

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Case No. 07-11337 (KG)
THE SCO GROUP, INC. et al., . Chapter 11
Debtor. . (Jointly Administered)
·
· 824 Market Street
· Wilmington, Delaware 19801
· November 16, 2007
· 2:04 p.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE KEVIN GROSS
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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(Telephonic Appearance)

1 THE CLERK: Please rise.

2 THE COURT: Good afternoon. You may be seated.

3 MR. O'NEILL: Good afternoon, Your Honor.

4 THE COURT: Thank you.

5 MR. O'NEILL: Good afternoon, Your Honor.

6 THE COURT: Mr. O'Neill, good afternoon.

7 MR. O'NEILL: Your Honor, this is -- things are
8 moving even as we speak.

9 THE COURT: Yes.

10 MR. O'NEILL: And I do appreciate the Court's
11 indulgence and, as mentioned, we called chambers earlier just
12 to let Your Honor know basically we have two matters that are
13 kind of on the going forward unresolved docket for today.
14 Those matters are Number 3, which is the debtors' motion for
15 approval of CFO Solutions in connection with their provision of
16 a chief financial officer for the debtor, and also Number 4 on
17 the agenda, which is the emergency motion regarding the bid
18 procedures. And, as we reported to chambers, we're still
19 working out some of the details on the bid procedures and we
20 requested, and kindly the Court has agreed, to hear that matter
21 at three o'clock today. We -- I did inform the parties when I
22 got here that we had made that request.

23 THE COURT: Yes.

24 MR. O'NEILL: And we will -- we plan to go forward
25 with item Number 2 on CFO Solutions, and I think that Mr.

1 Spector and Mr. McMahon from the trustee can give the Court an
2 update on that. They have made some progress even just before
3 the hearing to see whether they could resolve their
4 differences.

5 I wanted to report, Your Honor, on item Number 1,
6 which is the debtors' application to employ Dorsey & Whitney as
7 special counsel. I believe that there were some informal
8 questions raised by the U.S. Trustee, and I think those have
9 been resolved, and Mr. Schnabel can give the report on that
10 item.

11 THE COURT: And I did notice there had been a
12 supplemental affidavit filed.

13 MR. O'NEILL: Yes, Your Honor. There was a
14 supplement affidavit. I believe Mr. Schnabel has a copy of
15 that should Your Honor require it.

16 THE COURT: Thank you, Mr. O'Neill. Good afternoon,
17 Mr. Schnabel.

18 MR. SCHNABEL: Good afternoon, Your Honor. For the
19 record, Eric Lopez Schnabel on behalf of Dorsey & Whitney I
20 guess as the 327(e) applicant.

21 THE COURT: Yes.

22 MR. SCHNABEL: Your Honor, if I may hand up so that
23 you could look at these items, a redline to the order. We have
24 a clean copy of the order and the supplemental affidavit by my
25 partner, Mr. Taylor, that was filed this morning, and I can

1 kind of walk through what the discussions have been, what the
2 resolution is with the Office of the United States Trustee.

3 THE COURT: That would be fine. Thank you.

4 MR. SCHNABEL: Thank you.

5 THE COURT: Thank you, Mr. Schnabel. Thank you.

6 MR. SCHNABEL: Your Honor, as set forth in the
7 application, Dorsey & Whitney is general outside counsel to the
8 debtors, provides a variety of services, and with respect to
9 our application a number of questions arose, and it's a little
10 bit complicated because we are actually active as litigation
11 counsel with the Boies firm, but our fees are paid by Boies but
12 our expenses in those litigation matters are paid by the
13 debtor.

14 THE COURT: Yes.

15 MR. SCHNABEL: So we have a number of things that we
16 -- the U.S. Trustee, Mr. McMahon, asked us to clarify, and
17 that's in the supplement affidavit. So let me just walk
18 through those issues.

19 First, we don't have, and to the extent we even have,
20 we waive any right with respect to a contingency fee in those
21 litigation matters. We're on a straight hourly basis, and
22 Boies pays us for the litigation work. With respect to those
23 litigation matters that Boies pays us, we waive our right for
24 any compensation for the fees from the debtors' estates. So
25 those are between us and Boies.

1 The exception to that is with respect to the expenses
2 in those litigation matters. We will, through the normal
3 administrative order and monthly application and final
4 application process, seek reimbursement from the estate from
5 the expenses. And that's the exact arrangement that occurred
6 between the parties prior to the petition.

7 Your Honor, there's -- the U.S. Trustee also asked us
8 to make an acknowledgment, which is in the supplemental
9 affidavit declaration, that we do represent the debtors in the
10 litigation and obviously we'll comply with our ethical and
11 professional obligations to represent the debtors
12 notwithstanding this third-party payor arrangement.

13 THE COURT: Yes.

14 MR. SCHNABEL: Finally, Your Honor, this is a factual
15 matter, a supplemental disclosure that with respect to the
16 litigation involving Novell that Dorsey was not involved in the
17 negotiation or consummation of the transaction that's at issue
18 in that litigation.

19 THE COURT: Okay.

20 MR. SCHNABEL: So those were the supplemental
21 disclosures that we were asked to make and are happy to make.

22 Your Honor, with respect to the changes in the form
23 of order, besides from the recitation of the supplemental
24 affidavit being filed, there -- we added provisions making more
25 explicit the different areas of services that we provide, which

1 is just general outside corporate -- board governance
2 litigation. The specific litigation that are big assets of the
3 estate and other types of litigation, employment and so forth,
4 that's itemized in the order. Specific reference that we're
5 obviously not authorized to represent the debtors as lead
6 bankruptcy counsel, and kind of an E, which is on Page 3 of the
7 blackline, which is given that obviously in bankruptcy so much
8 of the general operations of the company and other legal
9 matters become involved, especially in a sale, that we're
10 allowed to communicate and provide assistance with bankruptcy
11 counsel and with the company in, you know, assisting it --
12 prepare schedules and other types of things, relating to --
13 incidental to the general work that we do and have done.

14 In addition, Your Honor, there's a -- we had a
15 retainer and were unable to fully get our last week invoice --
16 or a couple days out and apply to the retainer prior to the
17 filing. We're authorized to do that through those -- through
18 this order subject to disclosing that in our first monthly fee
19 app with obviously objection rights reserved pursuant to the
20 admin order, and there was some tinkering with that language.

21 And finally, Your Honor, in the last paragraph, with
22 respect to the Boies application and to the extent there's a
23 successful event which has to do with their application, we've
24 waived our fees to the estate, but we agree to hold those
25 invoices so that in case the U.S. Trustee needs them or other

1 parties in interest need them in connection with Boies seeking
2 compensation upon a successful event, those will be available,
3 and we'll do that.

4 And finally, Your Honor, the last two sentences are
5 just really reservation of rights relating to the agreements
6 and relating to our -- us seeking reimbursement for the
7 expenses in the litigation matters.

8 Your Honor, unless you have any questions, you know,
9 Mr. McMahon can confirm, but I believe we're fully consensual
10 here.

11 THE COURT: That's fine. Mr. McMahon? Good
12 afternoon.

13 MR. McMAHON: Good afternoon, Your Honor. We have no
14 objection to the form of order.

15 THE COURT: Okay. It's fine with the Court with
16 those additions and explanations, and I will be pleased to
17 enter the order.

