UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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| IN RE: | ) | |
| | ) | Chapter 11 |
| THE SCO GROUP, INC., | ) | |
| | ) | Case No. 07-11337-KG |
| | ) | |
| | ) | March 30, 2009 |
| Debtors | ) | |

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

APPEARANCES:

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(Appearances continued)

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I N D E X



Transcriber's Note - Alan P. Petrofsky appears telephonically.

(Court in Session)

THE CLERK: Please rise.

THE COURT: Good afternoon, everyone. Please be seated.

COUNSEL: Good afternoon, Your Honor.

THE COURT: Thank you. Good to see you all. Mr. O'Neill, good afternoon.

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

THE COURT: It's a double header for you today.

MR. O'NEILL: It is a double header. Nice to see you again in such a short time span. Your Honor, James O'Neill for the record appearing today on behalf of the debtors, The SCO Group, and I'm joined today by my colleague, Kathleen Makowski, and my co-counsel, Arthur Spector, who the Court knows.

THE COURT: Welcome back, Mr. Spector.

MR. SPECTOR: Thank you.

MR. O'NEILL: Also in the courtroom from the company who the Court knows are Darel McBride and Ryan Tibbits.

THE COURT: Yes. Welcome, gentlemen.

MR. O'NEILL: Your Honor, we have a couple of matters that are on the agenda for today, and I'm going to -- I think that really, we're going to start with the status conferences for items number 2 and 3 to give the Court a picture of where we are, and Mr. Spector is going to give the status report to the Court.

THE COURT: Thank you, Mr. O'Neill.

MR. O'NEILL: Thank you.

THE COURT: And certainly, that relates I think to item number 1. So it's probably helpful to do it in this order.

MR. SPECTOR: Your Honor, I don't know the Court's preference. Do you want to take appearances first, or do you want to --

THE COURT: No. That's all right. Everyone has returned, I think, and I know who -- who everyone is, and they'll just --

MR. SPECTOR: Thank you --

THE COURT: -- rise when they're ready.

MR. SPECTOR: Thank you, Your Honor. Once it became public knowledge that SCO was planning to auction its business UNIX which was, of course, public on January 8th when we filed a plan that proposed that, various parties, including prospective purchasers approached the management and asked SCO to take the auction away so they could do a deal privately.

Included within this group were several players that were -- I'll call them interested in the company pre Judge Kimball's ruling of July 16, 2008 and some that were also there after that. So we're not necessarily dealing with new players, but some of the old players came back and said don't auction it off to the public, we still want to buy it. Okay?

Eventually, SCO implicitly acquiesced --

(Rumbling sound)

THE COURT: It sounds worse than it is, I think.

MR. SPECTOR: I didn't --

THE COURT: That rumbling -- that rumbling is not thunder.

MR. SPECTOR: Yeah. I didn't -- I didn't need that today, and I had no lunch. So it's not that either, sir.

THE COURT: All right.

MR. SPECTOR: By withdrawing -- eventually, SCO implicitly acquiesced by withdrawing the motion that would set the hearing on the 16th of this month asking for approval of bid procedures. These talks were making sufficient progress so that we had hoped to have definitive documents that would have made a status report unnecessary. I -- I concede and to say that I spoke with Mr. Lewis on behalf of Novell, Mr. Levin on behalf of IBM, several weeks ago saying we are withdrawing that because we have talks in the works and I hope to have a disclosure statement fixed in a fashion that you would find less objectionable than what you had previously seen and see if we can work out any differences so that on March 30th, we can come in and say we kind of worked those things out and here is our disclosure statement and let's have approval, and I told them it's not going to be a lot like the January 8th version, because we have a private sale going now and so forth, and I --

I only say that because I believed it based on the status of the talks at the time.

Those talks have not come to the level that would be necessary for me to make any changes to the documents because I'd be writing and then erasing and then writing and then erasing, and I promised Your Honor some time ago with -- in the wake of another fiasco that I would not burden this Court any further with plans or disclosure statements based on LOI's and that's what we've been offered, and I've told that to our negotiating partners on the other side, saying, you know, LOI doesn't -- isn't worth anything. Well pointed out a year ago in one transaction.

So since I don't have such definitive documents, we don't have an amended disclosure statement, and we don't have, of course, anything worked out with IBM and Novell. In addition, there is another reason why we don't have an amended disclosure statement, and that's because we don't have our negotiating partners at the place we want them. The deal isn't at a point that we want to close a deal.

Now, I don't want to -- you know, I don't want to make disclosures about the status of negotiations, but we're not happy with where they are. Although there is progress, we're not there yet.

We had -- one of the bidders had a counsel that was going to join at this hearing and testify -- not testify but

speak to their -- her client's continuing interest in doing a deal, but she had a conflict and just said that she couldn't make it but we could relay that, of course, but that's obvious.

In a matter of five weeks, SCO will finally have its biggest day in court in its history. It's May 6th, just around the corner. It's the date set for oral argument on SCO's appeal of the August 10, 2007 summary judgment ruling in the Novell litigation, and the subsequent money judgment rendition in -- on July 16, 2008.

