honor.

4 THE COURT: Good evening.

5 MR. DONOHO: Christopher Donoho of Lovells, LLP,
6 on behalf of LNS acquisition, LLC. Nice to see you again.

7 THE COURT: Good to see you again.

8 MR. DONOHO: It's been an interesting day today.

9 THE COURT: And you've been very patient.

10 MR. DONOHO: Thank you, and you have as well.

11 I did want to point out that -- you know, it was
12 discussed today that my client has made a proposal. It's
13 been received by the Debtors. I think it's been viewed
14 other constituents in this case as well. We stand by that
15 proposal. We'd like to investigate that opportunity
16 further.

17 We would obviously be very interested in any kind
18 of further discussions with the debtor. We'd obviously be
19 interested in any kind of competitive bidding process that
20 may be set up. We think that our bid is an attractive one.
21 I don't think we would have gone through the trouble of
22 putting the bid together if we didn't think that it provided
23 a better form of recovery for the creditors than what's
24 currently on the table. And so, we'd like that opportunity
25 if the opportunity arises.

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Thank you, Your Honor.

THE COURT: All right, Mr. Donoho. Thank you.

MR. MARRIOTT: Your Honor, the Movants rest.

THE COURT: Thank you.

Mr. Levin?

MR. LEVIN: I was going to say that from here, Your Honor, only because I was on my way to the water, if I may access it.

THE COURT: Do the parties want a short break to -- you want a five-minute break just to kind of gather your thoughts and have a minute? Okay.

MR. LEVIN: Thank you, Judge.

THE COURT: Now, let me ask, about how long are you looking for closing arguments here?

MR. LEVIN: Hours.

THE COURT: That's what I was afraid of, Mr. Levin.

MR. LEVIN: We will attempt to be very reasonable, Your Honor.

THE COURT: Mr. Spector?

MR. SPECTOR: When I prepared this, I allotted about 15 minutes to mine, and I don't think I'll go longer than that. On the other hand, there probably will be issues that are -- we get the last say, I believe. Well, you know, we're the movant on one and we're the respondent on the

1 other.

2 THE COURT: That's right.

3 MR. SPECTOR: Go figure it out.

4 You know, Your Honor, when we're done with the
5 closing arguments, there's another issue. And that is, Your
6 Honor was contemplating whether you were going to make a
7 ruling first on the sale, whether we even have to go in to
8 argue the merits of the conversion motion.

9 While we're taking this break, could we ask Your
10 Honor to ponder that and give us some advice so we can talk
11 about that?

12 THE COURT: Well, I'm pondering it, and I really
13 think that I'm going to reserve decision on both motions at
14 this point; not for long, but at least to give myself an
15 opportunity to sort of review a lot of evidence that I've
16 heard today and to consider the arguments.

17 MR. SPECTOR: Okay. So we'll take the break now?

18 THE COURT: Yes. Thank you.

19 (Recess from 8:20 p.m. to 8:28 p.m.)

20 THE COURT: Thank you. Please be seated.

21 All right. Mr. Levin?

22 MR. LEVIN: Your Honor, given the, as Mr. Spector
23 noted, two motions that are pending, how would you like to
24 order this?

25 THE COURT: Well, I think, first of all, why

1 don't I hear from the Movants first on the motion to
2 convert? And then I'll hear Mr. Spector's reply, and then
3 Mr. Spector -- or response, and your then reply, if you'd
4 like on.

5 MR. LEVIN: Your Honor --

6 THE COURT: Did you have a suggestion?

7 MR. LEVIN: You just gave me an idea on what you
8 said.

9 THE COURT: Yes?

10 MR. LEVIN: We'll go first on the conversion
11 motion.

12 THE COURT: Yes.

13 MR. LEVIN: He can respond to that and give his
14 views on the sale motion.

15 THE COURT: Correct.

16 MR. LEVIN: We'll then be able to reply to the
17 conversion as well as respond to the sale motion.

18 THE COURT: Perfect.

19 MR. LEVIN: And then he can perhaps have the
20 final word, but just on the sale motion, not on the
21 conversion motion.

22 THE COURT: Exactly. Makes all the sense.

23 No? You don't like that idea?

24 MR. SPECTOR: I wrote a closing based on both
25 together because, as we noted on June 15th, one of the

1 unusual circumstances, to fight it, to defeat the conversion
2 motion, was the fact that there's a proposal to pay the
3 creditors in full.

4 THE COURT: All right.

5 MR. SPECTOR: So they kind of go together. I
6 can't separate them out.

7 THE COURT: Mr. Harrington?

8 MR. SPECTOR: Your Honor, there's one closing,
9 we'll take the prepared remarks maybe 10 or 15 minutes, but
10 it's one closing.

11 MR. HARRINGTON: Your Honor, isn't that exactly
12 what was just offered to him?

13 THE COURT: To some extent, yes. If you go
14 second, then you'll be able to do that.

15 MR. SPECTOR: Yes, but to bifurcate -- I can't
16 bifurcate.

17 MR. HARRINGTON: The offer was that the Movants
18 would go first on conversion, that you would do both
19 together.

20 THE COURT: Right.

21 MR. SPECTOR: Oh.

22 MR. HARRINGTON: And the Movants would respond.

23 THE COURT: That's right.

24 MR. DOSHI: Your Honor?

25 THE COURT: Yes?

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MR. DOSHI: Amish Doshi on the phone.

THE COURT: Mr. Doshi, yes, sir?

MR. DOSHI: I'd like Your Honor to note at some point, I would like to say a couple of words with respect to only the sale motion as it relates to the assumption and assignment of the Oracle agreement. So in the going back and forth, Your Honor, I would like to know at what point can I get my couple of words in.

THE COURT: I would say perhaps we should hear from you now so that Mr. Spector can respond to your concerns.

MR. O'NEILL: Your Honor, if I may.

THE COURT: Oh, yes? Yes?

MR. O'NEILL: Mr. Doshi I believe is representing Oracle, and they have proposed some language, which would potentially resolve or, really, rather put off for another day their cure objection. We only recently provided them with copies of the agreements, which are the subject of the Asset Purchase Agreement, and they provided language, which basically would be incorporated into an order if the Court approved the sale, which would indicate that their contracts would only be assumed upon the parties reaching agreement and entering into some kind of stipulation or agreed upon language; or if that was not possible, that we would have to come back to Your Honor for a hearing on that particular

1 cure objection. And that's acceptable to us.

2 And so, I just wanted to make that statement to
3 counsel for Oracle because it might abbreviate some of the
4 proceedings for him, and it also might alleviate their
5 concern. But they propose language, and we would be
6 acceptable -- we would agree to accept their proposed
7 language as an interim resolution of their cure objection.

8 THE COURT: Mr. Doshi, I wouldn't blame you if
9 you said, now he tells me.

10 MR. DOSHI: No, Your Honor. I appreciate that.
11 And with that confirmation, I just want to clarify one
12 thing, that our objection is not just with respect to cure,
13 it's also with respect to the actual assumption and
14 assignment. But the language -- if the language that we
15 proposed is going to be -- in the event Your Honor is going
16 to approve the sale, if the language that we propose is
17 going to be included in its entirety, then our objection is
18 resolved, and basically everything is reserved for another
19 day with respect to all the parties. And to the extent that
20 we can't resolve the issues, everybody has a right to come
21 back to court, and then Your Honor can deal with Oracle and
22 the Debtors at a later stage.

23 THE COURT: All right.

24 MR. O'NEILL: Yes, Your Honor. That is the
25 understanding. I can confirm.

1 THE COURT: Okay. Thank you very much,
2 Mr. O'Neill.

3 Thank you, Mr. Doshi.

4 MR. DOSHI: And may I be excused, Your Honor?

5 THE COURT: You may be excused, sir.

6 MR. DOSHI: Thank you.

7 THE COURT: Good evening to you.

8 MR. DOSHI: Thank you. Thank you for allowing me
9 to appear telephonically and thank you for the patience as
10 well.

11 THE COURT: All right, sir. Good evening.

12 MR. LEVIN: Your Honor, I wonder if Mr.
13 Petrofsky is still on the line.

14 THE COURT: Mr. Petrofsky?

15 MR. PETROFSKY: Yes. This is Mr. Petrofsky.
16 Hello?

17 THE COURT: Yes?

18 MR. LEVIN: Whether he wishes to be heard.

19 THE COURT: Oh, oh.

20 MR. LEVIN: I didn't mean to exclude him from
21 this process.

22 THE COURT: Did you wish to be heard or were you
23 on just for the sake of --

24 MR. PETROFSKY: Oh. No, I'm sorry. I'm just
25 listening. Okay. Thank you.

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THE COURT: All right.

Mr. Levin, are you making the closing?

MR. LEVIN: Your Honor, I am opening the closing.

THE COURT: Opening the closing, yes.

CLOSING ARGUMENT BY MR. LEVIN

MR. LEVIN: I'll be focusing only on the conversion motion, Your Honor, although they do interrelate --

THE COURT: Yes.

MR. LEVIN: -- and I'll try to keep this limited to the conversion motion.

Your Honor, our grounds for conversion were for cause, which is broad in general, and then for a specific cause in addition. And that is 1112(b)(4)(a), continuing loss and -- continuing loss to or diminution of the estate --

THE COURT: Yes.

MR. LEVIN: -- in absence of a reasonable likelihood of rehabilitation. Let me take those separately.

The debtor in its opposition to the conversion motion agreed that there are continuing losses.

Mr. Nielsen got on the stand, the CFO, and said, well, yeah, there are continuing losses, but they're much larger than we put in our opposition papers. They're really big. And, in fact, in the now I would guess 20 or 21 months

1 that we've been here -- I'm sorry. The record only cuts off
2 a few months ago, so for 19 months, \$5.3 million of cash
3 lost to the creditors and shareholders. Mr. Nielsen's
4 testimony is that that cash burn rate is continuing at the
5 rate of at least \$240,000 per month and maybe 280,000,
6 including the organization expenses.

7
8 There is -- he testified that there is somewhere
9 between five and \$800,000 in cash remaining. That's two to
10 three months, and it will be gone at that rate.

11 Now, sure, if the sale closes -- it's not going
12 to close tomorrow, certainly. But we are going to suffer
13 maybe as much as a third of that cash gone before a sale
14 closes.

15 Now, you'd think that the Debtors would do
16 something about that loss. What might they do? I'm
17 reluctant to refer to the Hunsaker deposition, Your Honor,
18 because it hasn't been admitted. But if it were admitted, I
19 would look at it and say, my goodness, I read the problems
20 that McDonald's would have migrating to any other system.