18 MR. SCHNABEL: Thank you, Your Honor.

19 MR. SPECTOR: Good afternoon, Your Honor.

20 THE COURT: Mr. Spector, good afternoon.

21 MR. SPECTOR: Arthur Spector of Berger Singerman,
22 representing the debtor. I'm here at this particular time to
23 put forward the motion for approval of the employment of CFO
24 Solutions, and actually Ken Nielson, who is the temporary CFO
25 that they placed with the debtor. Mr. McMahon and the debtor

1 have been trying very hard for a very long time over this
2 matter to see if we could come to an understanding. Mr.
3 McMahon filed his objections, as he had a right to do and we
4 expected, because we couldn't work out all of the terms. We
5 had some of them worked out, but some of them weren't, and I
6 think -- we have a witness that flew in here today. He no
7 longer works for the company, except maybe as a consultant.
8 And he flew in to testify today about this. His name is Burt
9 Young, and he's sitting back there, and he was prepared to
10 testify and I'll -- I guess I'll proffer this -- why the -- why
11 I'll argue the J. Alix protocols have no relevancy to the facts
12 of this case.

13 He would testify that the role of a CFO in SCO is the
14 traditional CFO role of a publicly traded company, as SCO is.
15 He would describe his activities when he was the CFO for the
16 few years that he was there and that he was directed when his
17 -- when it was told -- when he told them that he was leaving,
18 which was going to be leaving the 1st of October, the same
19 month as the year ends and the requirements for preparing
20 securities filings, financial statements comes due, why -- how
21 it was that they came about hiring Ken Nielson through CFO
22 Solutions.

23 He would testify that his job was to find somebody
24 who was conversant with securities -- financial statements for
25 securities issues, somebody who is a good solid CFO with all

1 the financial qualifications you would need for that role. He
2 never heard the term "CRO" until I asked him this morning in
3 preparation for this hearing about whether this person would be
4 hired as -- in any way fashioned as a CRO. He never heard the
5 term before. I had to explain to him what a chief
6 restructuring officer was. He'll testify to that and that none
7 of the requests for replacements that he made to other agencies
8 ever contemplated anything to do with the bankruptcy. It was
9 strictly the role of the CFO to do what he was normally doing
10 when the company wasn't contemplating or in bankruptcy.

11 Finally, he would testify that if he were leaving
12 this company in October 1st, 2006, a year before this
13 bankruptcy was filed, he would have done exactly the same thing
14 and hired the exact same person. The need for a temporary
15 agency, which is what CFO Solutions is, like Robert -- well
16 it's -- Robert Half may be a full-time placement -- but it's a
17 placement employment agency is because they needed somebody in
18 a hurry and you couldn't wait through normal newspaper
19 advertising process to get somebody onboard.

20 With those type of factual background, Your Honor, we
21 would argue at the close of the hearing that J. Alix protocols
22 have a lot of use in a lot of cases, but they don't apply in
23 this case and, therefore, the terms of the objections, the
24 objections raised by Mr. McMahon and the U.S. Trustee, which
25 presume that this is an appointment like a J. Alix, are off

1 base in this case. That's what we would be proffering if we
2 don't work something out. And Mr. McMahon has asked me just
3 before I stood up here if we could see if we can't work out
4 those last bit of terms.

5 THE COURT: That's fine. Thank you very much, Mr.
6 Spector. Mr. McMahon? And by the way, I am certainly pleased
7 to allow you to forgo any comments in an effort to have an
8 additional conversation with Mr. Spector, if that would be
9 helpful.

10 MR. McMAHON: Thank you, Your Honor, and good
11 afternoon. Joseph McMahon for the United States Trustee's
12 Office. First, with respect to the proffer, I'm not going to
13 be asking to cross examine the witness.

14 THE COURT: Okay.

15 MR. McMAHON: I just don't think it's going to add
16 that much to really what our issues outlined in the objection
17 are. I would note just with respect to the proffer that the
18 mention of the consulting arrangement between the debtor and
19 the former chief financial officer is something which we
20 learned of at the 341 Meeting, and our rights are reserved with
21 respect to that arrangement.

22 But moving to the CFO issues, if I could, Your Honor,
23 my -- after speaking with Mr. Spector immediately prior to Your
24 Honor taking the bench, my understanding of what the debtor's
25 issues presently are is different than what I understood them

1 to be immediately prior to the hearing walking over here, and
2 what I think would be productive is that with the debtor's
3 permission if they're willing to agree to use the next hearing,
4 the December 5th hearing as a backstop, that we could go back
5 and attempt to resolve the issues that are raised in our
6 objection and to the extent that it's agreeable we could
7 present a form of order to Your Honor under certification of
8 counsel or at the next hearing, and if we cannot get there, we
9 would just address the matter at the next hearing.

10 THE COURT: Mr. McMahon. Mr. Spector --

11 MR. SPECTOR: Your Honor, certainly there's no --
12 nothing unreasonable with that proposal, but I'm hopeful that
13 if Mr. McMahon and I can go out to the hallway that we may be
14 able to come back to you at three o'clock when we take the
15 other matter and give you an agreed order at that time. That
16 would be my proposal.

17 MR. McMAHON: Your Honor, that's fine.

18 THE COURT: Okay.

19 MR. McMAHON: And if we can get it done by 3:00, then
20 great.

21 THE COURT: That's certainly acceptable to the Court.
22 I think it would be helpful for everyone if you could reach an
23 agreement. So I guess that brings us to --

24 MR. O'NEILL: With that, Your Honor --

25 THE COURT: -- to the recess.

1 MR. O'NEILL: -- I think we're going to take a break
2 then until three o'clock.

3 THE COURT: Is that a reasonable amount of time, do
4 you think, to cover what you need to cover?

5 MR. O'NEILL: Well, I -- we don't have a lot of time
6 today, and I don't want to impose upon the Court, so I -- that
7 was the time that we thought would be reasonable under --

8 THE COURT: Yes. Would anyone else like to be heard
9 from?

10 MR. LEWIS: Thank you, Your Honor. Adam Lewis of
11 Morrison & Foerster for Novell.

12 THE COURT: Yes, Mr. Lewis. Certainly.

13 MR. LEWIS: We -- we've been following the docket
14 religiously for the last few days, and I'm sure Mr. Spector has
15 been doing everything he can hoping to see something prior to
16 this afternoon.

17 THE COURT: By way of an asset purchase agreement?

18 MR. LEWIS: That would be a start, yes, Your Honor.
19 And we understand there are some other agreements as well that
20 are just either completed or about to be filed. There's a --
21 and Mr. Spector can elaborate on that if need be, but I don't
22 think it's necessary at the moment. It's pretty short notice
23 even to talk about a bidding procedures motion when we don't
24 know what we're bidding on and whether the terms of the bidding
25 procedures make a lot of sense in light of that. I'm willing

1 to talk to Mr. Spector. You know, I've done this a long time.
2 I never say no for an opportunity to chat.

3 THE COURT: Right.

4 MR. LEWIS: But I have to tell the Court in candor,
5 I'm skeptical that I'm prepared to agree to anything today
6 without having had a chance to study this agreement, see what
7 else there is, have a chance to confer with my client and
8 litigation counsel and maybe tell Mr. Spector thereafter what
9 else we would like to see, so that we can streamline this
10 process and not come back here again and again. And maybe we
11 can't. I mean, maybe in the end we won't reach an agreement
12 and there will be a fight over whatever there is going to be.

13 THE COURT: Certainly.

14 MR. LEWIS: But to have conversations be meaningful,
15 we have to have an adequate opportunity. And, again, I don't
16 want to suggest that I'm pointing a finger at Mr. Spector. I'm
17 sure he's done everything he can, but -- and I'm willing to
18 talk to him now, but I am very skeptical that I'm prepared to
19 agree to anything. If the Court wants to take the time till
20 three o'clock, I'm certainly willing to try that, but that's
21 the Court's call. I just want the Court to make its decision
22 based upon my candid assessment of the situation.