How did we get a May 6th hearing date, oral argument hearing date on an appeal in which the record wasn't even submitted until January? Answer, following the suggestion of a clerk, I guess it was, at the 10th Circuit that maybe this case was worthy of expedited attention, SCO filed a motion for expedited briefing, which was granted, I don't know, a couple days later.

Within days there -- then SCO filed its brief on March 5th, and the very next day, the 10th Circuit set oral argument for May 6th. I think that's unusual.

The order also discouraged, and that's a word I -- that was in the order, quote, discouraged Novell from seeking an extension of its time to file a responsive brief. Wouldn't it be a shame if SCO ultimately wins the appeal in the 10th Circuit but had already sold all of its UNIX assets just to stay in business or to see -- or stay alive to see that day

come to fruition?

Before the August 10, 2007 ruling, SCO had a market capitalization of $35.0 million. Within weeks after that ruling, the price of SCO stock plummeted so that the market capitalization just a few weeks after that ruling was 1.5 million, approximately $1.5 million.

If the ruling is overturned, it's fair to say that the share value will improve dramatically. Consequently, SCO'S ability to obtain conventional financing would improve markedly, or if it's still then inclined to do a sale-based transaction, the demands that SCO will make to do it will be far more commensurate with the interests of its constituents and what's being discussed today, and this is all common sense.

The three underlying factors that lead to these conclusions are, one, the $3.5 million judgment against just, against SCO by Novell would be gone. That's part of the premise of the argument.

We believe that the marketplace has always felt -- always felt that SCO clearly owned the UNIX copyrights, the UNIX technology all together including the copyrights. Even certain IBM documents acknowledge that SCO was the owner of the UNIX copyright, and that will all be in evidence when we get to a trial.

We believe the market still holds this view, but it's -- it's -- the firmness of its view was shaken by the

August 10, 2007 ruling. By removing that opinion, the market will likely reassume the validity of SCO'S ownership in the copyright.

Third, major customers went into a holding pattern upon the release of that ruling, not knowing what to do. Just wanted to sit it out. Now, they didn't necessarily quit UNIX and go to some other platform, because, frankly, it's a very major task for them to do. I'll get into that a little bit later, but there were loads of orders for other upgrades and things that were frozen. That's revenue that's sitting on a shelf waiting to come to SCO if the fear that the customers have is taken away.

When we first came before you in September, 2007, we talked a bit about SCO'S future technology, the Mobility business through its subsidiary, Me, Inc. The technology at that time had not been fully developed nor marketed. It was a future technology.

In the worse economic times since the first great depression, SCO finished the development of the products and began their marketing in earnest, but due to the economic climate -- climate, SCO'S strategic partners in this endeavor, folks like Day-Timer, FranklinCovey, RIM, and Rogers Communications either pulled out or slowed down their marketing efforts because of their own financial problems. Well, I won't say problems, but concerns.

Now, both FranklinCovey and Apple, a new player in this marketplace, in this space, are aggressively marketing the products that have now come to market. Revenue stream has now commenced. This is no longer future technology. It's present technology.

Remember where we were in September of 2007 and what hill we had to climb to get revenue. There were people who were not friendly disposed towards the company who said that the Mobility products were a fiction. There really wasn't anything there. It was like Billy Celestes, if you're old enough to remember.

THE COURT: I remember.

MR. SPECTOR: The oil from one place to another. If you came and looked, it wouldn't be there. There are other apt analogies since then I know. It's not true. It not only exists, but it's being marketed and revenues have started to be produced.

As a result of this success, early success with the first product that SCO delivered, it's all FC Tasks. FC stands from FranklinCovey. Tasks is jobs. It's the first application SCO did in conjunction with FranklinCovey for the iPhone. That application made it to the top 20 paid productivity applications for the iPhone in days coming out of the market. It's still in the top something, but it -- it is -- and that's before FranklinCovey sent out the e-mail to its loyal base of

Franklin customers to push the thing. This is just word of mouth at this point.

SCO now has a pipeline. Oh, by the way, this is on the iPhone. There is 20.0 million of them approximately last count on the marketplace. This is a paid additional application you can get for your iPhone, and this is in the top 20 or was in the top 20 last we looked, I guess, of paid productivity applications for the iPhone. That's without -- I'm repeating myself. That's without the pushing of FranklinCovey. It's brand new. I think it only hit the market February 27th.

SCO now has a pipeline of new products being developed for other companies for the iPhone, people coming to SCO and asking for that. That's with all of the problems, A, in the world marketplace, B, with this company being in Chapter 11 and facing the -- the competition that it has and everything else in its way.

Now let's talk about UNIX. After all, that's what this company was all about. Thousands of SCO customers, loyal SCO customers have millions of SCO servers to run their basic business applications. It's a major task, as I said earlier, for them to switch off of the UNIX-based system to something else. They would have to rewrite their own business applications that run on UNIX. They have lots and lots of business applications, and I suppose some companies like

McDarel's, have the wherewithal to do it. A lot of them don't have the wherewithal to do that or not easily.

They would love to have the ability, all of these customers would love to have the ability to run their applications on a variety of platforms if they could of hardware and software configurations. SCO has developed a new product that will be released in a matter of weeks that answers this demand.