21 It seems to me that this debtor has enormous
22 pricing power over its customers if McDonald's is any
23 indication. And yet, they've sat here for 21 months and not
24 done anything to solve the loss problem with customers who
25 are inextricably tied to this debtor, and they're using that
as an excuse, as a reason not to convert but to continue to

1 lose money to support those customers, when, in fact, the
2 pricing power should be just in the opposite direction. We
3 don't think that's wise business management and is part of
4 the continuing loss and perhaps the gross mismanagement
5 aspect of the motion to convert.

6 If the sale is approved, Your Honor, and we'll
7 talk about that later, we had testimony about the
8 stand-alone ability of the mobility products, the mobility
9 applications, which have revenues in the tens of thousands
10 of dollars at this point. And I think the record will
11 reflect in Mr. McBride's deposition, which is in evidence,
12 that they would need about 10 to 12 employees to run that
13 business.

14 With revenues of less than \$100,000 per year and
15 10 to 12 employees, they're going to need perhaps a lot more
16 than Novell's constructive trust money to last very long.
17 They're going to need an outside investor. They're going to
18 need fresh cash. There's no evidence of that in this case.
19 This case suggests continuing loss, even if the sale is
20 approved because the mobility business cannot be a money
21 maker, at least in the near term, according to Mr. McBride's
22 testimony.

23 Turning to the absence of a reasonable likelihood
24 of rehabilitation, Your Honor. If the sale is approved, the
25 prospects for rehabilitating the mobility application's

1 portion of the business are as I just described. If the
2 sale is not approved, then we've got a business that is
3 losing \$250,000 a month approximately. Mr. Nielsen
4 testified we have a plan to skinny it down so that it
5 wouldn't lose month.

6 What have we been waiting for while 5.3 million,
7 plus a few months additional 250 a month, probably close to
8 6 million at this point, cash has gone out the door? What
9 are we waiting for?

10 Is that a rehabilitation? Is there a plan that
11 can be done around that? Mr. Nielsen's testimony suggests
12 it would not be cash flow negative anymore, but is that a
13 rehabilitation? Can a plan be had around that? There's
14 nothing in the record that suggests that, Your Honor.

15 The debtor has continued to press that if there
16 is a reversal at the Tenth Circuit, in whole or in
17 part -- and there are three separate claims that they
18 described at the Tenth Circuit -- that it will somehow help
19 the business. They've made that claim at several points
20 during this case. They're set out in my conversion motion.
21 I will not repeat them here, that things would turn around.
22 But I can note one thing.

23 The Debtors claim that the Novell claim early in
24 the case was in excess of 30 million perhaps \$40 million.
25 In fact, when the district court ruled, the Novell claim was

1 determined to be \$3.5 million, approximately 10 percent of
2 what the Debtors feared. If that's not a victory, Your
3 Honor, I'm not sure what I would characterize it as. And
4 yet, is there any evidence in the record that the customers
5 came flocking back, that investors arrived, that their
6 losses turned around? None. I'm not speculating about the
7 future, what may happen with the Tenth Circuit. I'm only
8 talking about the past and the ruling in the Novell case.

9
10 Your Honor, this case, as has been noted, is
11 about the obsessive pursuit of litigation and perhaps the
12 obsessive pursuit of the mobility applications, although
13 that's a little less clear. But we have here a Chapter 11
14 debtor who is supposed to be a fiduciary for the estate and
15 for the creditors. And what do we have?

16 McBride's testimony in his deposition that he
17 will not consider selling the litigation as part of any
18 sale, but worse we have incorrect financial statements to
19 this court, which were not corrected until called to their
20 attention. We have incorrect testimony not only on the
21 board meeting, which the record will show was incorrect on
22 the June 15th testimony, but also the reasons for the
23 termination of the sale negotiations both with York and with
24 SNCP, the first iteration of that.

25 Mr. McBride testified very clearly at the June 15
hearing that both of those deals fell apart because of the

1 uncertainty related to the litigation. We heard a very
2 different story today. I don't know which one to believe,
3 but a fiduciary shouldn't be telling this court different
4 stories.

5 We have a CEO of a business that has 62
6 employees, and he's not sure who his officers are or what
7 officer positions they hold. We have questionable payments.
8 There was debate about them. They attempted to justify
9 them. But at the most -- at the least -- excuse me, Your
10 Honor -- they were questionable.

11 We have a mischaracterization of board meetings.
12 We have a public reporting company that has a false website
13 identifying its officers, according to Mr. McBride's
14 testimony. And we have Mr. McBride's testimony that they
15 reached -- I'm not sure it was Mr. McBride, but we have
16 other testimony that they reached an agreement to revise the
17 fee agreement with Boies, Schiller & Flexner in this case
18 without this court's approval. And that is subject to this
19 court's approval under Section 327.

20 Your Honor, this does not amount to a Chapter 11
21 debtor that should remain in possession. These things all
22 speak of breach of fiduciary duty, failure to follow the
23 orders of this court, failure to comply with Chapter 11
24 procedures. We can debate whether that's grossly
25 mismanagement. There is no excuse for the failure to file

1 an operating report for any period after March 2009. All of
2 these are grounds for conversion of the case.

3 Unusual circumstances. How much must the estate
4 continue to pay to support McDonald's? McDonald's ought to
5 be able to support itself, Your Honor, and its other
6 customers.

7 Your Honor, as I mentioned in my opening, I think
8 the Court might appropriately consider, if the Court
9 determines to, to go the auction route on the sale, which
10 we'll discuss later, appointing a trustee under 1104(a)(3),
11 which an alternative to granting a conversion motion, or let
12 me say it's an alternative remedy upon granting a conversion
13 motion. And I'll address that more in connection with the
14 sale, Your Honor.

15 THE COURT: Okay, Mr. Levin. Thank you, sir.

16 Mr. Lewis

17 CLOSING ARGUMENT BY MR. LEWIS

18 MR. LEWIS: Thank you, Your Honor. I don't have
19 much to add there, except I'd like to focus on the issue of
20 rehabilitation.

21 THE COURT: Okay.

22 MR. LEWIS: The Court knows the standard is not
23 just whether you can confirm some kind of plan, whether you
24 can confirm a rehabilitating plan that puts an operating
25 company, the debtor, back out on the street. And Mr. Levin

1 has noted some of the concerns there, but on top of that,
2 Your Honor, we don't even have the debtor saying that's what
3 it wants to do. We have the debtor saying, if the sale's
4 approved, we want to have the case dismissed. We're not
5 telling you under what terms and conditions. We're not
6 telling you what kind of protections they're going to be.
7 And some of this gets to the motion to sell and the supposed
8 protections for creditors, so I don't want to get into that
9 too much now. I just ask the Court to remember this point
10 when we get there.

11 But, Your Honor, there is no rehabilitation being
12 discussed in this proceeding. It's in their papers. It was
13 in counsel's comments on the 15th of June that they intend
14 to ask for dismissal. This is a total abuse of Chapter 11,
15 and I think it's time to have a neutral Chapter 11 trustee,
16 Chapter 7 trustee, there to judge what should happen next in
17 this case, what operation should continue, what operation
18 shouldn't continue, what should be done with the litigation,
19 whether it should be prosecuted vigorously, whether it
20 should be settled in light of whatever happens in the Tenth
21 Circuit when the time comes.

22 I doubt seriously that given their devotion to
23 that litigation, the Debtors' management is going to scatter
24 to the four winds and desert a Chapter 11 trustee or a
25 Chapter 7 trustee. They're all shareholders. If they win

1 big, they make money anyhow. It's just not going to happen.
2 But that trustee will be taking -- while getting advice from
3 these people, he will be making his own judgments and
4 decisions as a new face on the block, as an experienced
5 bankruptcy person, perhaps as an experienced business
6 person.

7 Congress saw fit to provide for conversions to
8 Chapter 7, and to provide for Chapter 7, and to provide for
9 Chapter 7 trustees. And the notion that Chapter 7 trustees
10 can't be trusted to do their job just flies in the face of
11 Congress' judgment on that issue, which none of us is really
12 in a position to override.

13 So those are my comments, Your Honor. I'm going
14 to save most of what I have for discussions about the sale
15 motion because it really has to do, in many ways, with
16 what's left over if the sale is approved. Thank you, Your
17 Honor.

18 THE COURT: Thank you, Mr. Lewis.

19 Mr. Harrington?

20 CLOSING ARGUMENT BY MR. HARRINGTON

21 MR. HARRINGTON: For the record, Your Honor,
22 William Harrington from the Office of the United States
23 Trustee.

24 Your Honor, I think this case is interesting
25 because it's a case where the 800-pound gorillas didn't come

1 in on the first day of the case and demand conversion.

2 We've waited two years now, Your Honor, and I think kind of
3 what I'll call the 800-pound gorillas in this case have
4 finally come to the court and said, after \$5 million has
5 been taken away from our recovery, please do something about
6 it.

7
8 So this is not the case where you have the
9 overbearing creditors coming in on the second day of the
10 case, demanding action of the court before anyone has a
11 chance to look at the case, before the Debtors have a chance
12 to rehabilitate and catch their breath; two years, Your
13 Honor.

14 Your Honor, I'm not going to go over continuing
15 loss. I think that was well covered. And I think it is
16 essentially admitted in the Debtors' response. On
17 rehabilitation, I think that also was well covered, Your
18 Honor.

19 I do want to stress the plan aspect of it. As I
20 said in my opening, the Debtors aren't talking about a plan
21 here; the Debtors are talking about some kind of structured
22 dismissal. I don't know what that means. That's not part
23 of the bankruptcy code, Your Honor. It's not a plan. It's
24 not a Chapter 7 distribution.

25 I am concerned, Your Honor, when we get to that
point where I think we've demonstrated cause, what Your

1 Honor then has to do is look at to whether or not it's in
2 the best interest of the creditors, unusual circumstances
3 based on the best interest of the creditors.
4

5 The creditors are here telling you they want
6 conversion. They want an independent fiduciary. So I think
7 you have to take that into account, Your Honor, when you
8 make your decision. And I think it's important that you
9 think about that they waited two years. They're given the
10 debtor their a chance, and the debtor hasn't produced. And
11 so I think at this stage, Your Honor, you do have to take
12 into consideration what the creditors are asking you to do,
13 and these are the 800-pound gorillas in the case, Your
14 Honor.

15 THE COURT: Talk to me for one minute, if you
16 will, Mr. Harrington, based on your experience about an
17 operating Chapter 7.