23 THE COURT: I'm certainly prepared to allow the time
24 and hopefully the parties can at least discuss where you are
25 and what else is necessary, if anything, and how we should

1 proceed, and we can go into those details at three o'clock.

2 MR. LEWIS: Thank you, Your Honor.

3 THE COURT: But I think rather than my -- telegraph
4 my thinking which might somehow sort of derail the
5 conversations, I would just as soon allow the parties to have
6 those discussions.

7 MR. LEWIS: Of course, Your Honor. Thank you.

8 THE COURT: Thank you, Mr. Lewis.

9 MR. LEVIN: Good afternoon, Your Honor. Richard
10 Levin, Cravath, Swaine & Moore, appearing for IBM Corporation.

11 THE COURT: Welcome, Mr. Levin.

12 MR. LEVIN: Thank you, Your Honor. It's a pleasure
13 to be here. Your Honor, I would like to echo Mr. Lewis's
14 comments and tell you that of course we always talk. However,
15 we're looking at 39 minutes now. There are numerous issues in
16 the bid procedures order. I know three o'clock is going to
17 roll around and somebody's going to come in and say, well, can
18 we have until four o'clock, and then four o'clock is going to
19 roll around, and I don't know if somebody will say, can we have
20 until five o'clock and so on. There's just too much to get
21 through in 39 minutes, and I think it is unfortunate that the
22 matters came to the Court as late as they did, but since they
23 did, I think we have to deal with that, and I think the proper
24 thing to do is put this over for a proper hearing after the
25 parties have a time -- have time to review what has been filed,

1 what has not yet been filed and what the debtor-in-possession's
2 case is going to be to approve even bid procedures before even
3 getting to the sale order.

4 THE COURT: I appreciate that Mr. Levin, and I
5 understand.

6 MR. LEVIN: Thank you, Your Honor.

7 THE COURT: And my first comment was, is three
8 o'clock realistic, and, look, we don't have a shutoff here at
9 five o'clock either, but at the same time my impression is
10 there's an awful lot to cover --

11 MR. LEVIN: Tremendous amount.

12 THE COURT: -- in order to make a hearing on the
13 motion at all meaningful. So --

14 MR. LEWIS: I would concur in that, Your Honor.

15 THE COURT: Yes.

16 MR. LEVIN: Your Honor --

17 THE COURT: On the other hand, it may just be that
18 the parties can at least address what remains to be covered and
19 how best to proceed in an orderly fashion.

20 MR. LEVIN: You know, it may make sense, Your Honor,
21 for us to adjourn this hearing and for the parties to actually
22 sit out and talk since we're all here, but, as Mr. Lewis said,
23 we need to consult with our clients.

24 THE COURT: Yes.

25 MR. LEVIN: We need to consider some of the things

1 and read them. It may be that we'll come back with an agreed
2 order of some sort. It may be that we won't, but I doubt we're
3 going to come back with an agreed order in an hour or an hour
4 and a half.

5 THE COURT: No, I understand that, Mr. Levin. I
6 would --

7 MR. LEVIN: So I don't think there's sense in holding
8 the Court up and holding the time and suggesting we're going to
9 come back with some form of agreement this afternoon.

10 THE COURT: Thank you. I appreciate that.

11 MR. LEVIN: Thank you, Your Honor.

12 THE COURT: And I understand that very well. Mr.
13 Spector.

14 MR. SPECTOR: I'd like to say one thing that I never
15 thought I'd say, from your lips to God's ear. Maybe we'll come
16 back with an agreed -- but, I'm not asking for -- if I have to
17 ask for miracles, there would be -- world peace would be on the
18 list. I wouldn't waste it on -- but, Judge, just so you have
19 an idea, I, speaking for myself, hoped that we would have an
20 asset purchase agreement before this Court before November 6th
21 when we first came here and asked for the emergency hearing --
22 emergency hurry-up hearing. I was hoping we'd have all that
23 and the questions that were raised, valid questions that were
24 raised by Novell, IBM and the U.S. Trustee would all be
25 answered by the documents and we would then bring witnesses to

1 supplement, and it would all be done in an appropriate manner.

2 I have colleagues, four of them that were up in New
3 York, and they worked literally around the clock, no break,
4 maybe two hours I think they took off, for two days, went
5 around the clock twice in the middle of this week. Fourteen
6 lawyers I'm told were on the other side of the deal from
7 Proskauer representing York. I don't know how much money has
8 been spent in legal fees to try to get the documents in order,
9 and were still catching things and -- well, yes, we filed the
10 APA this afternoon after one o'clock.

11 THE COURT: Oh, it has been filed.

12 MR. SPECTOR: Oh, yes. We have a copy for Your Honor
13 if you really want it.

14 THE COURT: I'm sorry. I had checked a little while
15 ago.

16 MR. SPECTOR: Okay. We have a copy for Your Honor.
17 We'll give it to you. But, yes, we filed it a few minutes ago.
18 We know that putting it in the system a few minutes ago is
19 meaningless. We could have handed them out right now. We also
20 have a credit facility -- the credit facility agreement, which
21 is in substantially complete order, and it may be deemed filed
22 as we speak because we directed people to get that on the
23 system as well. A third document that we have to file as the
24 third part of this piece is called a cross licensing agreement.
25 That's still in motion. We could not get -- we have drafts

1 going back and forth, but it's not finished. We would like to
2 have that on file also. And then Novell, IBM, the U.S. Trustee
3 will have the whole deal in front of them. We understand that,
4 and we do not -- we would like the Court not to just simply
5 say, let's all go home. We would prefer that Your Honor
6 continue this to the three o'clock call. We have people here
7 from York, well, at least one lawyer from York, that would be
8 here. They have a stake in what's going on as well, and if
9 Your Honor's decision at that time is to say let's all go home,
10 come back on Tuesday -- I know Your Honor doesn't have court on
11 Monday -- and if we can find airline tickets to get back here
12 for Tuesday, maybe that would be the best time. Everybody
13 could then -- presumably we'll have the documents, all of the
14 documents, and they can look at it over the weekend and Monday
15 and maybe we'll have a more intelligent discussion before we
16 get to court, and even if we get to court and have to fight,
17 we'll have a more intelligent hearing. So, I just ask Your
18 Honor, because Mr. McNutt for York is back there still working
19 on documents, that we not do anything until at least we give
20 the privilege of coming before the Court.

21 THE COURT: Understood, and certainly that will be
22 the case. Mr. Levin.

23 MR. LEVIN: I understand Mr. Spector's desire to get
24 something done, and I don't deny the -- or don't doubt the
25 authenticity of it, but he just described 14 lawyers on one

1 side and four lawyers on another working four days around the
2 clock with maybe a day in between those two -- sets of two, and
3 he wants to get this done in -- it's no longer 39 minutes, Your
4 Honor. It's much shorter than that. And yet he said despite
5 all that work there are still problems. There are still things
6 that need to be corrected in this agreement. Let's slow down.
7 Let's get it right. There's a regularly scheduled hearing I
8 think about two and a half weeks from now.