Although UNIX sales have been on a steady decline for years, this product is designed to reverse that trend. The product is called SCO UNIX V. V is for virtual. It will allow SCO customers to access Windows operating system overtop of the existing UNIX, which would save them the necessity of making the changes.

So that's what's happened. This is a status report. I'm telling you what's happened in the core business, and -- and the litigation is one of the core businesses unfortunately to say in the SCO -- in the SCO company. We touch on UNIX, Mobility, the litigation. It's a three-legged stool largely, and it's largely been a race against time as the Court well knows.

I'll now turn to the -- well, that's the status report. We didn't touch about the third -- I think item 1, we're just talking about the exclusivity, but it kind of runs into that. If you want me to sit down now and stop or I can --

THE COURT: No. Continue. Continue, Mr. Spector. That's fine.

MR. SPECTOR: Thank you. As we said at the hearing on the first-day motions in September, 2007, SCO filed this case to protect itself from a $40.0 million plan by Novell with the poison dagger of a constructive trust that would immediately shut the doors.

This would have been calamitous to the thousands of loyal customers that we talked about, because they wouldn't have anybody to provide ongoing support or upgrades. As they get new applications, business applications for the business to run on UNIX, we have to do things to make it run on UNIX, and there wouldn't be a SCO company to do that. So that was one of the major considerations. If we go out a business, a lot of people would be harmed by that.

Second, it would have killed SCO'S budding Mobility business. At the time, there was -- the products had been mostly developed, and we were on the verge of coming to market with product, and then, of course, it slowed down because of the economy, but we finally had gotten there, and so that goal has been realized, and third, it would have cost SCO its valuable intellectual property rights, which when and if we get to court and prevail at a trial can be worth billions of dollars. That's what this case is largely about.

Chapter 11 has helped SCO achieve these objectives so

far. It's still here. We are now on the last lap of the race against time. Therefore, we are making an ore tenus motion for the last extension possible.

Under 1121(d)(2)(B), the Court may allow an extension of the time for exclusivity under 1121(b)(3) for 20 months. In this case, that's May 14th. Then we can't ask you for anything more except confirmation of a plan when that date comes, and that -- I know that the motion we had on file said March 16th, but we all know -- first of all, we asked for January 16th for the exclusivity. We filed on January 8th. The dates got all jumbled up, but let's look at the statute. The statute doesn't say anything about the minutia of facts that we have on dates. Simply says the debtor has to -- has exclusivity if the Court so grants it for not longer than 20 months from the date of the order for relief for getting a plan confirmed.

Now, I am fully aware that if we filed a plan April 15th and we went to a disclosure hearing somewhere around May 14th, and not shortening schedules, just the normal 30-day, 25 days plus a little bit of notice, if we did that and we got here May 14th and the Court granted approval of that disclosure statement, on May 15th, we wouldn't have exclusivity anymore. I know that. I can't change that. Congress thought it was wise to put those limits in, and we live with them. We have to live with them, but that's -- I hate to -- I'm thinking words like Dayenu. I'm thinking words like Alavai. I'm thinking of

words -- and I don't know how you're going to put that on the transcript.

I'm thinking that that will suffice us. Okay? Because at that point, we're out of the gate, we've got the horse in front, and we can -- and we can get to a confirmation in June, if necessary, but ahead of any competing plan, unless the Court wanted to slow it down and put it on a track, and we would argue against that for obvious reasons.

So, I mean, I can't ask for any more than that, but I -- but I really can't ask for any less than that. So that is what the request is for today, and it's the only real request we have for you today. And with that, I'll either take questions of Your Honor or sit down and let someone else speak.

THE COURT: Let me hear from others who might want to be heard first.

MR. SPECTOR: Thank you.

THE COURT: Thank you, Mr. Spector.

MR. PETROFSKY: Good afternoon, Your Honor. This is Al Petrofsky.

THE COURT: Yes. Mr. Petrofsky.

MR. PETROFSKY: Thank you. Well, let me start by addressing a couple of points that came up here. That May 6th oral argument date in the SCO v. Novell deal, that is -- that is an argument date. That's not a decision date.

THE COURT: That's right.

MR. PETROFSKY: And the Court's ruling, I don't think that's been submitted to you, but the -- the Court's ruling on that case on expediting the appeal did not say anything about expediting the decision after the argument.

THE COURT: Correct.

MR. PETROFSKY: And, of course, there are no -- you know, unlike some State Appellate Courts, there are no limits on how long they can roll that thing over after the argument, and the appendix in that case is 16,000 pages. So I don't think they're going to be turning around in one day with a decision.

Secondly, on the supposed success of the Mobility business, SCO is still reporting losses every quarter on this operation, and that's -- even when you exclude all of the reorganization expenses.

Okay. And then one other thing that may just be a misunderstanding. The debtors claimed in their motion that they are paying their debts as they come due. However, as I pointed out in my objection, the debtors contradicted in their operating reports in which they say that they are more than half a million dollars of past due unpaid post-petition debts.