18 MR. HARRINGTON: Well, I think there are a number
19 of options here, Your Honor, and I think Mr. Levin mentioned
20 it. I mean, a Chapter 7 trustee can proceed under 721. You
21 can rule that he can operate the Debtors through a sale, and
22 that's happened in this district before. I know George
23 Miller has operated companies before --

24 THE COURT: Yes.

25 MR. HARRINGTON: -- under 721. But I think there
are other alternatives.

1
2 If you decide that the cause exists for
3 conversion, you can, under certain circumstances, appoint a
4 Chapter 11 trustee if you think that's appropriate in
5 carrying out a sale process or the appointment of an
6 examiner, Your Honor.

7 THE COURT: Thank you, Mr. Harrington.

8 All right.

9 Mr. Spector --

10 MR. SPECTOR: Yes, Your Honor?

11 THE COURT: -- it's your turn. Thank you very
12 much. It's been a long day and a long couple of weeks for
13 you, I know.

14 CLOSING ARGUMENT BY MR. SPECTOR

15 MR. SPECTOR: Yes, sir.

16 Before I dive into my closing, I'd like to
17 address some of the things that I've heard from counsel, and
18 put that aside, and then get into the guts of mine.

19 THE COURT: Okay.

20 MR. SPECTOR: Mr. Levin said SCO had pricing
21 ability. There's no evidence of that. As Your Honor
22 probably knows from testimony in this case or just living
23 with this case, that's not how this business works. There
24 are contracts. He's suggesting that they can go out and
25 tell Microsoft tomorrow we're raising the prices. Licenses
have been bought. It's not like there are new customers

1 walking in the door and they're going to raise the price.
2 There's no evidence that they have pricing ability.

3 The debtor -- the reorganized SCO -- I don't want
4 to say the reorganized SCO because it would be the former
5 debtor SCO -- will have new money to go on in the
6 rehabilitation phase post bankruptcy. If the Unix sale
7 closes, they'll have a million dollars left over after
8 paying the claims. That's new capitalization.

9 Why no skinny-down plan until now? Because
10 you've heard the efforts to try to sell the company is a
11 going concern. Who wants the Unix business if there are no
12 engineers there or R&D or support and service? That's why
13 there's not a skinny down plan. The major ease that this
14 company's been looking to is to try to sell the Unix
15 business. And by the way, it's also not true that
16 Mr. McBride testified that all they wanted to do was keep
17 the litigation. They did have some of the A,B,C,D,E,F,G,
18 which we never linked up the names, by the way.

19 THE COURT: Understood.

20 MR. SPECTOR: Some of those people were offering
21 deals that involved taking stakes in the claims, and you
22 heard Mr. McBride testify about that. So everything was on
23 the table. In fact, even the York deal involved that.

24 All the website said was
25 SCO. It didn't say SCO Group, SCO operations. the website

1 says what it says and all at least the subsidiary that Mr.
2 Buyer was affiliated was also called SCO Group, SCO Group
3 GBH which is Germany. It's a marketing website. Why bother
4 about niceties about, you know, one or the other. And I
5 won't go into the ruling again, but that deals with that.

6
7 By the way, the record should show and of course
8 the record speaks louder than lawyers, that the April and
9 May MRO's were filed. It's not just this March. Maybe
10 counsel misspoke when he said March and he meant to say May.

11 The BSF deal is contingent and it's not a done
12 deal. It's an officer basically by Boies Schiller Flexner.
13 It hasn't been executed. There's no signed agreements or
14 anything like that. It's just a statement saying if we get
15 past this and we go forward, they will do -- they'll
16 restructure going forward their contingency fee in return
17 for giving up their pre-petition claim and some other
18 consideration which --

19 MR. LEVINE: Your Honor, I apologize for
20 interrupting Mr. Spector, but I believe he's going far
21 outside the evidence record that we have so far.

22 THE COURT: On the Boies Schiller issue?

23 MR. LEVINE: Yes.

24 MR. SPECTOR: I think he said it was contingent.
25 I think the testimony from Mr. Tibbitts in his declaration
talked about that.

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THE COURT: All right.

MR. SPECTOR: 1104(a)(3), we said in our response that that -- there's four options on the table. It's not as hard and fast as some commentators say since Bap CPA [ph] came to the floor. This Court still has options and that's one of them. An examiner is another one. And frankly, we'll get to those I suppose at another stage.

The U.S. Trustee and Mr. Lewis talk about what's the details of this dismissal, structured dismissal actually. I didn't say anything about that. There is no motion before the Court yet we have talked about it. It's not unfair for them to raise it. But there's also no discussion of any structure. It wasn't the plan to be any structure. Once the sale closes, this is me talking, there's no evidence, this is legal argument. Once the sale closes and the money is in the hands of SCO and in the bank account of SCO, the idea would just simply be I suppose and we haven't gone through this, haven't talked to the client about it, we just file a Motion to Dismiss. We no longer have the Unix business. We no longer are -- have the problem of, you know, the problem of the appeal will have probably gotten to the end of the appeal by then. And there probably is no reason to stay in bankruptcy, the purposes of the bankruptcy have been accomplished. If there's some structure that is requested by U.S. Trustee, we'll discuss

1 the structure.

2 The bulk of the creditors are not here. I know
3 Mr. Harrington is just coming in at the last minute and it's
4 amazing that he had to do all that today, but the bulk of
5 the creditors are not here. Novell is a creditor because it
6 has a judgment. IBM has a claim they say that you've heard
7 testimony and it's been valued by their own people at zero.
8 They don't have -- all it is is an attorney's fees claim is
9 all it is.

10 MR. MARRIOTT: Your Honor, I would object to that
11 characterization of the value of the claim by their own
12 people. That's absolutely untrue and it indicates there's
13 no evidence in the record, but have their own people,
14 whatever that means value the plan.

15 THE COURT: Yes, I --

16 MR. SPECTOR: I thought there was evidence about
17 an expert report saying there were no damages except for the
18 attorney's fees.

19 MR. MARRIOTT: And expert report in which Mr.
20 Tibbitts said he didn't really have a great recollection
21 about what it said. That's not the same thing as testimony
22 as to what it says and I'm happy to make a proffer as to
23 what it says if and when the Court wishes to hear that.

24 MR. SPECTOR: Well that's why I was -- I thought
25 there was something in the record about it. I'm trying not

1 to go out of the record.

2 THE COURT: I don't think there was anything. I
3 know there's nothing in the record on that issue.

4 MR. SPECTOR: I'd like to now get to the Sale
5 Motion.

6 THE COURT: Yes.

7 MR. SPECTOR: It's the assumption and assignment
8 part of it. I just want to put that away. Mr. Norris
9 testified and others have testified, Mr. Hunsaker has
10 pointed out, and the Purchase Sale Agreement itself has
11 provisions saying who's going from SCO to Unxis once it
12 takes over the Unix business? Basically, the engineering
13 cadre, the important people, the techies that run this
14 company. The management but for some of the management but
15 for Mr. McBride and I think Mr. Nielsen was on the list, Mr.
16 Hunsaker was. These people know how to run a business. The
17 testimony -- I think the Court can make an easy inference
18 that there's adequate assurance of future performances
19 contracts that are being assumed and assigned from that.

20 In addition, you heard the testimony about the
21 capitalization of the new company going forward, the deep
22 pockets that back it or the commitment of the people behind
23 it to make it operate, the vision they have and what they
24 want to do with this company. I think all of that goes to
25 evidence to our assumption and assignment. You've heard

1 very little testimony about the objection. I guess he hasn't
2 argued it yet. so I'll save that for that.

3 Addressing the Conversion Motions, the Debtors
4 submit that the Movants have failed to carry their burden of
5 proof to establish cause under Section 1112(b). Now I'm
6 going to make a legal argument and I'll make it fairly
7 briefly. There is no Third Circuit case that holds what the
8 standard of proof on a Conversion Motion is. I will confess
9 that there are cases, lower court all around the country
10 that just say as a matter of knee jerk reaction, well it was
11 by a preponderance of the evidence. I'm going to pause at
12 the argument that that's wrong. I'm going to pause at the
13 argument that it should be clear and convincing evidence and
14 this Third Circuit is not -- as far as I can tell, there's
15 no case that says otherwise. Here's why. We've already
16 heard argument that the Statute 1112(b) has a lot of
17 options.

18 One of the options is I believe Mr. Harrington
19 said and the Court followed is to appoint a Chapter 11
20 Trustee. So let's look at what the Third Circuit says about
21 the evidence necessary to appoint a Chapter 11 Trustee.
22 Well I cite the Court to Marvel Entertainment Group and
23 Sharon Steel Corporation. I'm not going to waste your time
24 at the cites, they're well known cases. And both of those
25 cases hold that in the Third Circuit and by the way others

1 as well, the standard of proof to get the appointment of a
2 Chapter 11 Trustee is by clear and convincing evidence.

3 Now to use a criminal law analogy, I would say a
4 Chapter 11 Trustee, especially the way this now appears as a
5 result of Bap CPA is a lesser included in a Motion to
6 Convert. That is a less drastic remedy than the Conversion
7 Motion. And that's really the way it's been put up to Your
8 Honor anyway.

9 Well, if the Third Circuit is on record as saying
10 to appoint a Chapter 11 Trustee you need clear and
11 convincing evidence, what do you need for conversion, proof
12 beyond a reasonable doubt I surmise not. But certainly, it
13 doesn't make sense that the more drastic remedy requires a
14 lower standard. So I know it's novel because I don't know
15 anybody else who's made the argument and the Third Circuit
16 permits the argument. I would submit that the standard of
17 proof is by clear and convincing evidence on this motion.

18 On the topic of cause under Section 1112(b)(4),
19 this Court's decision in 15374 Memorial Corporation and I
20 won't cite it, although there are numerous cases. It was up
21 and down and subpoenaed, the original one, listed factors
22 for why the Movants there had not established gross
23 mismanagement. That's one of the things they're talking
24 about here. And I think Mr. Levin made a couple of points
25 about, you know, why they didn't do this and why they did do

1 that but, you know, their tunnel vision on the claims and so
2 forth. Well that case was reversed on a different issue,
3 the finding on good faith or bad faith. The fact is that
4 the Court laid out in that case, Stan, in its instructive
5 and I'll just go through five them that exist both in that
6 case and guiding the Court to deny the Motion there and why
7 they -- and how they existed there as well.

8 The Debtors here successfully asserted the
9 automatic stay to avoid the Suisse [ph] Arbitration in
10 Switzerland. It's one of the things the Court found
11 important in the factual context of that case. SCO's
12 management facilitated the dismissal of the Debtors from the
13 IPO Class Action litigation in New York of \$59 million.
14 That's something else the Court found important in a
15 different context in a Motion to Convert in the Memorial
16 case.