9 Had the bid procedures motion been filed with the APA
10 and with the sale procedure, it wouldn't be reasonable to
11 schedule a hearing two and a half weeks after the filing of the
12 bid procedures motion on the bid procedures themselves. That's
13 the stage of the proceeding that we're at today. They just --
14 effectively, they just filed it today, minutes before the
15 hearing and during the hearing. I would suggest this matter be
16 continued. We're happy to spend the afternoon talking, or
17 listening, because we don't have a lot to say until we hear.
18 We've got a 55 page single-spaced agreement that we were just
19 handed. We're not even going to read that before three
20 o'clock. So, we'll be happy to spend the afternoon listening
21 as long as we're all here in this building, but this hearing
22 ought to be continued to December, I think it's 6th is the next
23 regularly scheduled hearing or 5th, two and a half weeks hence.
24 That's what we would like to see happen today, Your Honor.

25 THE COURT: Yes, Mr. Lewis.

1 MR. LEWIS: Thank you, Your Honor. After listening
2 to Mr. Spector's comments, I guess I'm more inclined to agree
3 with Mr. Levin now. I mean, I just -- I'm happy to spend my
4 time talking. I would do that -- I'm a bankruptcy lawyer. We
5 do that all the time. I'm here. The idea that we're going to
6 come back next Tuesday or Wednesday -- there may be York people
7 who have come down from New York. I've come from California
8 for the second time now. I don't want to be turning around,
9 coming back again, only to find out that we are going to have
10 more fights and maybe have to come back yet again.

11 I'm inclined to concur with Mr. Levin's comments that
12 -- now that we just set this for the next -- the emergency is
13 gone. There's no emergency. I don't know if there ever was
14 one, but it's gone now. We're long past that. We're obviously
15 going to be long past that whatever we do today. So, let's
16 have this done on a considered basis where everybody has a
17 reasonable opportunity to respond.

18 There are so many complicated questions that we would
19 like to try to flesh out, and we're probably not going to flesh
20 them out this afternoon. We may get some stuff done today, but
21 more and more between now and say the 5th, and then we can
22 maybe at least narrow the issues. That's not going to happen
23 by next Tuesday or Wednesday in any case.

24 So, I guess at the moment now I concur with Mr.
25 Levin's suggestion, we just reschedule this for the next

1 hearing date, let the parties have a reasonable opportunity to
2 see everything, some of which hasn't even been filed yet, and
3 maybe very important this cross license agreement may be the
4 tail that wags the dog for all I know, and so let us go and
5 voluntarily spend, as we would, time talking about what we can
6 talk about today, but let's have this done on a reasonable
7 schedule. There's no emergency. There's no need to keep this
8 going. Thank you, Your Honor.

9 THE COURT: Thank you, Mr. Lewis. Mr. McMahon.

10 MR. McMAHON: Your Honor, good afternoon. We believe
11 that the objector's proposal has merit, and we would join in
12 their request to push the matter to first December hearing.
13 Thank you.

14 THE COURT: Thank you, Mr. McMahon.

15 MR. SPECTOR: Your Honor, all I want to ask is that
16 we defer these requests --

17 THE COURT: Yes.

18 MR. SPECTOR: -- until three o'clock when York can --
19 York, by the way, their lawyer came from San Mateo.

20 THE COURT: Well, why don't we do this. Let's resume
21 at 3:15. We'll pick a few of the minutes we've lost. And what
22 I'm going to do is try and at least get you a courtroom or some
23 area, or you're welcome to remain in here, or -- and talk, or
24 you can go into a separate courtroom if you'd prefer. Which
25 would work best for everyone?

1 UNIDENTIFIED ATTORNEY: Okay.

2 THE COURT: Right here is fine?

3

4 UNIDENTIFIED ATTORNEY: Yes, this is --

5 UNIDENTIFIED ATTORNEY: Defer to my --

6 THE COURT: Is this --

7 UNIDENTIFIED ATTORNEY: This is fine, Your Honor.

8 Yes.

9 THE COURT: Okay. So why don't you talk. If you
10 finish before 3:15, obviously you can let us know and I'll come
11 back, but in the meantime, out of courtesy really more than
12 anything, I'm going to allow the time, and we'll resume in
13 about 45 minutes. Thank you.

14 UNIDENTIFIED ATTORNEY: Thank you very much.

15 UNIDENTIFIED ATTORNEY: Thank you, Your Honor.

16 (Recess)

17 THE CLERK: Please rise.

18 THE COURT: Thank you, counsel. You may be seated,
19 everyone. Who would like to speak first? Mr. Spector?

20 MR. SPECTOR: Thank you, Your Honor. The matter of
21 the CFO Solutions --

22 THE COURT: Yes.

23 MR. SPECTOR: -- I'm please to advise the Court that
24 Mr. McMahon and I have agreed to carry this over to December
25 5th. We have resolved one of the three issues that separated

1 us. The other two I'm going to try to see if I can get
2 resolved.

3 THE COURT: And if you can, of course, then you can
4 send over an order under certification.

5 MR. SPECTOR: And we'll -- if we have to, on December
6 5th, we'll come back and argue based on the proffer.

7 THE COURT: Okay, wonderful. And just so I'm clear
8 and also Mr. Spector's clear, Mr. McMahon, you would not be
9 seeking to cross examine a witness at that hearing.

10 MR. McMAHON: Your Honor, no.

11 THE COURT: Okay. Thank you.

12 MR. SPECTOR: With respect to the minor matter of the
13 bid procedures motion, we have with us today an increased staff
14 of folks, some of whom represent the potential stalking horse
15 bidder, York Capital Management, and the rest are -- I'd like
16 to introduce my partner, Dan Lampert --

17 THE COURT: Mr. Lampert, welcome.

18 MR. SPECTOR: -- who has been admitted for this case.
19 Thank you for that, Your Honor.

20 THE COURT: Yes.

21 MR. SPECTOR: He's part of the team that did the
22 all-nighters and (indiscernible). We're prepared to proceed
23 and we understand that at the last hour there were some
24 procedural points that Your Honor has deferred until we can get
25 the full cast of characters here.

1 THE COURT: Yes.

2 MR. SPECTOR: I'm not going to -- in deference to
3 that because that was on the table first, I'm not going to
4 proceed right now and present our witnesses for the bid
5 procedure or make my argument on the bid procedure, although we
6 are prepared to go forward and do all of that today.

7 THE COURT: Thank you, Mr. Spector. Mr. Lewis,
8 you've had a little bit of time to talk.

9 MR. LEWIS: Yes, Your Honor, and we appreciate it.
10 Unfortunately, as I envisioned, it was -- it was a useful talk,
11 but there's -- it only, I think, emphasizes there's a lot to
12 know and a lot we don't know yet, and I don't think it's going
13 to be clear by early next week. I would suggest that the Court
14 -- or ask the Court consider hearing this matter on the 5th.
15 Assuming that we get everything filed promptly so that we know
16 what we're dealing with and can duly prepare for the 5th, ask
17 the Court for response dates because it is --

18 THE COURT: Yes.

19 MR. LEWIS: -- a bit shortened notice, and it is over
20 a holiday period. We're willing to live with that burden. And
21 also that way we'll know what we're doing, but we do have to
22 know when it's being filed. There's also -- I don't think I'll
23 do this if I don't have to. I almost certainly will do this in
24 connection with an actual sale motion, but in connection with
25 the bidding procedures motion, once I see what gets filed, I

1 may want to do some discovery. That will obviously be on
2 cooperation of parties if I -- I will not try to do that unless
3 I really feel I need to and I will try to save my discovery for
4 after if and when a bidding procedures motion is approved and a
5 sale motion is actually filed for a hearing. But that's where
6 I am on this, Your Honor. Mr. Levin can speak for himself.