Since I filed the objection, the debtors have filed two more operating reports which continue to show past due debts in similar amounts. Now, maybe these are all just mistakes in the operating reports, but if so, you know, it's

troubling that the debtors continue to make this mistake after its been brought to their attention.

And now getting to the heart of the matter, it's the debtor's burden to show cause for an extension, and Congress said, "A granted extension should be based on a showing of some promise of probable success", and we haven't seen anything to the Court.

Back in September, Mr. Spector said --

"We promise Your Honor that we wouldn't come in again with a half-baked, quarter-baked plan. We would make sure that everything is there. We would do what Mr. Lewis says we could have done the first time, make sure there is a real commitment, that there is financing behind it, it's not the pie in the sky that you walk away from in the due diligence period. That -- that, Your Honor, is why we need a further extension of exclusivity."

Now, the Court then generously gave the debtors until the end of the year to come up with a plan that wasn't half-baked or quarter-baked, but was completely baked, and the debtors failed to do so. We're now three months into the year. We haven't seen any progress for confirmation. Just more false starts and promises that the next time will be different.

We've had three hearing dates set and then cancelled. This is not progress. Success has not been shown to be

probable. This case has been held hostage for too long by debtor's ineffective efforts. There is no cause to continue to silence all of the other parties while the debtors get us nowhere.

Let's open up the floor to all parties, including the debtors. I'm not suggesting that their plan should be, you know, completely rejected right now, but just open it up to all parties and find out which parties, if any, can propose a vital plan, and I think that's all I have to say. Thank you.

THE COURT: Thank you, Mr. Petrofsky. Mr. Lewis, it's good to see you again, sir. It's been a while.

MR. LEWIS: Thank you, Your Honor. It's always a pleasure to be here. Your Honor, I'm going to just kind of address the whole package at this point --

THE COURT: Okay.

MR. LEWIS: -- and you'll hear my specific comments about the exclusivity motion along the way. But looking at the larger picture, I'm not quite sure whether I'm hearing Periclis (phonetic) say the uphill path is the downhill path or vice versa or whether we're hearing people in the Government say well, the really bad economic news is really good news, because that's essentially what we've heard, and, in fact, that's what we've heard every time we've come in here for an extension or something else, a new reason why it didn't quite happen this time, but things are just looking great, but the fact is that's

all we've ever heard. We have no evidence of anything solid happening.

Mr. Petrofsky has referred to the operating statements. The debtor continues to lose money and while if everything goes right and the debtor somehow manages to stay in business and continue its appeal, if the debtor wins, I suppose there are billions of dollars at the end of the rainbow, as the debtor says, or maybe there are. On the other hand, if the debtor loses, where are we?

Your Honor, when -- when we were here one or two times ago on this issue, in fact, I think it was back in April when the debtor withdrew the SNCP plan, we heard that really, this case is not about the creditors. They're going to get paid in full. The only real stakeholders are the shareholders.

Well, Your Honor, if all of this doesn't happen as -- as the debtor would like it to happen, there won't be enough money to pay the creditors even. The creditors are being sacrificed to this pot at the end of the rainbow, and I don't think that's appropriate. If it were ever true that the creditors were going to get paid in full, even if everything goes wrong, it's not true now and it's only going to get worse.

The Court may recall Mr. McBride's testimony and Mr. -- and counsel's comments at the September extension motion hearing where we were told really, the UNIX business was a dying business. That's what we were told.

Mr. -- counsel put it a little bit more aggressively than Mr. McBride did, but essentially, that's what we were told, and we were told the Mobility business was right on the verge of a real breakthrough, they were ready to go, and what we finally heard is that there are some revenues. We didn't hear anything about the size of the revenues. We didn't hear anything about how they might increase and when they might increase. In fact, those were all issues that should have been addressed, the Court may recall, in the last disclosure statement, and we made objections that they were not addressed. There was no substantiation for all these claims about how business was going to operate and was going to be wonderful and money was going to come in and everything was going to be just fine, and I suspect one of the reasons we didn't see any substantiation is because it couldn't be substantiated.

So here we are again in a case where the debtor has continued with its single-minded focus on this litigation, which I suppose it may be true that if they win, they win big, but if they lose, and they have lost so far, and we have to keep that in mind. However the debtor would like you to think that their prospects are wonderful and would like you to draw that inference from the mere fact that the Court ordered an accelerated oral argument, the fact remains that we won, and even if our claim isn't 40 but 3.5 million, we don't even know what IBM's claim is yet when it gets liquidated if they win and

IBM wins, and we know there are several million other dollars in creditor claims. How is that all going to get paid? Who's going to make up for the deficit? Who's going to -- who's going to compensate the creditors or the shareholders, if that's who's behind this, speculating at their expense?

Under the circumstances, Your Honor, I think the notion that there should be an extension just doesn't make any sense. In fact, the notion that this should remain a Chapter 11 doesn't remain -- make any sense. There should be a neutral installed here by conversion to Chapter 7, which this Court has the power to do even sua sponte, or the appointment of a Chapter 11 trustee to make an independent assessment which is made not by someone who's been committed to whatever this company's prospects thought -- thought they were for years and years but can make an independent assessment of whether the litigation is worth pursuing in light of the damage to the creditors that may well ensue if it is pursued rather than resolved in some fashion.