17 The management used the Freedom from
18 Dismemberment to reduce the claims against the estate by 91
19 percent and to develop and market cutting edge new software
20 obligations in mobility and virtualization. The parts of
21 the business that were either nascent or non-existent with
22 the cases commenced. That's an important fact to show what
23 management has done.

24 Management negotiated the sale of the claim by
25 (inaudible) for about a third of what was originally

1 asserted. And as I mentioned before have contingently,
2 conditionally eliminated a claim for in excess of half a
3 million dollars by Boies, Schiller, Flexner.

4 Management took steps to preserve cash and to
5 locate hidden assets and one of those a patent was sold
6 earlier in the case and they've now uncovered another
7 patent, the Java patent particular sale and can get
8 somewhere between a million and a half a million dollars.

9 All of those things I didn't just make up. Those
10 were -- this Court found in another Motion to Convert case
11 for relevant considerations. There were a couple other
12 minor ones and I'm going to say why it's so minor. One of
13 them was the Court said fixing the bar date. You can see
14 why I didn't go there.

15 THE COURT: Right.

16 MR. SPECTOR: Okay. Based on the evidence
17 establishing these factors, the Court should find that the
18 Movants have failed to carry the burden for cause under
19 1112(b)(4)(b) for mismanagement.

20 And by the way, let's talk about the tunnel
21 vision of the claim. They won't let us and Your Honor won't
22 let us tell you why management spent so much of their effort
23 and time on those claims because to do so you'd have to
24 evaluate how strong the claims are, how -- because if it's
25 important that they're having tunnel vision on these claims,

1 then it really ought to be, you know, why are they so
2 concentrated on these claims? I'm barred from arguing it.
3 But I think, Your Honor, cannot fault management for
4 concentrating on what they think is their largest asset by
5 far in selling off the Unix business which has been, you
6 know, dying slowly in their hands and so forth.

7
8 I'm not going to make much of an argument about
9 the other grounds, the continuing losses. There was an
10 error. Had I realized when I was drafting that response to
11 June 5 that the losses were as we now know they were, I
12 probably wouldn't have gone there. I would have
13 concentrated my power somewhere else. So I'm not going to
14 make an argument. Sure there's been continuing losses and
15 we're not surprised. We didn't expect to spend that much
16 money in this case. We had the devastation of the York deal
17 failure and other things but, you know, 20 months in Chapter
18 11 is going to cost money. And of course all of the
19 business reasons that existed before they came into this
20 case didn't get better because of that except for mobility
21 and that didn't have a material effect through this time
22 period.

23 So let's talk about unusual circumstances because
24 well let's stop for a second and say sure, there were
25 continuing losses, but I'm not saying sure as to a lack of
reasonable possibilities for rehabilitation. I don't know

1 where Mr. Harrington gets it and maybe he -- maybe there's
2 case law to support it, I don't know. I never looked at it
3 this way. I never heard that it was necessary for the
4 Debtor to say oh, by the way, rehabilitation shall come from
5 our plan of reorganization and then we will come out
6 rehabilitated. I didn't know that you couldn't rehabilitate
7 in the course of the Chapter 11 and say you know what, we
8 don't need to plan anymore. We took care of all of our
9 business, we just want it dismissed.

10 And if I'm wrong, then Your Honor, will tell me
11 I'm wrong. But I think we can still show that there's a
12 reasonable likelihood of rehabilitation despite a plan. And
13 if a plan were necessary, I suppose we could dig down and do
14 one as well. But we didn't plan to do that, but if we had
15 to, we really could do a plan, mobility going forward and
16 the litigation going forward. By then, everybody would have
17 been paid. It would be Novell would either have not had a
18 claim any longer or the LC would have been cashed and they'd
19 have been paid. And the only one left would have been Red
20 Hat, IBM, and we'll just go out and litigate it in the real
21 world. So I suppose we could put together a plan that said
22 we'll pay all our creditors in full. Oh, by the way, we did
23 that and we'll go out and litigate with remainders. I mean,
24 sure, we can do that if it's really necessary.

25 So you heard testimony about the growth of the

1 mobility business. You heard testimony from Mr. Nielsen
2 that if we sold the business, the Unix business and the
3 mobility server and kept the mobility applications and got
4 rid of -- well I won't say get rid of, that's a terrible way
5 to say it, skinny down because we don't need those engineers
6 any longer to go off with Unixis, you turn cash flow positive
7 in the short-term. And of course with the million dollars
8 that's funded, it's reasonable to believe that the long-term
9 (inaudible). There's no real evidence to the contrary
10 anyway. So we maintain that the Movants will not have
11 satisfied the burden of clear and convincing -- by clear and
12 convincing evidence that 1124(b)(4)(a) has done that because
13 of the rehabilitation problem. We don't have to talk about
14 J any longer.

15 And so it now brings me to the unusual
16 circumstances. If the Court were to find cause in either A
17 or B, we should talk about the unusual circumstances in this
18 case. And by the way, this case is chock full of unusual
19 circumstances. Usually, you're lucky to find one, but I'm
20 going to go through a list. Rarely, if ever does a Court
21 find at a context like this, a Conversion Motion, the Debtor
22 coming into Court saying oh, by the way, we have a means
23 within days to pay all of our creditors in full. Sale,
24 whatever, reinvestment, just the fact that the Debtor has a
25 credible means to pay the creditors. The Debtor has a

1 credible means to pay the creditors in full days from now
2 usually is all it takes. There's case law.

3 It's in my response, Your Honor, to find any
4 cases, two cases. It's rare because -- you won't find a lot
5 of cases because it's a rare circumstance that you really
6 have that. In these cases, we actually have that. You've
7 heard testimony about the steadfastness of Mr. Norris and
8 his partners on this deal. You know their deep pockets.
9 You know that there's been a lot of thinking on this.
10 They're ready to close. There's no contingencies on SCO,
11 but for getting Your Honor's signature on a piece of paper.
12 There's nowhere due diligence that has to be done. And I
13 guess I will cite the two cases in my response, the Newtown
14 Development case and the Orbit Petroleum case both in my
15 response.

16 Well a second unusual circumstance, while the
17 Court wouldn't hear about the merits of the substantial
18 claims, the fact that they exist and are large and important
19 are certainly relevant, extremely relevant in this case and
20 I'll cite a case to that effect. In re original IFPC
21 Shareholders, Inc. It's in my response. In this case,
22 these claims alone present unusual -- these claims against
23 the big entities that we have alone present an unusual
24 circumstance forgetting about that we have the money to pay
25 people in full in a few days, a matter of days I should say.

1 But this fact is especially an unusual circumstance when
2 just deposed with how soon these claims may be at least
3 partially vindicated. We should know and there's a
4 reasonable basis to believe that we'll know within 34 days
5 just how meritorious these claims are or at least more light
6 on that will be shed.

7 In the -- with the timing, I talked before about
8 discretion and timing. With the unusual circumstance of the
9 size and importance of these claims, with the -- just the
10 position of the timing when we're going to get clarity on
11 those things, that alone is an unusual -- those two together
12 are unusual circumstances. And what do we have to do for
13 those 34 days of look and see? In the meantime, if the
14 Court approved a sale, one would concede it will close.

15 But the other one is if we took even until August
16 31, we have testimony from Mr. Nielsen that we have the cash
17 to last that long. Notwithstanding testimony from the
18 lawyers to the contrary, we have the cash. We have over
19 \$1.8 million I think he said now. We could lose perhaps
20 \$200,000, \$100,000 to \$200,000 I think his declaration said.
21 And we have another unusual circumstance, the insurance
22 policy of Mr. Yarrow who's put up \$200,000. Just in case it
23 does lose \$200,000 in that 34 day span, he's going to put in
24 money to save the creditors so they don't lose anymore.
25 They don't lose any of that. It's a reimbursement to the

1 estate for that loss. Where do you find a case like that?
2 Just with that, forgetting all the other things I talked
3 about, where do you find a case with that? These -- this
4 case is loaded with serious unusual circumstances.

5 Once the Unxis deal closes, of course I said
6 we'll move to dismiss the case and any pay you creditors in
7 full and the claims -- well I don't have to go through that
8 again, we've already covered that. But if the case is
9 converted now, now before Unxis can buy the company. Before
10 we can get \$2.4 million from Unxis, nobody wins. If the
11 Unxis deal closes, everybody wins. All fees and expenses of
12 the Chapter 11 case will be paid on exit. All the allowed
13 claims will be paid or taken care of. The employee's jobs
14 will be saved. They'll be moving on with the same job with
15 a new employer. Important customer interest will be
16 preserved, not the least of which is the government. The
17 foreign non-debtor subsidiaries in their re-sell would have
18 been saved. The stockholders investments which basically
19 will rely a little bit on mobility, but a lot of the claims,
20 they'll still exist. Every constituency in the case
21 prevails, wins if we do this.

22 On the other hands, if the case is converted now,
23 nobody wins. The sale disappears. There's a \$715,000
24 benefit that goes away, \$515,000 that Boies Schiller Flexner
25 is offering to wipe out and the \$200,000 that Mr. Yarrow was

1 going to put up. That's never going to come about. The
2 mobility business would be gone. The most likely scenario
3 is that the businesses will shutdown making a going concern
4 impossible. Now, Your Honor asked a very good question. I
5 always think it's a fair question about an operating 7 or as
6 the Trustee said what about an 11 Trustee? Well I can't
7 speak about the 11 Trustee, Your Honor's question though
8 raised some hackles.

9
10 You'll read in Mr. Hunsaker's declaration about
11 what's like to happen. People don't know, especially
12 European's and customers out there, they get very nervous
13 when a company they do business with files Chapter 11. Ask
14 them what they feel if they're thinking about a Chapter 7,
15 okay? Oh, what's an operating 7? These engineers have to
16 think about their families. Will they stick around and run
17 this company? Will management run the company? The same
18 will go on about management. Will Mr. Hunsaker stick around
19 and do it? Will any of these other people do that with a
20 trustee in charge in the 7 mode for crying out loud? I
21 think that's a big risk.

22 And what happens to what -- the product he wants
23 to sell the Chapter 7 Trustee, he or she wants to sell in
24 that scenario? Mr. Hunsaker testified and I believe it's
25 common knowledge. I don't know that it needs much evidence
that when this company ceases to operate in the normal

1 course of business like it's been, you can kiss it goodbye
2 in terms of recovery. We've got a recovery that's twice
3 what is out there in terms of debt. And you can bet that's
4 not going to happen in 7 mode or probably even an 11 Trustee
5 mode.