7 THE COURT: Thank you. Thank you, Mr. Lewis. Mr.
8 Levin.

9 MR. LEVIN: Thank you, Your Honor. We are -- not
10 surprisingly, we were not able to reach an agreement on bid
11 procedures. We stand by our prior position that the hearing
12 should go forward on December 5th. We have no objection to
13 shortening time for the bid procedures motion to be heard on
14 December 5th, as Mr. Lewis said, assuming the sale motion,
15 which Mr. Spector has advised us contains all of the
16 information that would normally be in a bid procedures motion
17 as well, assuming that motion gets filed today or perhaps
18 tomorrow. In addition, to make this hearing meaningful we need
19 not only asset purchase agreement, which has been filed and
20 which we have a copy of, but there are extensive exhibits and
21 schedules, and that is where the heart of this agreement is.
22 That's where the bulk of the substantive matters are contained,
23 and without seeing that we can't know really what the asset
24 purchase agreement means.

25 As to the discovery issue, we, of course, also would

1 reserve the right to take discovery. Today is a good example.
2 Mr. Spector just said he is prepared to call witnesses. We
3 don't have an idea of who those witnesses are. We think if he
4 is going to call witnesses that we be given advanced notice of
5 that so that we have an opportunity to prepare and perhaps even
6 if it's not discovery we have some opportunity to prepare for
7 cross examining those witnesses and understanding what they're
8 going to say.

9 We are not looking to launch a discovery battle here,
10 but there are many, many unanswered questions in the papers
11 filed so far. It may be that the sale motion and the exhibits
12 and schedules answers all of those questions, but we simply
13 don't know. We're shooting in the dark. We would propose,
14 Your Honor, that if the matter gets continued to December 5th
15 that we set an objection deadline of Friday, November 30, and a
16 reply deadline of Tuesday at noon on December 4 so that we can
17 have that in advance of the hearing on the 5th.

18 THE COURT: Thank you, Mr. Levin. Mr. McMahon.

19 MR. McMAHON: Your Honor, good afternoon. Our
20 position is the same as the objector's. We think it would
21 advisable to carry this to the 5th for a variety of reasons
22 which have already been identified on the record. Thank you.

23 THE COURT: Thank you, Mr. McMahon. Mr. Spector.

24 MR. SPECTOR: Your Honor, I understand why they're
25 saying that. There are a lot of things that they think they

1 need. We don't think they necessarily need them all for
2 purposes of a bid procedures motion or a hearing on a bid
3 procedures motion. Typically, what's most important is when
4 you get the APA you look at the conditions of closing. They
5 have that now, I know. And if we came back in a few days, they
6 would have had -- that's the gist of it. I'm told that the
7 schedules are available. With a confidentiality agreement we
8 can make those available as well. And the other documents
9 should be on file. Either -- one of them already is, the
10 credit facility. I don't -- believe that was being filed when
11 we left about an hour ago. It should be on file by the end of
12 the day if it isn't. And the other one we hope to have filed
13 either over the weekend or on Monday. That's the cross
14 licensing agreement.

15 I'll tell you the real problem with putting it over
16 to December 5th. The problem with putting it over to December
17 5th is if we intend to have an auction process, which is what
18 we intended, and we have fulsome marketing for a period of --
19 you know, how fulsome can it be if we have to close by December
20 31st, and that's what I'm getting to. York has advised us that
21 it's a condition of closing that the closing has to come by
22 December 31st. I'm told that there are exigent reasons for
23 that. It's not just because they want to speed it up to jump
24 everybody else's opportunity to put in a competing bid, that
25 they have extrinsic reasons why that has to happen. And we

1 don't want to lose York. I know this Court and other parties
2 in the court have heard this before from purchasers. We want
3 it yesterday and we don't want -- we want the bid procedures to
4 be as stringent as possible, we want the bid protections to be
5 as aggressive as possible, otherwise we walk. I know you hear
6 that and it's a matter of chicken in a lot of cases, and the
7 one that takes the risk really is debtor who really wanted the
8 deal. Maybe we're running into something like that, too, but I
9 don't think so. York has spent a lot of time and money to get
10 this deal and they've been clear from the beginning. Terms
11 have come and terms have gone, but one thing that's always been
12 clear is that they wanted a closing by the end of this year.

13 And I just want to point out something that is so
14 rarely used, how we could save this deal, and I'm not
15 necessarily espousing it because I haven't checked with my
16 client. Of course, marketing -- marketing is an important
17 issue and I see that, you know, I said the magic word, and we
18 do want to see a possibility, that is the debtor-in-possession
19 wants to see potentially competing bids to either bid up York
20 or to sell it to somebody else if it need be and we'd have a
21 better deal. That's --

22 THE COURT: And I assume there's nothing stopping the
23 marketing process from proceeding even today.

24 MR. SPECTOR: Yes, there is.

25 THE COURT: Tell me.

1 MR. SPECTOR: Two things. Number one is we have to
2 make sure that people know what they're bidding on, and, number
3 two, we're in an agreed phase with York that until we beg a bid
4 procedures order we aren't to market the property. We're in a
5 -- what do you call that term --

6 UNIDENTIFIED ATTORNEY: No shop.

7 MR. SPECTOR: -- a no shop provision that until we
8 get the bid procedures order we won't go out shopping. So, as
9 I was saying, we do think that marketing to others is
10 important, but I should point out it's not required under the
11 Bankruptcy Code. Under 363(b) and under Bankruptcy Rule
12 6004(d) -- 6004(f)(1), a sale could be a public sale, which is
13 the auction, which is the way we usually do it in bankruptcy,
14 or it could be a private sale. Now, we have spent an awful lot
15 of time and energy working out a deal with York. If it so
16 happens, and I'm not making this as a motion, Your Honor,
17 because, again, I haven't talked to my client, and they do want
18 to see marketing, but it's theoretically possible that we could
19 come back on December 5th and say, you know what, Judge, forget
20 the bidding procedures order, we'd like to turn this into a
21 motion for sale under a private sale provision under 6004(f)(1)
22 and let's go with York and be done with it. That's a
23 possibility, too, without bid procedures. So, if you can do
24 the greater, why can't we do the lesser? That's my argument.

25 THE COURT: Mr. Levin can't wait.

1 MR. LEVIN: I feel like I have a lot of energy today,
2 Your Honor, despite having a cold.

3 THE COURT: Okay.

4 MR. LEVIN: Mr. McNutt stood at this lectern ten days
5 ago and said that they have been working on this since 2005.
6 Now, I don't know if that's early 2005 or late, but it's at
7 least two years ago. And now all of a sudden we're jammed into
8 less than a six-week period from something that started in
9 October and was said to be an emergency then. The emergency
10 seems to have dissipated. There was a November 9 deadline.

11 And what the debtor-in-possession is asking here,
12 Your Honor, is that they launch on a marketing process on
13 assets -- as Mr. Spector just said, we need to identify what
14 the assets are. Haven't been identified yet. That's
15 confidential. It requires a confidentiality agreement. That
16 means bidders are going to have to sign a confidentiality
17 agreement. They're all going to have to get up to speed and
18 bid between Thanksgiving and Christmas at a time when people
19 who are possibly interested in doing that are already rushing
20 themselves to close year-end deals. This is not realistic.

21 Even if we were to approve it today, that is what the
22 process would be, and to close before year end, yes, you might
23 get a waiver of the ten days under 6004, maybe, but for all
24 practical purposes, we're going to need to have an auction and
25 a sale hearing before December 20 -- 20th, I think -- no, 21st,

1 which is the Friday before. Now, nobody is coming to an
2 auction on Monday, December 24th. We can be confident about
3 that. So, this just -- and the fact that they've been working
4 on it for this long, all of a sudden there's an emergency? It
5 just disadvantages the estate. It disadvantages the
6 debtor-in-possession. It disadvantages the creditors. It's
7 not the right way to do this. A private sale might be
8 permissible when there's an adequate showing of what has gone
9 into producing the private sale, no showing. Maybe when the
10 motion to approve the sale gets filed we'll see something about
11 that, but nothing now.