I can't control whether it gets resolved, but we have what it seems to me is a clearly biased party adhering to this litigation endlessly no matter what, willing to come in and tell this Court again and again well, we made a mistake this time, but next time we won't make a mistake and next time it will be for real, and as Mr. Petrofsky pointed out, this last claim was not for real. It was something that was filed

because exclusivity was about to run out. It wasn't for real because it wasn't substantiated in the disclosure statement, and it wasn't for real, because it had its own inherent problems, impairment problems, problems with the absolute priority rule.

In fact, the notion that exclusivity hasn't expired already I think is -- is doubtful, because while there is a plan on file, the debtor has all but admitted that's not its plan. It's just -- it's a placeholder. That's not a plan. The debtor is not going to pursue that thing, whatever it was. The debtor is going to file something new if it gets the chance to maybe some day, maybe by mid-May, maybe not.

But, you know, I recall the Court saying at the first extension motion that we opposed -- as the Court may recall, the first extension motion was filed in January of 2008.

THE COURT: Yes.

MR. LEWIS: We didn't even oppose that. We did oppose the next two, and we were told that the debtor was going to bring in something for real and was never again going to come to this Court with anything that wasn't for real, and that's exactly unfortunately what the debtor did do. The SNCP plan wasn't for real. The -- the -- this plan that was filed in January wasn't for real, and I think that there comes a time where the Court's admonition that each time you ask for an extension, it gets harder needs to be taken seriously.

They're now asking for another extension when there is no reason to believe -- I mean, we've heard from counsel this morning and I appreciate the candor. It's -- it's to his credit, that there is no deal. In fact, doesn't sound like they're really close to anything. Sounds like they're still talking and they don't like what they're hearing, and maybe -- maybe it's because the market isn't at all convinced that they're going to win on appeal. Maybe that's part of the problem. They want this Court to almost assume that they're going to win on appeal, but the market apparently doesn't believe that's so, and you can bet there are people out there, Your Honor, who have a lot of money and a lot of sophistication and can hire high-priced lawyers like counsel and me and Mr. Levin and can make their own assessment, and they're apparently not quite taken with what they see or we would be seeing investments now of one kind or another, people willing to step up. Probably what we're seeing is people who are low balling because they don't believe it, and the market is telling something right now, and it's not simply because there is a cloud hanging over the debtor's assets. It's because the cloud is a serious cloud.

I can't rule out that the debtor will win on appeal, although even if it did, the most likely result would not be it's all over. The most likely result would probably be a remand, and how much longer are we going to wait for that to be

decided? And we'll hear well, if it gets remanded -- Your Honor, you may recall when we were here in September, we heard that -- that parties were waiting to see what happened. In fact, we were told that last June. Waiting for the appeal to get started was somehow a magic -- a magic moment or the debtor was waiting for the outcome of the trial. We've known of the outcome of the trial since mid-July. The appeal has been on file or we knew there was going to be an appeal filed and it got started, and we're still waiting.

After a while, the story just doesn't have any credibility anymore, and the interests of other parties which have been subordinated here, including my client, which is, after all, a creditor, and we do have a judgment. We may have interests that are adverse to the debtor, but we do have a judgment and we are a creditor, and it's not an insignificant judgment and it's cost us a lot of money to get to that point.

So I suggest, Your Honor, that exclusivity not only can't be extended. It doesn't even exist anymore. There has not been a plan on file that's been a real plan in the time during which the exclusivity still existed, and as a consequence, I think it's expired, but even if that were not so, there is absolutely no reason to cause another month and a half's delay here based upon another reassurance that we're talking to somebody and something might happen, and on the notion that -- the implicit notion in this entire argument that

the -- that the debtor is going to win the appeal, that's really what we're hearing from this, and -- and counsel wants you to draw the conclusion that there is a signal from the 10th Circuit in its ordering expedited oral argument right after the debtor filed its motion, that that somehow is a signal that the 9th Circuit looks favorably on the appeal.

It's a completely neutral thing. It could just as well be a signal that it wants to get this over with and understands the problem or it could be nothing at all. It could take six months or eight months or whatever for -- I mean, I have an appeal in front of the 9th Circuit, which I -- I grant is not necessarily the paragon of timeliness among the circuits, but I have an appeal from the 9th Circuit where the last appellate brief was filed on the 29th of April of last year, and I still don't even have an oral argument set. So, you know, appeals can take a long time.

THE COURT: Well, lawyers love to read a lot into orders for expediting and so on, and I've learned, of course, that they really don't mean very much.

MR. LEWIS: Exactly, Your Honor. I mean, our clients want to hear what we think, but --

THE COURT: And we give them that positive spin.

MR. LEWIS: With a king's X behind our back.

THE COURT: That's right.

MR. LEWIS: So I think not only should the Court deny

the exclusivity motion, but the Court should take a step to set this case on a rational path, which it has not followed to date, because the management of the debtor has been entirely too focused on the big payday.