6 Finally, the fact that the Debtors' core Unix
7 business is infused with a strong public interest is itself
8 independently an unusual circumstance of cases that -- of
9 the case law cited on that is Gateway Access Solutions also
10 in my response. The Court stated "we were continued
11 operation of the Debtor who provided an exclusive essential
12 service would foster the public interest." And it says "the
13 Court should not convert the case to one under 7". That
14 ascribed generally SCO.

15 The Unix operating system has to move on. If SCO
16 could have won this litigation sooner, it could have stayed
17 with SCO and it could have continued. Unix could have
18 stayed with SCO. It's exhausted its ability to keep it
19 operating. But in the public interest, its management is
20 looking to put it in the hands of somebody to keep it
21 operating because of the enormous install base that will
22 find it very difficult to migrate away or to make any
23 changes. That's not mismanagement, Your Honor, that's
24 management with a capital M. And when it's become pretty
25 likely that they can't go on any further, they had to make a

1 deal. And this is the deal they did. And they're happy with
2 the deal. They trust the people who are going to be taking
3 over. They're going to be good stewards of the Unix
4 platform. They have great ideas going forward. They can
5 make it run.

6 And by the way, one other little fact in
7 evidence. On June 15 when we came here facing only a
8 Conversion Motion, the evidence was the stock price of SCO
9 was 12 cents. On Friday, still facing the Conversion
10 Motions, but knowing that there's a sale to Unxis which has
11 been out there for awhile, the stock price was 17 cents.
12 Who really votes on this? The marketplace has voted on this
13 sale and it's voting thumbs up for this sale.

14 We can talk about the LNS deal. I don't know if
15 you want to do it now or in response, but I would defer to
16 Mr. Caplan who was the deal guy who's here, who's looked at
17 the -- I can tell you, I have not looked at the LNS deal. I
18 can tell you before we do that why we have not -- we're not
19 interested in the LNS deal. Generically, he can parse the
20 deal and can tell you the -- because it's there if we talk
21 about it. He can parse it and tell you why it's not
22 acceptable.

23 But number one, you've heard testimony about
24 principals of this company and the principal of the York
25 deal and one of the lettered entities that I won't name, the

1 experience that this company has had with them, the distrust
2 there is. There is also distrust of other natures that
3 there's nothing in evidence, but their distrust is deep. We
4 don't think that they're good custodians of the Unix
5 platform. We think there are ties with IBM. One thing I
6 will point out, they did -- they made it look like they were
7 putting this deal on the Unxis PSA platform, but they
8 deleted one of the reps. One of the reps that they deleted
9 was that there's tie in with IBM, no relationship with IBM.
10 That's not in its right and we think that's telling. And we
11 think that there's a willful chief component.

12 And for a moment, I'd like to defer to Mr. Caplan
13 if he can tell the Court the details of the deal and why
14 it's unacceptable. If it's no, I have some notes on that
15 and I could almost like read I guess.

16 MR. MARRIOTT: Your Honor, if I may.

17 THE COURT: Yeah.

18 MR. MARRIOTT: Mr. Caplan was on the witness list
19 to be a witness. It sounds like we're now opening --

20 THE COURT: I -- well Mr. Spector, you've now
21 gone on for roughly 40 minutes. It's late. I think your
22 time is up.

23 MR. SPECTOR: It is up. There are deal terms
24 about the LNS deal that are very, very poor and then much
25 worse financially than the Unxis sale.

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THE COURT: All right.

MR. SPECTOR: Your Honor, for these reasons, I'll ask Your Honor to approve the sale and deny the Motion to Convert.

MR. SPECTOR: Thank you, Mr. Spector.

THE COURT: All right. Mr. Levin?

MR. LEVIN: Turning to the Sale Motion, Your Honor, let me pick up where I left off this morning how many hours ago? I said we had a few problems with the Sale Motion. One was the poison pill.

THE COURT: Yes.

MR. LEVIN: The other was the solar eclipse. Another was the lack of a record. Well I can say that the Debtor has made at least somewhat of a record and one of our problems has been solved in part. Of course it would have been a lot easier had that record been made when the motion was filed so we didn't have to go through all of this exercise and we could have focused on the remaining open issues. Let me address the remaining open issues.

To approve a sale, this Court has recognized that the Debtor must meet four, must show four things. First, a sound business purposes. Second, a fair price. Third, notice. We're not disputing that, although Novell might. And fourth, good faith. Let's take those in order.

Sound business purpose. Mr. Spector argues that

1 the sale will provide the ability to pay all claims in full.
2 He doesn't say what happens to shareholders. If all claims
3 are paid in full, there might be something leftover for
4 shareholders. But -- and IBM as we have known it, Your
5 Honor is a shareholder in this case in addition to its other
6 positions in this case. What I'd like to go over is a
7 statement of the ability to pay all claims in full. and
8 Your Honor, if I may approach, I'd like to hand a
9 demonstrative exhibit up to the Court which I admit has to
10 be amended a little bit because of the testimony today.
11 This was prepared in advance so if I may, Your Honor, I'll
12 hand that up and I'll hand counsel a copy.

13 THE COURT: Yes, thank you.

14 MR. LEVINE: I need to retain one for myself.

15 THE COURT: Good idea. That's a good idea, thank
16 you.

17 MR. LEVINE: Your Honor, this was an effort to go
18 through the sources and uses of funds in a proposed Unxis
19 sale.

20 THE COURT: Yes.

21 MR. LEVINE: The sources of funds we started out
22 with projected July 31 cash balance of \$479,000. Now Mr.
23 Nielsen testified that that might go up by about \$325,000
24 maybe \$500,000 because of good sales, \$325,000 because of
25 the -- some of that is reserved for Boies Schiller. I don't

1 know why that wouldn't still be reserved, but let's give
2 them the benefit of the doubt that that goes up by \$500,000
3 and we'll call that \$979,000. I'm not going to release the
4 Novell cash of \$685,000 that is restricted cash. They
5 claimed that there was projected receivables. Your Honor,
6 this was on Exhibit MX53, these numbers are derived from
7 that exhibit. There were receivables, net of allowance of
8 \$1,323,000. We don't know if they're all collectible even
9 after net of allowances there's always some uncertainty
10 about the collectability of receivables, especially in this
11 economy. But I put in the full amount shown on there and
12 \$2.4 million cash from the Novell, I'm sorry, the Unxis
13 transaction.

14 Then I went and looked at their schedules that
15 they filed just a few weeks ago listing the unsecured
16 claims, some of which are disputed. Some of the large ones
17 are disputed. But in any event, those claims needs to be
18 reserved for. I did not include in this exhibit the Novell
19 claims on the theory that if the Debtor is right that the
20 letter of credit Sun and the reserved cash pays the Novell
21 claim in full if the judgment is affirmed, it's a wash, so I
22 did not include that. And, in fact, this \$3.5 million in
23 priority and general unsecured claims does not include the
24 Novell claims.

25 Importantly, Your Honor, it also does not include

1 an IBM claim. And we don't know how much that claim may ever
2 be allowed for, but we know that in any fair Chapter 11 or
3 Chapter 7 process, that claim would be reserved for until it
4 was determined. And we could not simply say well we can
5 disregard the IBM claim, there's enough to pay everybody
6 else. We would be entitled to the same pro-rata distribution
7 as everybody else. So that doesn't include that.

8 The executory contract cure amounts are \$134,000.
9 That was the schedule that they filed a week or ten days
10 ago. And then I looked at the pre-petition liabilities
11 which are again on MX53, accounts payable. I ought to point
12 out, Your Honor, that exhibit -- you'll see the fourth line,
13 royalties payable assumed PSA Schedule 2.4

14 THE COURT: Yes.

15 MR. LEVINE: Section 2.4 of the PSA says no
16 liabilities are assumed except for those set forth on 2.4.
17 And therefore, that's why from MX53 where there was a number
18 for royalties payable, I've zeroed it out. But all the
19 other payables on MX53 are listed here, accounts payable,
20 accrued payroll and benefit, accrued liabilities, long-term
21 liabilities, cash burn rate one month \$240,000. That's an
22 approximation. And we come up with a total of pre-petition
23 liabilities, total post petition liabilities and I'm going
24 to give them the benefit of the doubt that we reduce claims
25 by \$500,000 for the Boies Schiller claim and that brings

1 that down to we'll call it \$5 million round numbers. And
2 even increasing the 4.2 at the top by the \$500,000, I'm
3 sorry, by the -- yeah, \$500,000 there, that's 4.7. We're
4 still \$300,000 underwater.

5 So if anything, despite the Debtors' repeated
6 assertions that this sale pays all claims in full, the
7 record at least the explained record does not reflect that.

8 THE COURT: And your numbers as I understand them
9 don't include professional fees and expenses.

10 MR. LEVINE: Yes, thank you for pointing that
11 out. It does not include accrued unpaid professional fees
12 and expenses and given what's gone on in the last month, I
13 imagine they are not insignificant.

14 THE COURT: Correct.

15 MR. LEVINE: Plus whatever holdback there was
16 Your Honor and we did not do a calculation on that holdback.
17 So sound business purpose, because we can pay all claims in
18 full, the record does not support that.

19 Second, the purpose of the sale. Let me turn to
20 Exhibit MX34 which one of the witnesses was questioned about
21 which was the marketing materials that Gulf Capital Partners
22 and Merchant Brit [ph] had put together to find investors.
23 And I quote from UX04898, that's the page number, the date
24 stamp of that exhibit MX34 "returns of over 80 percent in
25 three years are achieved due to the minimal purchase price

1 of the assets agreed with the management of SCO which needs
2 funds to finance their longstanding litigation." That does
3 not ring of a sound business purpose for this sale.

4 We already discussed the sale protecting
5 employees and customers. A laudatory purpose, Your Honor,
6 but a sale that is improper in other respects should not be
7 approved simply because it protects employees and customers.
8 That is not by itself a sound business purpose, that is
9 collateral.

10 And the exclusion of the mobility. Mobility has
11 less than \$100,000 in revenues. There is the evidence, Your
12 Honor, Mr. McBride admitted that the purchase price was
13 reduced \$500,000 for the exclusion of mobility and hip check
14 [ph]. \$500,000 that might have made up that gap if my
15 figures were right or might not have if IBM's claim is
16 substantial or Boies Schiller's restricted cash is not
17 available or whatever else. \$500,000 for a business that
18 essentially has no revenue and only expenses. That does not
19 sound like a sound business purpose.