12 This is a rush to we don't know what at a time when
13 it simply -- the market will not accept it, will not assimilate
14 it. This has got to be heard on December 5th, and we've got to
15 set an ordinary procedure to have a proper auction at a time
16 when participants in the auction process will actually come to
17 the table.

18 THE COURT: Mr. Lewis.

19 MR. LEWIS: Thank you, Your Honor. Let me start kind
20 of at the rear end of this, since Mr. Levin has taken some of
21 my thunder away from me. That's why he got up first. I'm
22 anxious for this estate to generate some money for its
23 creditors because we're one -- probably one of the two biggest
24 creditors, probably along with IBM. In a sense, we are the
25 creditors. There are a lot of smaller ones, and I don't want

1 to denigrate them, but if our claims are anywhere near \$40
2 million, which we hope to find out some day when we're able to
3 proceed in Utah, you know, we're the -- we are the creditors,
4 and what we would like out of this is an important thing, and
5 we're not indifferent to the estates getting some money, but
6 that really leads to the point, which is I don't know that if
7 York walks I care, because I don't know what else there is
8 that's out there that's been tried or might be tried and why
9 the debtor is so determined to sell to York. All those
10 questions we raised in our brief, all of those things bear, I
11 think, on the question of whether that's even an issue, and, of
12 course, there is the open question whether York will adhere to
13 the December 31st deadline any more than they did to the
14 November 9th deadline, which generated the alleged emergency
15 before. And, as I say, even if they do, I'm not sure that I
16 care. I might, but I don't know enough.

17 And then I'm also disturbed to hear talk about, well,
18 we might just turn this into some kind of other proceeding if
19 we have it on the 5th, and I want to say now I think we ought
20 to set a proceeding and we ought to abide by it, and if the
21 debtor wants to change it to something else then let it
22 re-notice the proceeding, not turn something into something
23 else, because if the debtor tries to turn this into a private
24 sale and I've gotten notice of bidding procedures hearing and I
25 haven't had a chance to do discovery on the sale, as I said I

1 probably won't do discovery on the bidding procedures, then
2 I've been -- you know, I've basically been outflanked without a
3 chance to test this, and I think the parties need a reasonable
4 opportunity to test this, and in that sense I would certainly
5 endorse what Mr. Levin has said about setting this on a
6 reasonable track. We're not talking about a sale by the end of
7 the year. It seems to me it's just not realistic, and it's not
8 fair to the creditors, and we don't know enough about what's
9 been going on between the debtor and the buyer and the debtor
10 and other potential parties and who has what interest in the
11 outcome of this for us to do any of that.

12 So, I urge the Court to go ahead -- if the debtor
13 wants to set a bidding procedures hearing for the 5th, let's do
14 that, but that's all that's on for the 5th, and if the debtor
15 wants to change that into something else, let the debtor
16 re-notice it, and then if we go ahead on the 5th, let us set a
17 hearing on an actual sale in a reasonable amount of time,
18 giving parties a chance to vet these assets that doesn't
19 include a big chunk of time in the biggest holiday season of
20 the year. Thank you.

21 THE COURT: Thank you, Mr. Lewis. Mr. Spector.

22 MR. SPECTOR: I was just making a rhetorical
23 flourish, making an argument. I wasn't really saying I was
24 going to switcheroo on December 5th. I don't -- I may have
25 made it too strongly. The point was the greater and the

1 lesser.

2 Your Honor, Mr. McNutt rises. I think you heard from
3 him the last time. He'd like to speak to York's particular
4 concerns, if he may.

5 THE COURT: Thank you. That's fine. Mr. McNutt,
6 good afternoon.

7 (Mr. McNutt not speaking into microphone)

8 MR. MCNUTT: Your Honor, good afternoon. Scott
9 McNutt, McNutt Law Group, San Francisco. Once or twice a year
10 I have the pleasure of being in court and having firms like
11 Cravath and Morrison & Foerster explain that we're railroading
12 them in some meteoric trail and it's impossible for them to
13 keep up with our timetable. I take that for what it is.

14 There is obviously to me, but not to someone who is
15 not familiar with this, a great deal of urgency here. As
16 everyone is aware, this debtor is under a death sentence.
17 After two or three years of active litigation in the District
18 Court in Utah, litigation against Novell and IBM, the Judge
19 ruled a -- issued a tentative decision that will result in a
20 substantial judgment being awarded against this debtor.

21 Now, York is a number of investment funds. It's very
22 well established. It's very liked. One of those funds likes
23 to buy legacy software Companies. This is a legacy software
24 Company. Buried in this -- I don't want to use an unfriendly
25 term, but buried in all of this complexity of this multi-year

1 litigation, there is a little healthy legacy software company
2 called UNIX. We want to buy it.

3 Now, for business reasons, to put this into a fund in
4 this year, we need to close it by year end. It's just a simple
5 business issue. And we'll walk away from the transaction if we
6 can't do that. We have increasing desires to walk away from
7 this transaction. This is a small transaction. It is a -- it
8 has some defined parameters. Now we find ourselves actively
9 arguing with the likes of Cravath, Morrison & Foerster and
10 other lawyers that will -- that given the chance will turn this
11 into a very complicated proceeding, and a deal that maybe could
12 have been done for a modest price is now becoming a much higher
13 price with no end in sight unless we get to that point where we
14 actually are able to buy the assets, and then we either have
15 them or not, we take our lumps or not, and we'll have realized
16 the value that we believe to be here. And from my own
17 experience -- I've worked on several of these transactions for
18 York -- holding a company like this together when it's in the
19 throws of huge external problems is very difficult, and the
20 company itself has a hard time focusing on the healthy little
21 part of the business when it has these huge problems over here.

22 So, we'd like to come back on Tuesday. We know we've
23 pressed the Court's patience because it has been difficult to
24 come to rest on some of these documents because there are so
25 many moving parts. Thank you, Your Honor.

1 THE COURT: Thank you, Mr. McNutt. No one has to
2 worry about pressing my patience. I'm very patient, and I
3 understand -- you know, let me say this. The -- and I'll hear
4 from you still, Mr. Lewis, but I'll tell you what my thinking
5 is.

6 Emergencies are the very nature of bankruptcy, and by
7 their very nature emergencies create a lot of inconvenience for
8 parties and hurry-up and people's schedules and -- are in
9 upheaval often and they have to produce a work product very
10 quickly and drop everything else and come to court, and there's
11 often a fine line between inconvenience and real substantive
12 prejudice, and I think that the line really has been crossed
13 here at this point, where parties are not only being
14 inconvenienced, but they're being prejudiced, and mistakes
15 happen and judges make mistakes when there's -- when issues as
16 complicated as these are forced.

17 In fact I would say very candidly that if we proceed
18 too quickly I also think the debtors are going to be prejudiced
19 here because of the papers that I've seen thus far, and I
20 haven't seen the new papers and I haven't seen all of them, but
21 I just think that the debtors themselves and indeed indirectly
22 York are going to benefit if we proceed in a somewhat less
23 hasty fashion, and I am going to schedule this for December the
24 5th. I'm going to give the parties an opportunity to finalize
25 their positions, to identify the assets.