Now, maybe an independent party, trustee in a Chapter 7 case, which would be appropriate here, because there is really no business to run. The business is losing money. That's the record in this case. The contrary record, there is none. There is only counsel's assurances this morning that there is some revenue somewhere from the new Mobility products, but we're losing money in the meantime.

There should be -- this case should be, as it were, shut down and an independent third party, a trustee should be appointed either as a Chapter 7 trustee or a Chapter 11 trustee to make an independent assessment of where to take this case. Thank you, Your Honor.

THE COURT: Thank you, Mr. Lewis. Mr. Levin, good to see you, sir.

MR. LEVIN: Pleasure to see you, Your Honor. Thank you. Good to be back. I haven't been here for quite a while, because we've been very patient with this debtor, but there is a time in which patience runs out, and that's why our client has asked that we come back and be heard on this -- on the exclusivity extension, on the status conference on the disclosure statement, and the plan confirmation motion.

I was thinking to thank Mr. Spector, Your Honor, for his consideration of all of our time, of not wasting time of putting a witness on the stand but just testifying himself for us, but my real concern here is a -- a procedural concern which is real. It's substantive. It's not -- it's not just lawyers testifying.

THE COURT: Well, I wasn't sure that we weren't still going to --

MR. SPECTOR: I have witnesses --

THE COURT: Yes.

MR. SPECTOR: -- if the Court -- if the Court were willing to accept, we would put witnesses on. We could do that.

THE COURT: That's what I had understood, Mr. Levin.

MR. SPECTOR: I was just making a status report on -- on the case.

THE COURT: And sort of an opening argument so to speak, but --

MR. SPECTOR: Exactly.

MR. LEVIN: Fine. I will take it as such, but here --

THE COURT: That's how I understood it.

MR. LEVIN: But here is -- there is still a major procedural problem with this --

THE COURT: Yes.

MR. LEVIN: -- before I get to the substantive issue. The exclusivity motion was filed in December. It had none of those facts in it. In fact, that was three months ago. Those facts didn't exist at the time.

THE COURT: Right.

MR. LEVIN: There has been no supplemental motion filed that would give anybody any notice of the evidence that Mr. Spector intends to introduce this afternoon, would give us any opportunity to take discovery, to investigate on our own, to put on any kind of a counter case, to cross-examine or to put on contrary witnesses in opposition.

If he's relying on his December motion, then we should proceed on the December motion. If he wants to file a new motion properly noticed with adequate evidence and argument on it that we can then test in this court, that may be appropriate to do so, but it's a little late in the day for that, especially given the May 17, May 14, whatever the day is, mandatory expiration of exclusivity.

So I'm going to object, Your Honor, to any testimony along the lines of what Mr. Spector proffered in his either status report or opening statement or however it's characterized. That's number one.

Let's turn to the substance, Your Honor. Two points to make here. One is just the -- the timing of the mandatory expiration along with the timing of the plan.

If exclusivity is extended to May 17, there is no chance absent shortened time on both the hearing on approval and on the voting and on the notice of the confirmation hearing that we're going to have acceptances by May 17th. Exclusivity will expire. Other parties in interest will be permitted to file their plans. Don't know if they want to, but they certainly will be permitted to.

So all that Mr. Spector is really asking for, all the debtor is asking for today is we want a head start on that process. We've had a head start for 18 months, but it isn't enough. We still need another month and a half of a head start on that process, and that doesn't seem like -- if there are going to be competing plans anyway, let's put them on parallel tracks. I don't know if there will be competing plans, but if there are, there is no sense to start solicitation on one only to have one come in several weeks later and then start solicitation on that. They ought to be done together.

So we might as well terminate now and allow those competing plans, if -- if they're to be filed, if the debtor is to file a new plan, we still don't know about that, to allow them to go in parallel rather than one ahead of the other.

And to Mr. Lewis's point whether exclusivity still exists, as I recall the state of the record, Your Honor, and I may be mistaken here, exclusivity expired on December 31. The plan was filed on January 8 or January 9. There was a motion

to extend, but I don't recall that there was a bridge order or anything else that would have extended the exclusivity. So even if that plan which Mr. Spector has told us is going -- is going to be amended or withdrawn or superceded in some fashion counted for the exclusivity preservation, I think the record reflects that it expired before that plan was filed. Something to consider.

Now, going forward, the debtor has had 18 months to file a plan. Through a technical reading, if I'm wrong about exclusivity having -- not yet having expired and if we can count the plan that was filed in January as a real plan, if we suspend disbelief on that for a moment, Congress has said the debtor should have 18 months of exclusivity to file a plan. I suppose you could construe that to mean any plan, whether the debtor intends to proceed with it or not, but I don't think that's what Congress had in mind in 2005 when it said cases should be moved along at a faster pace.

So we're past that 18 months. We don't have a plan, a viable plan on file. So again, there is no reason to extend, even if it's technically still in -- in effect, the policy behind 1121(d) suggests that this Court should not extend it any further, but the facts of this case lead to the same result.

Over the first 16 ½ months of this case, and that's through the January 31 operating report, the debtor, SCO

Operations, which is the main operating company, not counting SCO Group, the debtor, SCO Operations lost over $11.0 million on an accrual basis on revenues of just slightly over $20.0 million. They've lost over $3.0 million in cash in that same period. I haven't gone and tried to tie cash to accrual and see why one is so much larger than the other, but the debtor started the case with just slightly over 6.0 million in cash, and now it has somewhat less than 3.0 million in cash. So it's less than half.