20 Let me turn to fair price. One of the things
21 that we raised in our opposition that is not addressed by
22 the amendment that was filed at 11:30 last night is the
23 price reduction depending upon the outcome of the Novell
24 litigation. The Debtor in its response to our opposition or
25 its reply said well, if the -- if Novell does not prevail,

1 then shareholders are not affected by the reduced price
2 because we need less to pay the creditors.

3 First of all, there's been no talk of
4 distribution shareholders here today. All I've heard is
5 we'll have \$1,000,000 to try to fund this mobility business.
6 But even if that were -- even if there were something for
7 shareholders, Your Honor, the idea that a buyer -- let me
8 say it differently. The idea that assets become worth less
9 if unsecured pre-petition claims are less is contrary to
10 everything we know in bankruptcy law. If Unxis is willing
11 to pay \$5.4 million for the assets because the assets are
12 worth that, then it shouldn't matter whether the Novell
13 judgment is overturned on the monetary. In fact, we'll be
14 out there cheering for it so there will be more distribution
15 to creditors. Nothing personal, Mr. Lewis.

16 So that is not an element of a fair price in this
17 deal. The Java patent we've already discussed. There's no
18 reason that that should be -- go over to the buyer if it's
19 not sold within a certain time.

20 Fair price, Mr. Nielsen is qualified to do
21 valuation and he has done valuation of other companies in
22 the past. No valuation now to make any showing that this is
23 a fair price. We simply don't know. And yet he's qualified
24 to do it without spending on an investment banker. And I
25 already noted on the fair price issue the reduction in price

1 of \$500,000 for the loss of assets for the non-sale of
2 assets that have essentially no value. That's not part of a
3 fair price.

4 The poison -- excuse me, good faith, Your Honor.
5 I'm skipping notice and going to good faith. Your Honor,
6 one of -- we had a few items on good faith, but there's
7 still -- I think the record is still uncertain on the
8 payments. I think the questionable payments, but the record
9 is not uncertain on the poison pill. There was an amendment
10 filed as I said at 11:30 last night. And, Your Honor, on
11 Page 5 of that amendment begins not a provision that simply
12 strikes 12(b)(4), 12(a)(4) which was the provision that we
13 said we objected to that upon a conversion or the
14 appointment of a trustee, the rights, the SCO retained
15 rights transferred to the purchaser. Instead, we need a
16 page and half to make that amendment.

17 And let me boil down what it says. Your Honor
18 will have a chance to review it when you review the record
19 in this case. What it says is if the right to transfer to -
20 - I'm sorry, if those events happen, the rights won't
21 transfer to the purchaser, at least not right away. It says
22 they will transfer to the purchaser, however, if the trustee
23 ever attempts to sell them. And they will transfer to the
24 purchaser on October 1, 2009, two and a half months from now
25 even if the trustee doesn't attempt to sell them. I believe

1 that's what it says. I'm reading a page and a half on not
2 much notice, Your Honor. We would be -- and there's another
3 provision that says if they do transfer to the purchaser,
4 the purchaser is not to pursue them. Well that's terrific.
5 We're very pleased with that as you can imagine, Your Honor.

6
7 But to the extent this is any attempt to
8 influence this Court's decision on conversion by saying
9 valuable rights would be lost if the case were converted, it
10 is still a poison pill. We don't believe those rights are
11 valuable, but the Debtor has stated its whole case on that
12 argument and for it to argue now that it should not matter
13 to the estate is contrary to everything it said at this
14 point.

15 Finally, Your Honor, the last point has to do
16 with the private sale.

17 THE COURT: Yes.

18 MR. LEVINE: Private sale as you know, Your Honor
19 does occur in bankruptcy cases, but is very unusual. Mr.
20 Spector attempted to point to GM and Chrysler, but in fact,
21 even in those cases, the Court provided for an auction in
22 case there was an over bidder. Of course there wasn't and
23 the sales went to the stalking horse bidder in both of those
24 cases. Here we have another bidder who has made known his
25 willingness to participate in an auction based on a starting
bid of the Unxis proposal. I think we can infer from that,

1 Your Honor, that the bidder would not be bidding less than
2 the Unxis proposal. There wouldn't be much point. So we
3 have a live competition and there is no reason in this case
4 to approve this now as a private sale.

5 Now if this Court is going to order an auction,
6 how should it be done? As we said earlier, we believe an
7 appropriate way to do that would be the appointment of a
8 trustee under 1104(a)(3). Unless Your Honor feels -- would
9 like to hear closing argument to the burden of proof issue
10 which I was -- well let's just say I was surprised by it,
11 I'll leave that one aside and go straight to the appointment
12 of a trustee.

13 Why is a trustee appropriate in this case? We do
14 not take the position that a shutdown of the business
15 pending an auction makes sense. And we, IBM have never
16 argued that if the case is converted to Chapter 7 there
17 should be an operating trustee in Chapter 7. We think the
18 Bankruptcy Code is structured in a way that makes it easier
19 to operate in Chapter 11 and not in Chapter 7. If there is
20 a conversion because this company is losing money and has no
21 reasonable prospect of rehabilitation, then it should be
22 converted to Chapter 7 and money saved, stop the bleeding.

23 If there is going to be an auction, we believe
24 it's important to keep the business operating for that and
25 we would not seek immediate conversion but would seek

1 Chapter 11 trustee instead. Why? The Debtor has made very
2 clear on the witness stand today in Mr. McBride's testimony,
3 that they do not trust Mr. Hale. That's despite the fact
4 that they were here on multiple occasions seeking to pay
5 York Capital \$150,000 fee. I don't know when relations
6 turned sour, Your Honor, but I tend to doubt when Mr.
7 McBride said they turned sour the minute the negotiations
8 stopped back in November of '07. It -- the two things do
9 not seem consistent. But now they say they cannot trust Mr.
10 Hale. Well if they cannot trust Mr. Hale, that's exactly
11 why we need an independent fiduciary to conduct the auction.
12 We don't want one of the bidders at the sale to be told your
13 bid is not welcome here. That is not how to have a free and
14 fair auction.

15 We believe a sale process can be conducted
16 quickly. Mr. Hale is familiar with this business. He's
17 already proposed an Asset Purchase Agreement. We believe it
18 will take some negotiation, but we think it could be
19 concluded within about 30 days give or take without looking
20 for an extended auction. It may be that once the buyers who
21 were identified on that secret certificate of service know
22 that there's really an auction, they might come back to the
23 table. When they're told there's a private sale, they
24 probably don't have much incentive to come back. We don't
25 know.

1
2 So, Your Honor, we believe the sale should not be
3 approved for all of the reasons. There's no sound business
4 purpose. The price as set is not fair. We questioned the
5 good faith, especially of the poison pill provision. And if
6 there is a sale approved, that should be changed.
7 Certainly, the fair price issue could be addressed by an
8 auction and that is where we stand, Your Honor.

9 THE COURT: Thank you very much, Mr. Levine. Mr.
10 Lewis?

11 MR. LEWIS: Thank you, Your Honor. I'm always a
12 man of my word and again, I won't be very long on this.
13 Your Honor, one way to look at the sale price here is to
14 look at the sale process throughout this case. And while
15 the Debtor wants you to believe that it was diligently
16 pursuing potential sales, you'll see in Mr. McBride's
17 deposition that basically the deal has been the deal
18 whatever, sell the Unix business, buy it for \$10 million and
19 keep going on and on and on.

20 What we saw was they had a complete deal with
21 York that collapsed and not because we didn't know the
22 outcome of the litigation at that time. We saw another half
23 deal with SNCP in April that was based upon a memorandum of
24 understanding. Talk about rushing into Court to try to save
25 the day to keep the Chapter 11 case going. We saw once
again last January another plan and disclosure statement of

1 sale that weren't a plan and disclosure statement of sale
2 and what purpose were they? They wanted to try to keep
3 exclusivity over it. And now we see this one.

4 I want to read to the Court from one of the
5 exhibits. This is Exhibit 3, SCO's Exhibit 3. It's the
6 minutes of the June 11, 2009 Board meeting. The status of
7 financing efforts as the section titles, the first section.
8 And on the first page it says Mr. Yarrow asked Mr. McBride
9 to update the Board on the status of the company's financing
10 efforts since -- and the June 15 bankruptcy hearing. Mr.
11 McBride explained that in preparation for the June 15, 2009
12 bankruptcy hearing, the company is trying to secure
13 financing. He indicated that the company needs to have a
14 valid finance plan in order to avoid having the bankruptcy
15 agree to convert the bankruptcy case to Chapter 7 and
16 liquidate the company.

17 This sale was put together not because it was
18 necessarily the best sale which might have included a sale
19 of the litigation which though Mr. McBride he may have heard
20 such offers but we clearly know the Debtor never pursued any
21 such offers. It was put together to meet the Conversion
22 Motion. And that to me, Your Honor, given the history of
23 this case is indicative that the Debtors' purposes here have
24 always been served by just trying to keep the ball in the
25 air, hoping to get the litigation to a point where they

1 might be able to capitalize on it. It was not for any other
2 purpose here. And I think that also goes to the question of
3 whether the Debtors have been guilty of gross mismanagement.
4 Gross mismanagement doesn't mean dishonesty or fraud, it
5 just means gross mismanagement and you have to take that in
6 view of the fiduciary duties of management in a case like
7 this.

8
9 Now let's talk about the sale a little bit on
10 other terms. One of the objections that we filed, Your
11 Honor was an objection to the assumption and assignment of
12 all of those pages, the 400 and 500 pages of SVRX contracts.
13 And our view was as we explained that those were an integral
14 part of the whole asset sale that was the Santa Cruz Novell
15 deal which includes 4.16 which prohibits assignment without
16 the consent of Novell which requires the buyer and the
17 Debtor in this case SCO to reassign the licenses if so
18 directed. And it also requires the Debtor to collect and
19 remit revenues for whoever the counter party is now the
20 Debtor.

21 We haven't heard anything about how the problem
22 is going to be dealt with here because the Debtor has to
23 assume the APA in order to assume an assigned -- the Debtor
24 has to assume and assign the APA in order to assume and
25 assign all of these SVRX contracts. That's the way the
agreements work. You can't separate them out. And the

1 closest I think we've heard of anything to that was Mr.
2 McBride's opinion that that was no longer executory. Well,
3 Your Honor, if you look at Schedule G in this case, guess
4 what appears on Schedule G? The Asset Purchase Agreement on
5 the schedule of executory contracts since the beginning of
6 the case, never been amended. The Debtor simply cannot
7 complete this deal the way it's currently structured. The
8 Debtor cannot assume and assign the SVRX licenses without
9 assuming and assigning the Asset Purchase Agreement. It's
10 made no effort to do that and there would be some serious
11 objections if it did, but that's not in front of the Court
12 today because that's not the deal.