1 I heard, for example, that York is interested in
2 buying a -- you know, a very small operating copy, UNIX, but as
3 I have read the papers thus far, York is itself -- investing
4 itself in a lot of these more complicated issues. But we
5 really have to sort that out I think further, and I just don't
6 think that it is realistic, reasonable or wise to proceed on
7 Tuesday, have people come back, when I know that we will be a
8 little bit better off than we are today as far as people
9 understanding the nature of the transcript, but not enough to
10 really assist everyone, including me, in arriving at an
11 appropriate decision. So, I just think that -- we'll have to
12 see. I am not prejudging where we go after December 5th and
13 what that schedule might be depending upon what I hear on
14 December 5th, but I just think that we would all be making a
15 huge mistake to proceed so quickly.

16 MR. McNUTT: Thank you, Your Honor. This case is
17 peculiarly one where it has to be gotten right the first time.

18 THE COURT: I think that's correct. Hopefully we --
19 we're not going to have time -- as one judge once told me,
20 trial judges are just supposed to make the decision and let the
21 appellate courts get it right, but we want to get it right the
22 first time.

23 MR. McNUTT: I always like it when the appellate
24 judges kill the wounded, but --

25 THE COURT: Yes. Thank you, Mr. McNutt.

1 MR. SPECTOR: I just want to thank Your Honor for
2 accommodating us as much as you already have, and we understand
3 and as usual respect the Court's ruling and will abide by it.

4 THE COURT: Thank you. And -- now we do have I guess
5 some filings to discuss.

6 MR. LEVIN: Your Honor, the dates and the deadlines.

7 THE COURT: Yes. And I think that probably the
8 proposal that you've made with a November 30 filing with your
9 response to the bid procedures motion based upon the further
10 filings and reply on December the 4th by noon --

11 MR. LEVIN: We'll make noon on both days, Your Honor.

12 THE COURT: That's fine.

13 MR. LEVIN: Okay. And what about the filing of the
14 motion and the other supporting papers?

15 THE COURT: Well, I think all -- let me ask Mr.
16 Spector. What are we realistically, very realistically,
17 talking about?

18 MR. LEVIN: And I have one other issue after that,
19 Your Honor.

20 THE COURT: Thank you.

21 MR. SPECTOR: I missed what was the November 30th
22 obligation.

23 THE COURT: November 30 would be the objectors'
24 filings.

25 MR. SPECTOR: Objecting to I suppose the rest of the

1 documents --

2 THE COURT: That's right.

3 MR. SPECTOR: We would like to file the sale motion
4 sometime between now and November 30th, and the proposed order
5 approving the sale would be a part of that. And we would also
6 be filing the remaining documents to the extent they weren't
7 filed today in I would say a reasonable -- today's the 16th --
8 I would have said a week or the 23rd, but that's -- that's not
9 a day. The 20 -- would the 27th be a reasonable day to get
10 that in? I'm looking to the people that do the work. The
11 27th, is that enough?

12 MR. LEVIN: I didn't -- what document?

13 MR. SPECTOR: Well, we're going to get the sale
14 motion in, which is what we addressed before, and all of the
15 other documents that haven't already been filed would be in by
16 then. Actually, we may be able to get those documents in now.

17 MR. LEVIN: Your Honor, I don't mean to speak out of
18 school. Mr. Spector has represented to us that the sale motion
19 is either ready or almost ready, and he's asking for 11 days
20 from now to file and then giving us three days to respond to
21 that. If they are in such a rush as they've been describing,
22 it should be ready now and should be filed in the next day or
23 two.

24 THE COURT: Yes, I -- after all, they were pushing
25 for a hearing on Tuesday. Presumably --

1 MR. LEVIN: That's right.

2 THE COURT: -- we were going to have papers filed by
3 Tuesday.

4 MR. LEVIN: And if we're going to make -- and if all
5 of the things that we said were missing from bid procedures
6 motion are, in fact, contained in the sale motion, we're
7 agreeing to shorten time from now until December 5th, but not
8 from November 27th to December 5th.

9 THE COURT: Yes, I --

10 MR. SPECTOR: I was -- I had to talk to the people
11 that's why it was catching me unawares. I originally thought
12 you were saying November 30th for our obligation to get it in.

13 --

14 THE COURT: Oh, no, no.

15 MR. SPECTOR: And -- all right. So we're talking now
16 about getting the other -- the cross license --

17 MR. LAMPERT: The significant documents that are
18 outstanding I think that are left are the --

19 UNIDENTIFIED ATTORNEY: Can you come up to the
20 microphone?

21 THE COURT: Yes.

22 MR. LAMPERT: Good afternoon, Your Honor. Dan
23 Lampert from Berger Singerman, the transactional all-night
24 person. And the significant documents that remain open are the
25 cross license agreement, the security agreement, the sale

1 motion and the sale order and the DIP loan agreement motion.

2 UNIDENTIFIED ATTORNEY: The cross license --

3 UNIDENTIFIED ATTORNEY: We said that already.

4 THE COURT: You are going to proceed with that
5 pursuant to Section 364 I assume?

6 MR. SPECTOR: 364. We'll have a 363 motion -- 363,
7 365 slash motion and a 364 motion.

8 THE COURT: Okay.

9 MR. SPECTOR: And those documents we can have in by
10 --

11 MR. LAMPERT: Well, from our side, we're -- we need
12 to have them --

13 MR. SPECTOR: -- Tuesday.

14 THE COURT: Fine. Okay.

15 MR. SPECTOR: A lot better than the 27th.

16 THE COURT: Yes.

17 MR. LEWIS: Will that -- will that include schedules
18 and other --

19 THE COURT: That is my understanding.

20 MR. LEWIS: -- critical information?

21 THE COURT: That's my understanding. Those are --

22 MR. LEVIN: Is that also noon on the -- on Tuesday
23 the 20th?

24 THE COURT: Yes. I'm going to make it at noon
25 because there's a holiday coming, and you may not be working

1 all weekend but at least you can have an opportunity to be
2 reviewing them all weekend.

3 MR. LEVIN: Or we may be -- I appreciate that, Your
4 Honor. Thank you. The other open item is the schedules and
5 exhibits, and Mr. Spector said, and we have no objection
6 conceptually, that there should be a confidentiality agreement.
7 I don't want to be in a position where we haven't been able to
8 negotiate a confidentiality agreement for two weeks, and I
9 think that we need to have the understanding that lawyers in
10 this court typically have that these documents will remain
11 confidential and the details of a confidentiality agreement are
12 not necessary in this circumstance, that these documents will
13 be kept with us and our clients and any other advisors working
14 on it, and that is the end of the matter, rather than launching
15 into a long and laborious negotiation over a confidentiality
16 agreement. But I would suggest, Your Honor, that as part of
17 what they file by next Tuesday, if bidders are going to be
18 required to sign a confidentiality agreement, that that
19 proposed confidentiality agreement be included with the bid
20 procedures.

21 THE COURT: I think that's fair, and that should be
22 done. Mr. McMahon, did you want to say anything? I mean, my
23 own view is that we do often operate, especially in exigent
24 circumstances such as this, with a confidentiality
25 understanding and perhaps the parties who receive the documents

1 would just at least keep a record of parties who receive and
2 have access to those documents. Mr. McMahon, did you want to
3 suggest something?

4 MR. McMAHON: Your Honor, yes, just for clarification
5 purposes. I assume that we're talking about documents that are
6 part and parcel of the APA and the deal such that we would
7 expect that the debtors would be filing a motion to place
8 whatever items need to be placed under seal and that the agreement
9 which counsel just referenced on the record would hold us over
10 until such point as that motion is resolved by the Court.