I cite those figures as of January 31, Your Honor, because the operating report for February 28th has not yet been filed. It's overdue. In fact, the operating report for January was way overdue. It was filed in mid to late March. I think it was the 20th or 23rd of March that it was filed. So it was at least a month late as well.

So we're not quite current on all that's happened in February, and certainly, March is still here. So we can't -- can't know that, but we don't know how much more was lost in February.

What those operating reports show us, Your Honor, is that there is no real remaining business. The disclosure statement that was filed in January, it almost admits as much, that as Mr. Lewis has said, the ability to pay claims has seriously been compromised. The December -- I'm sorry. The January disclosure statement notes that there are approximately

$1.9 million in general unsecured claims at Operations. There is about $500,000 of unsecured claims at Group. There is the $3.5 million Novell claim. There is a disputed uncertain amount of an IBM claim, and if you look at the January operating report, there is over $2.0 million in current administrative expenses that have not been paid, and I don't mean to say that the debtor is late in paying those, but just in the normal operation of the business that get paid routinely, there is, as we stand at the end of January, and I have no reason to believe it's different today, there is over $2.0 million in unpaid administrative expenses.

You start adding those numbers against the less than $3.0 million in cash and who knows if the business will sell for anything and that's another topic which I'll get to in a moment. Creditors are seriously at risk. This is no longer a case about how much the shareholders will recover. It's about whether even the pre -- the pre-petition unsecured creditors will uncover anything, let alone be paid in full.

You look at the administrative expenses. By the way, that number does not include unpaid professional fees, and it's hard to tell exactly from the operating report how much the -- how far the cash would have to go, but looking at the liquidation analysis that was filed in the January disclosure statement suggests that there is a real question as to whether unsecureds would be paid anything at all given the current

level of cash at operations at the company.

Section 1112(b) lists cause for converting a case. (b)(4)(A) says it's cause if there is continuing loss or diminution of the estate and no reasonable prospect for rehabilitation, and I emphasize rehabilitation rather than just confirmation of a plan. They are different, and 1112(b)(4)(F) says that grounds for conversions if there is an unexcused failure to satisfy timely any filing or reporting requirements imposed by the statute or the rules.

Both of those circumstances are present here, Your Honor, and both of those circumstances, because they constitute cause and because 1112(b) has now been amended to make conversion mandatory, should provide grounds for conversion of this case, or under 1104(a)(3), the appointment of a trustee, as Mr. Lewis suggests.

Now, the -- this debtor, as I noted, has been given an ample chance to reorganize. The Court I recall in one of the earlier hearings said it was incumbent on the debtor to come up with a plan that was not dependent on waiting for the outcome of the litigation, and yet, the debtor by fainting plans, proposing, pulling back, proposing, pulling back -- we're now at the third time on that, Your Honor -- has accomplished or attempted to accomplish exactly that.

The statements that Mr. Spector made today almost sound like a replay of the prior hearings; we have a buyer; we

have York Capital Partners; we have a term sheet but we don't have the definitive documents yet but we're working on it and we're really close; we have a buyer, Stephen Norris Capital Partners; we have a term sheet; we don't have the definitive documents, but we're negotiating and we're really close; this time we have a buyer, but we're not going to tell you who it is; we don't even have a term sheet yet; we don't have a substantive deal, but we're negotiating and we're really close.

Your Honor, sometimes -- I understand they may be close to getting products out there. They may be close to generating revenues, and it's -- and it has been hampered apparently, according to Mr. Spector's opening statement, by the state of the economy.

Well, the fact is that sometimes the economy just doesn't cooperate with the best laid plans of business and particularly of debtors. All we have to do is look at President Obama's address this morning about the car companies. Whether they -- whether the car companies were right or wrong, the economy sure caught up with them, and that's what may have happened to this debtor. I can't tell you whether the debtor's business plan was right or whether it was wrong, but as Mr. Spector said, the economy is substantially hampering that.

Now, I believe Your Honor has ample authority under Section 105(a) on a sua sponte basis to convert this case or order the appointment of a Chapter 11 trustee. Harking back to

my statement at the opening, however, about proper procedure, I think it only appropriate that the debtor be given an opportunity to be heard yet again on why this case is going to be a success some day just around the corner, and what I would suggest the purpose of the status conference should be, Your Honor, would be to set a date for the hearing on the motion to dismiss, not on a disclosure statement which has not yet been filed. Thank you, Your Honor.

THE COURT: Thank you. Yes, Mr. McMahon. Good afternoon.