13 So there's a second reason why the Court, I think
14 needs to -- would have disapprove this sale today even if
15 the Court were otherwise convinced that the sale were
16 somehow an appropriate transaction unless we're going to
17 hear that somebody's going to waive all those SVRX contracts
18 and maybe that's what we'll hear, but that's what would be
19 needed. The Debtor would have to -- and the buyer would
20 have to decide those were not being assumed in the summary
21 because they can't do that without the APA, as simple as
22 that. And in light of the XI case, I don't think there's
23 any doubt that the APA is so integrated with those SVRX
24 contracts that you can't assume and assign the one without
25 assuming and assigning all those others or vice versa

1 The final issue is the payment issue, Your Honor,
2 that I want to address. And of course, Mr. Levin has nicely
3 addressed the question of whether we're really talking about
4 payment in full even before administrative expenses. But
5 let's think about this a little bit further. The way the AP
6 -- the way that the Purchase and Sale Agreement is now
7 structured, yes, there is a letter of credit and yes, it
8 lasts for awhile, but it still has conditions under which it
9 disappears. And after even when that happens, and if -- and
10 not withstanding that, the litigation between Novell and SCO
11 is continuing because, you know, Your Honor, it took how
12 many months for the District Court to schedule a new trial
13 after we got stay relief in January of 2008? Five months,
14 four months?

15 THE COURT: Yes.

16 MR. LEWIS: It took a long time.

17 THE COURT: Yes.

18 MR. LEWIS: And then to get to trial. It was six
19 months before we had a ruling. We don't know how long
20 depending on the contours of -- if the Tenth Circuit
21 reverses it in any way, we don't know how long that's going
22 to take. And at some point, when that letter of credit
23 disappears as it will if things go on, we will be
24 unprotected as well. Now the Debtor would like you to think
25 that because we then won't have them allowed the claim, we

1 don't count. The same thing is there -- the Debtors are
2 claiming with respect to IBM. That isn't the way bankruptcy
3 works. We didn't ask these -- the Debtor to file
4 bankruptcy, but the ground rules change when you do. And
5 what we're hearing and what we've been hearing today is the
6 Debtor wants the advantages of bankruptcy without the
7 burdens. And that's an abuse of the bankruptcy system. The
8 Debtor claims today, oh well, we're, you know, we've never
9 said we're going to dismiss. It's not like the Debtors have
10 -- counsel for the Debtor on June 15 said that. Said we
11 want with the Court's permission, we'll be asking for
12 dismissal if the sale closes.

13
14 And in the reply to the objections to the Motion
15 to Sell at Page 2, the Debtor says pursuant -- and this is
16 the first full paragraph on Page 2, pursuant to the motion,
17 the Debtors' request the Court to approve a transaction that
18 will enable payment in full of allowed claims including the
19 establishment of an effective surety for the disputed claim
20 of Novell, also not true. Subject to the Court's approval
21 and following the closing of the sale, the Debtors plan to
22 seek the dismissal of the Chapter 11 cases and preserve post
23 bankruptcy business assets and so on and so forth.

24 That's the Debtors' plan. Now true, no motion
25 has been filed, but I don't see how the Court can consider
the sale without considering what the unofficial, the plan

1 with a small P, I guess and not a Chapter 11 plan is here
2 and how that's going to work and what the Debtor really
3 plans to do and how it's going to protect all creditors
4 within the meaning of the Bankruptcy Code Section 101. Not
5 all creditors within the meaning of the Debtors' view that
6 the only real creditors are the creditors whose claims they
7 admit they owe. Thank you, Your Honor.

8 THE COURT: Thank you, Mr. Lewis. Mr.
9 Harrington?

10 MR. HARRINGTON: Your Honor, very briefly because
11 I think a lot of ground has already been covered. I did
12 want to just on that last point, Mr. Spector keeps saying
13 pay the creditors in full, pay the creditors in full. And I
14 think he thinks if he says it enough, Your Honor's going to
15 have it ingrained in your head that all the creditors are
16 being paid in full. But he never tells you when and how the
17 creditors are going to be paid. And so he says we're going
18 to be all paid before we get out of bankruptcy so we're just
19 going to dismiss. There's no way to pay pre-petition
20 creditors in bankruptcy without a plan or without a Chapter
21 7, you know, trustee filing their trustee's distribution or
22 trustee's final report. So you can't just pay all of your
23 creditors just because you have some money. That's not
24 possible, Your Honor. So I did want to raise that issue.

25 Your Honor, I know you don't want to address the

1 clear and convincing evidence standard. I don't think
2 there's any case law in the country on it with respect to
3 the 1112 issue. To pull that in from the 1104, I don't
4 think is appropriate. Also there's an argument that post
5 Bap CPA is not clear and convincing in the 1104 context as
6 well. So I don't think I need to address that any further.

7
8 There was a lot of commentary on how the Debtors'
9 management distrusts Hale and I think Mr. Levin handled that
10 very well. One other thing I would want to get to was there
11 was a sort of -- it was implied that the problem for going
12 forward with the customers again if that -- if they were the
13 successful purchaser here. Again, it's protection of the
14 customers as opposed to the protection of the creditors and
15 the equity security holders. And those -- that's what Your
16 Honor has to be looking at here, the creditors and the
17 equity security holders in their best interest, not the best
18 interest of the customers.

19 And finally, Your Honor, there's been a lot of
20 talk about how if this case there was an appointment of a
21 Chapter 11 Trustee or a Chapter 7 Trustee that all the
22 engineers would go running to the four corners of the earth.
23 This case has been going on since 2003. If these people
24 haven't left by now, they're not leaving, Your Honor. So
25 that's all I want to say, thank you.

THE COURT: Thank you, Mr. Harrington.

1
2 MR. SPECTOR: Your Honor, I'm not going to make a
3 long -- I'm just going to deal with the points that were
4 raised.

5 THE COURT: All right.

6 MR. SPECTOR: This demonstrative exhibit, a
7 variety of points I want to raise. Number one, in the
8 evidence, we have that the unsecured claims after scrubbing
9 \$1,074,000 not \$3,531,000. When does anybody pay attention
10 in terms of what's really owed by looking at the schedules?
11 If that were -- I mean, this is not -- the fact the
12 schedules exist and they say things has a very, very minimal
13 value. The -- for example, if this had come up in
14 examination, we could have showed you that a lot of those
15 were ongoing taxes that were paid in the ordinary course or
16 wages. Those numbers and priority things, well -- they sort
17 of -- these numbers aren't accurate and they're not in
18 evidence.

19 The \$3,531,000 on the Schedule F, the number
20 you've seen in the evidence is \$1,074,000. You take away
21 the two -- this is not to be trusted. This demonstrative
22 exhibit comes as not the 11th hour, it's the 12th and half
23 hour. We distrust the information on that. We do have a
24 similar demonstrative exhibit with -- that was -- we didn't
25 introduce but we have -- and it was old and it has been
updated and so forth. The testimony was there's enough to

1 pay over \$1,074,000 in pre's and I think Mr. Nielsen's
2 declaration shows how much there are post, notwithstanding
3 pulling things off of documents. The evidence supports the
4 fact that everybody will be paid in full with the exception
5 of course that those people that we don't know if we owed
6 them anything, we've objected to IBM's claim, objected to
7 Red Hat's claim talking about a plan.

8 There's nothing wrong with a plan that says --
9 nothing wrong -- if I had done this with a plan, there's
10 nothing wrong with a plan that would have said here's our
11 plan we forwarded something months ago. We're going to find
12 a buyer and we're going to sell it. We're going to get the
13 money. We're going to pay the undisputed allowed claims at
14 that time. We're going to waive discharge as to the
15 disputed claims. And we're going to litigate those in the
16 Courts in which they're pending. That's not an uncommon
17 plan.

18 So if the U.S. Trustee says they'd rather see
19 that kind of plan, we could file that kind of plan. I'm not
20 running away from my comments of dismissal. I never said I
21 was running away from it. I was simply saying if they're
22 complaining that it's not a structured dismissal or haven't
23 given details of dismissal, that's true. It's because we
24 haven't brought it on. Nobody's given the idea that they
25 wanted that. And if they do, we can discuss the structure.

1 And if they insist it has to be in the plan, I suppose we
2 can do a plan. That's the only context I was talking about
3 there.

4 I'm going to skip to the Novell argument about
5 the APA. There is no evidence that the APA has to follow the
6 SVRX licenses. There's -- all we have is Mr. Lewis in his
7 written document saying yes they do and sitting up here
8 saying it two more times, yes, they do, yes, they do. When
9 we try to get witness testimony to get to the nub of that,
10 what are your responsibilities? No, he can't testify to
11 that. Well I don't know. I mean, he's the President. He's
12 the CEO of the company. He wants to testify to say this APA
13 is irrelevant. And oh, no, he's drawing a conclusion, we
14 can't do that. All right, but what do we have on the other
15 side? All we have is commentary from the lectern from Mr.
16 Lewis. What evidence do they have that we have to do that?
17 We have the buyer saying it, Mr. Norris. I think we've got
18 all we need. We have the seller saying it. We don't need
19 to assume the APA

20 Now why does it say -- I said you can't always
21 trust schedules, yes, at the beginning of the case the
22 schedules were put together and they throw these documents,
23 you put down Schedule G. I had forgotten all about that it
24 was there. And I assure you had we recognized, we done our
25 homework properly and checked to see the Schedule G still

1 said it was an executory contract, we would have long ago
2 changed that.

3 But the evidence is -- the only evidence is and
4 it's pretty skimpy because we couldn't go in as much as we
5 wanted was that the APA does not provide that the SVRX
6 licenses do not have to come through the APA. And even if
7 they did, and I'll make this argument, they are exclusive
8 licenses and there are two cases I'll cite to the Court on
9 exclusive licenses.

10 We all know about the Catapult Decision and the
11 Third Circuit adoption of a hypothetical test. I'm not
12 going to go into that, the Court knows it very well. And
13 that's what really what Novell's resting on. We have a very
14 skimpy record on that. I mean we couldn't -- this is a very
15 complex document they have. We have a very skimpy record on
16 that. However, Judge Kimball stated in July 2008 that SCO
17 owns the business it runs. SCO has all it needs to run.
18 That's all the buyer is buying, what it needs to run.

19 There is another fact in evidence and that is
20 Santa Cruz Operations, the party that dealt with Novell
21 under the APA sold all its rights under the APA, the Caldera
22 [ph]. There was never consent. There was never an
23 objection. There was never a hint of that. That was all
24 done. And that --

25 MR. LEWIS: Your Honor, there's no evidence to

1 that effect in this record.