11 THE COURT: Were we talking about asset purchase
12 exhibits or were we talking about underlying documents, due
13 diligence type documents?

14 MR. O'NEILL: Your Honor, James O'Neill. I believe
15 we're talking about the schedules and exhibits to asset
16 purchase agreement. I mean, I -- my understanding was that
17 there was a proposal that all the parties present had agreed to
18 maintain confidentiality with respect to those documents. I --
19 we would not -- if they are confidential documents they
20 wouldn't be filing the schedules on the docket --

21 THE COURT: Right.

22 MR. O'NEILL: -- either.

23 THE COURT: That makes sense.

24 MR. McMAHON: That's understood, Your Honor, but what
25 -- let me just get to it. You wouldn't be filing an

1 un-redacted version of the schedules with the court, but to the
2 extent that it's part and parcel of the deal, Your Honor, the
3 documents should be filed under seal and the debtor should be
4 filing a motion to lodge those documents with the court under
5 seal, with all parties in interest rights reserved with respect
6 to being heard on that matter. They're part of what the Court
7 is authorizing. It's not like they should be in an office of
8 some law firm after Your Honor considers them is my point. So,
9 I have no problem with proceeding on the agreement that Novell,
10 IBM, other parties that they debtors may agree to give the
11 documents to, you know, hold those and agree not to disseminate
12 them pending Your Honor's ruling on the seal motion, but the
13 seal motion's got to get filed and the documents have to be
14 lodged with the court under seal for the purpose.

15 THE COURT: Mr. O'Neill?

16 MR. O'NEILL: I just wouldn't want that process to
17 hold us up, Your Honor, and I wouldn't want objections to a
18 seal motion to hold up the process, so that's my -- that's my
19 concern.

20 THE COURT: And I'm not going to allow -- what we'll
21 do is you'll file your motion, which I'll approve, and we'll
22 have a hearing on any issues relating to the filing under seal
23 on the 5th as well, but that will at least move things forward
24 at this point.

25 MR. O'NEILL: And in the meantime, all the parties

1 shall be -- will be bound by the confidentiality --

2 THE COURT: That's right, and anyone else who comes
3 forward and is willing to be bound by confidentiality may also
4 have access to those documents.

5 MR. McMAHON: Your Honor, thank you for the
6 clarification.

7 THE COURT: Absolutely. Thank you, Mr. McMahon, for
8 helping me to explain it further.

9 MR. McNUTT: Your Honor, this doesn't particularly
10 help my client, but I have not been before you before, so I've
11 got to put this right out front. This is a purchase and sale.
12 It concerns money. This is intellectual property, this -- and
13 core to what York will be buying is a precise language of the
14 sales order. I assume that that sales order will be
15 aggressively challenged and that there'll be a lot of time
16 spent here with Your Honor seeing if the order can be approved
17 in the form York is going to require as a condition of this
18 deal. I just want to be honest with the Court. Usually these
19 things are subject to significant flexibility. In this
20 situation that order -- because making clear that what we're
21 buying is not tainted with other disputes is particularly
22 important, the exact verbiage is going to be important.

23 THE COURT: Is that going to be in the asset purchase
24 agreement, the precise language that you're concerned about?

25 MR. McNUTT: Well, the asset purchase agreement has

1 already been filed. It will be in the sales motion --

2 THE COURT: In the sales motion, okay.

3 MR. McNUTT: -- which I believe will be filed
4 Tuesday.

5 MR. SPECTOR: We've committed to file it Tuesday.

6 What we're waiting on is the order with the exact language they
7 want to have.

8 THE COURT: I see.

9 MR. SPECTOR: That's why it hasn't been filed. We
10 have the motion. We don't have the order to go with it.

11 THE COURT: Okay. Now I understand.

12 MR. McNUTT: I just want to be candid. That will be,
13 in my eyes, the issue, and everything else will follow that.
14 As to schedules, all that sounds very good. These sorts of
15 schedules do change as you approach closing. Everyone will
16 have to be reasonable about disclosing what may change and what
17 its materiality is. That's -- thank you, Your Honor.

18 THE COURT: Thank you, Mr. McNutt.

19 MR. LEVIN: Thank you for your indulgence, Your
20 Honor. As I said, there was one other matter, and that was --

21 THE COURT: Yes.

22 MR. LEVIN: Mr. Spector said that he was ready to
23 call witnesses, and I suggested earlier that we be given a list
24 of those witnesses. I would suggest Tuesday at noon would be
25 an appropriate deadline for that as well.

1 THE COURT: Mr. Spector, would that present a
2 problem?

3 MR. SPECTOR: I can always do that, but I'd rather
4 see the objection so I know what it is I'm fighting. So it
5 makes more sense, I think, to wait till after their objections
6 are filed. Then I can tell you who I want to call to rebut
7 them.

8 THE COURT: Well, I --

9 MR. LEVIN: We filed the objection, Your Honor. It
10 could only narrow. So whatever he was going to put on today,
11 that's what we'd like to know based on the objection that we
12 filed.

13 THE COURT: That's fine, and what you -- yes. In
14 other words, what testimony you would be presenting in support
15 of your motion --

16 MR. SPECTOR: I can do that.

17 THE COURT: -- with the understanding that you can
18 always delete witnesses who you don't think are necessary after
19 you see what's filed on the 30th, hopefully in discussion with
20 the objecting parties.

21 MR. SPECTOR: I can do that.

22 THE COURT: Is there anything further for us to
23 discuss?

24 MR. LEWIS: What time, Your Honor, on the 5th?

25 THE COURT: What time did we schedule this? Let me

1 see. I think -- 10:00 a.m.

2 MR. LEWIS: Thank you, Your Honor.

3 THE COURT: We'll start at 10:00, and I will do --
4 I'll just do a very brief order setting for the schedule so
5 there's no confusion, and obviously, as I say at every hearing,
6 I'm available if the parties run into any difficulties or need
7 the Court's assistance or intervention. Mr. O'Neill.

8 MR. O'NEILL: Yes, Your Honor. Just to the extent
9 that if -- I don't know whether any of the other parties intend
10 to call witnesses, but obviously if they get to a point in the
11 process where they do intend to call witnesses, if we could
12 just have the same courtesy of identification of witnesses, as
13 well, in sufficient time so that we can be aware of who's going
14 to be presented that would be very much appreciated.

15 THE COURT: I think that's a -- I think that's a --

16 MR. LEWIS: We're happy to do that, Your Honor.

17 THE COURT: Thank you, Mr. Lewis.

18 MR. LEVIN: As are we, Your Honor.

19 THE COURT: All right, Mr. Levin. Thank you, sir.

20 Anyone else? Mr. O'Neill.

21 MR. O'NEILL: I think that's -- I think that's it for
22 today, Your Honor.

23 THE COURT: All right. And as I said, if you need
24 me, I'm available. Just -- we can even arrange a conference
25 call if need be.

1 MR. O'NEILL: Thank you very much.

2 THE COURT: Thank you, everyone.

3 UNIDENTIFIED ATTORNEY: Thank you very much, Your
4 Honor.

5 UNIDENTIFIED ATTORNEY: Thank you, Your Honor.

6 THE COURT: Good day and good weekend.

7 * * * * *

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

9 I, DENISE M. O'DONNELL, court approved transcriber,
10 certify that the foregoing is a correct transcript from the
11 official electronic sound recording of the proceedings in the
12 above-entitled matter, to the best of my ability.

13

14 /s/ Denise M. O'Donnell

15 DENISE M. O'DONNELL

16 J&J COURT TRANSCRIBERS, INC.

Date: November 26, 2007

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