2 MR. SPECTOR: And there's no evidence to the
3 contrary. That's what I'm saying. The record is entirely
4 skimpy. The -- there is nothing here that allows us to make
5 any conclusions that there is something improper about the
6 SVRX licenses which the Debtor owns going on.

7 And I believe there was testimony from Mr. Norris
8 that the licenses were conveyed from a prior company that
9 did the due diligence and was satisfied by that fact. And
10 if they were satisfied by that fact, it means that there
11 must have been something about it. And I submit it would
12 probably be that consent was either given or waived because
13 it wasn't needed. And if you examine the briefs in the
14 Tenth Circuit case, you'll get a better idea of the -- an
15 understanding what that's all about. And that's really the
16 only place they consent to.

17 As I said, Judge Kimball has ruled that SCO owns
18 the UnixWare and Open Server which has imbedded with it the
19 SVRX. And I know I'm getting into the merits and I'm not
20 very converse with the idea of the case. We have people
21 here for that. But he also said we have a license if
22 necessary to run the business with the SVRX license. So and
23 its exclusive because what good is it selling it for
24 millions of dollars to this company and then say oh, and
25 Novell can sell it to everybody else at the same time. It

1 kind of puts the whole idea of the sale to Novell.

2 The cases that cite to the Court are Golden Books
3 Family Entertainment, Incorporated, 269 Bankruptcy, Recorder
4 300, District of Delaware case in which the Court said the
5 opposite as if it's not an exclusive license you need to get
6 it. The converse of course is if it's an exclusive license
7 that you don't. And the other one is a Southern District of
8 Indiana case, District Court, Trachoff v. Digital Media that
9 says copyright, exclusive copyright licenses are not -- you
10 don't need the consent of the license or it is really
11 transferrable which is what we say we've got here anyway.
12 And precious little record on this, Your Honor, but they're
13 objecting and we've got evidence to say the buyer and seller
14 are confident they can do this and they don't have anything
15 but a brief and a couple of arguments from a lectern.

16 By the way, they keep saying that, you know,
17 there was no effort to sell anything to Unix. The evidence
18 in the record is that there was a merger, through emergent
19 talks. There were investments. There were warrants. The
20 York deal included investments in the claims side of the
21 case. There were various iterations. It wasn't only
22 selling.

23 There was some argument by, I think it was Mr.
24 Levin because I didn't hear anything about a disbursement to
25 shareholders or the shareholders I mean. Where do you get

1 the idea when you come out of 11, out of the sale proceeds
2 you turn around and say oh, now we make dividend to the
3 shareholders. We're not making dividends to the
4 shareholders, I'm sure. They're going to use that money to
5 keep the business operating. The shareholders will get
6 their benefit from the success of the business. That's
7 usually the way it's done. So I don't understand what that
8 point was trying to make.

9
10 The interesting thing -- well let me talk about
11 York's \$150,000. Yeah, and you can look at that. But you
12 have to read further in the motion. The purpose wasn't to
13 pat York on the back. The reason and the motion says the
14 reason why we did that is we were early in the acquisitions
15 marketing game. We didn't want to have a reputation of
16 someone welshing on due diligence expenses. And it says so
17 in the motion. And if we wanted to have other people come
18 kick the tires and try to, you know, spend some time and
19 money on this, we didn't want to be seen as walking away
20 from those obligations. So we wanted the world to know we
21 will honor them. And of course the Court didn't hear that
22 and we -- that's an independent vehicle. I think don't
23 think we have any proof. But that's the purpose of that.
24 Notice to the world. We're not running away from it.

25 THE COURT: Well when I heard that reference to
that motion, I was thinking to myself, my God, I hope I

1 didn't grant that motion.

2 MR. SPECTOR: No, Your Honor.

3 (Laughter)

4 MR. SPECTOR: No, no, no, we didn't -- they --
5 actually they did our work for us. They objected. We said
6 okay, we'll defer that to another time but the word was
7 effected because we did have other people kick the tires and
8 spend money.

9 Well let's talk about the plausibility of the
10 solar eclipse. That's another one I would love to have Mr.
11 Caplan assess. My knowledge of those APA amendments are
12 shallow. But I'll tell you what I can tell you about the
13 poison pill.

14 THE COURT: And let's make this your last point,
15 all right, because it's 10:00.

16 MR. SPECTOR: Yes, sir.

17 THE COURT: Okay.

18 MR. SPECTOR: I don't want to --

19 THE COURT: This will be your last point. This
20 will be your last point so decide what your last points are.

21 MR. SPECTOR: The poison pill does not tie the
22 hands of the Court. It is not a poison pill by any means.
23 If the Court does not approve the sale, nothing happens with
24 regard to -- none of the rights in that agreement ever
25 arise. If the Court approves the sale and authorizes the

1 Debtor to close, it makes no sense. I mean, we couldn't get
2 it through the deal people. It makes no sense to worry
3 about your converting the case. Why would you approve the
4 sale at the close and then appoint a trustee of what's
5 remaining? Why would you be converting the case at that
6 point?

7
8 I saw it as a polar situation. The Court's going
9 to approve the sale and deny the conversion or nothing bad
10 is going to happen. If -- and it was a point that the other
11 side wanted to have because they felt comfort in it. They
12 didn't want -- they wanted to have the Unix business without
13 the claims. You heard Mr. Norris talk about that. They
14 didn't want these claims to fall into the hands of whoever
15 the trustee sells it to. They didn't want to be messing
16 with them. They trusted in the hands of SCO's management to
17 continue. They weren't going to be doing crazy things on
18 that. But if the Court were to grant the motions for a
19 sale, none of the rest of things are likely to happen and we
20 would be moving to dismiss the case.

21 And the other thing is the only time the October
22 1 date comes up is if the Court were to grant one of the
23 three things, conversion, appointment of a Chapter 11
24 Trustee, or an examiner with unusual powers, extraordinary
25 powers. And as I said, that's not going to happen. If the
Court were to do that, you're going to approve the sale.

1 These rights -- and it looks bad, but it really isn't. And
2 the purpose of that wasn't to bind this Court's hands in any
3 way. It was to -- and you'll see there's other things
4 talking about future events after the case is done and we're
5 out of bankruptcy if something should happen and SCO should
6 potentially lose the rights to the claims and other things
7 happen, that's really what that's all designed to do.

8 I would be interested in the Court's following up
9 with Mr. Harrington's discussion about an 11 Trustee if we
10 can work out or an auction process. I don't discount that.
11 The PSA does, in fact, talk about if the Court were inclined
12 to grant an auction that they want to be considered in the
13 PSA itself as a stalking horse is even break up fees and so
14 forth. So it's not off the table on our end.

15 THE COURT: Thank you, Mr. Spector.

16 MR. LEWIS: Your Honor, might I just have
17 literally 10 seconds?

18 THE COURT: Sure.

19 MR. LEWIS: And the 10 seconds are on the
20 question of what evidence there is on the APA, there is the
21 APA It is in evidence, the document itself speaks for
22 itself. And the contract rules of interpretation in the
23 first instance they're always you look to the four corners
24 of the document. It says what it says. It just like Exide
25 [ph]. Anybody else who testified to that about what it

1 means or doesn't mean wasn't around when it was negotiated.
2 And there is the second piece of evidence which is Schedule
3 G which like so many other things we now heard was an
4 oversight. Everything something inconvenient comes up, it's
5 an oversight. But it was there and it's been there all
6 along. Thank you, Your Honor.

7 THE COURT: Thank you.

8 MR. SPECTOR: Are these -- are all of the
9 exhibits, the amendments and everything to the APA here or
10 is it just the first original APA because if we're going to
11 have just exhibits, I mean, we don't have the full thing --

12 MR. LEWIS: I believe it's just the APA

13 MR. SPECTOR: Then, Your Honor, we would ask to
14 supplement the record with the rest of the exhibits because
15 that's not -- an amendment to that APA changes the APA

16 MR. MARRIOTT: I thought we were done, Your
17 Honor. The evidence is closed. What's in is in. And I was
18 standing to stretch.

19 MR. SPECTOR: You heard testimony about that the
20 amendment, Your Honor, and if the amendment is not in then
21 the exhibit is not complete and the amendment affects the
22 language. In that case, you don't have --

23 THE COURT: Any problem with submitting --

24 MR. JACOBS: We have no problem, Your Honor.

25 THE COURT: All right.

1 MR. JACOBS: It's the part to the APA, the
2 amendment, it's Amendment 1 and Amendment 2 should be in
3 there. You'll look at them yourself. You'll see they have
4 no impact on our objection to the transaction here.

5 THE COURT: Thank you, Mr. Jacobs. All right,
6 you may submit the amendments.

7 MR. SPECTOR: We'll do that. We don't have them
8 with us today.

9 THE COURT: Understood.

10 MR. SPECTOR: I've got them. I really have.

11 THE COURT: I'm reserving decision. I will act
12 on this as promptly as I possibly can. I think -- I know
13 that there is a statutory time limit here and --

14 MR. LEVIN: Which has long since run, Your Honor.

15 THE COURT: And yes.

16 MR. LEVIN: And we will be patient for Your
17 Honor's decision.

18 THE COURT: But certainly within a week. That I
19 can tell you for certain.

20 MR. SPECTOR: Your Honor, if you wish to call us
21 about any ideas that come to you with regard to the U.S.
22 Trustee's suggestion, I welcome -- you can reach me this
23 week any time you wish. And if you want to have a
24 conference call to discuss the parameters, we're willing to
25 discuss that at any time as well.

1 THE COURT: Thank you, Mr. Spector. All right,
2 counsel, thank you for a long but entertaining presentation.

3 (Laughter)

4 MR. LEVIN: Your Honor, thank you.

5 THE COURT: Good evening to you all and a safe
6 trip home.

7 MR. LEWIS: And to your staff, Your Honor, we
8 appreciate your staff sticking around so long.

9 MR. LEVIN: Yes.

10 MR. LEWIS: And the marshals.

11 UNKNOWN SPEAKER: You're allowed to buy him a
12 drink if you would.

13 THE COURT: I know.

14 UNKNOWN SPEAKER: Appreciate it, Your Honor.

15 THE COURT: A safe trip home everyone.

16 ALL: Thank you, Your Honor.

17 (Whereupon, at 10:05 p.m., the hearing was adjourned.)

18 CERTIFICATION

19 I certify that the foregoing is a correct
20 transcript from the electronic sound recording of the
21 proceedings in the above-entitled matter.

22
23
24 _____
25 Traci L. Calaman
Transcriber

5 August 2009

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