MR. MCMAHON: Your Honor, good afternoon. This is -- these cases have been difficult to be assigned to on one level to say the least, Your Honor, and perhaps that's the way bankruptcy is. If every set of debtors had an unlimited supply of free money in the form of equity or credit from which it could operate, things would be easy to figure out, and I've been doing a fair amount of thinking recently, especially today leading up to the hearing as to well, why, why is this difficult, and you've got a debtor -- debtors whose business is presumably caught in the cross hairs of litigation, and the temptation, the immediate temptation, Your Honor, is to relegate your mind to the thought that well, if I try to make sense of the litigation, I can determine the course of the bankruptcy case or if we give the debtors a bit more time, this will resolve itself, if -- if we see things from IBM's and

Novel's perspective, then we can just dispense with this and move on, and I think really, probably the easiest way of thinking about the case, and that's really where we're at. I know the -- there was a status presentation, and the exclusivity motion is before the Court.

Let's be candid here. I said this at an earlier hearing. The purpose of exclusivity is to put things in a package and a bow and bring it before Your Honor to allow Your Honor to consider something in a more streamlined fashion. Exclusivity has not served any purpose whatsoever to date in these cases. It's basically been the cause for interim opportunity for the parties to come to court and state their respective positions.

But here we are more than 18 months into the cases, and the bottom line is you have to step back, and I think that's the perspective that our office approaches the matters from. It's not a matter of who's right with respect to the litigation, but that's the way every case comes in. You know, Your Honor takes debtors, our office takes debtors as we find them --

THE COURT: Right.

MR. MCMAHON: -- and if you move -- you look at that -- things through that prism, then I think that after 18 months, after the erosion of the case base to date on a natural basis -- and IBM's counsel correctly notes that there is an

accrued number to be factored in on top of that -- then we're at a point where at a minimum, there has to be a hearing to determine where we go next, and the creditors certainly have their position with respect to the fact that dispositive motions should be scheduled, and we would support a hearing to -- to test that subject.

Section 1112 of the Bankruptcy Code is clear that a debtor to avoid having its business being transferred to Chapter 7 has to demonstrate that there is no continuing loss to diminution of the estate. That's beyond satisfied at this point, Your Honor. There can be no debate about that if and when there is a hearing, at least from our perspective, and the second element of that is the absence of a reasonable likelihood of rehabilitation, and if anything has occurred after 18 months, Your Honor, the -- that ball has been put in the debtor's court at this juncture I think fairly clearly.

And to underscore something about what Congress intended, Your Honor, in the 2005 amendments to the Bankruptcy Code, that's the one item in 1112 that the Court has no discretion to sidestep. If Your Honor makes those findings, there -- there is an exceptional circumstances situation where the Court can give the debtor more time if someone objects to the relief sought, but that's one of the -- the Code subsections where the Court is -- is powerless to do anything but grant the relief requested by a party in interest.

So I think that our office shares IBM's view that the debtors are certainly entitled to present their evidence with respect to their position presumably that there is a viable business here to be salvaged notwithstanding the litigation, but the difficulty again that I noted at the outset of my comments is extracting oneself is the people who are in neutral positions, our office, the Court with respect to thoughts about the litigation and accepting -- evaluating the here and now.

Novell's counsel correctly notes that the 10th Circuit result is not necessarily the end. It's a summary judgment motion. So it goes back down, and it's a significant piece of litigation, and it could go on interminably.

So what's the purpose of this Court? Well, after giving the debtor a fair opportunity, after going through as much cash as -- as these debtors have with their -- with respect to their operations in Chapter 11, our office does believe that it's high time to have a wholesome consideration of the direction of these cases. Thank you.

THE COURT: Thank you, Mr. McMahon. Anyone else before I hear from Mr. Spector? All right.

MR. SPECTOR: I didn't hear you, Your Honor.

THE COURT: No. I was just asking if anyone else had anything before you spoke.

MR. SPECTOR: Well, if I were in the positions of the gentlemen that preceded me, I'd be saying exactly -- not as

well, but I would be saying basically the same thing as they've said, and there is a lot of merit to what they said, but we've got to remember who this is coming from. There are hundreds of creditors in these cases. You haven't heard a single one in those 18 months find anything, anything.

What you've heard -- and I'm not saying that IBM has beat us up. They really have been gentlemanly, and what they're saying is certainly within the bounds, but IBM is not a creditor of this estate. They were given notice because they assert a claim -- I know technically they're a creditor because they assert a claim, but we sued them. They counterclaimed against us. Our claim is multiples of what they claim is owed to them.

We intend to file an objection to the claim. I was hoping we wouldn't have to get to this, but we have an objection to the claim, and ultimately, I think the Court will have to do, and I wasn't wishing this on the Court either, an estimation so we know who it is talking about this, and if -- and if IBM is seen not to have a claim or not to have a claim in excess of our claim against IBM, then notwithstanding perhaps some of the wisdom that they impart, you've got to realize they're not a creditor in good standing to be making that argument.

Novell has a claim. It has a judgment, but in the year and a half since this claim commenced, their claim went

from 40.0 million to 3.5 million. Let's give some credit on the balance sheet for that.

There was an IPO claim against us for $50.0 million. That's disappeared. Let's give us some credit for that.

There is a case called Gray -- you don't even know about it -- Dwayne Gray in -- pending in Tampa. That case was dismissed a couple weeks ago. It was stayed here, but the underlying case was dismissed a couple weeks. I don't know how many millions were involved in that. That's -- and we weren't active in it, so I don't want to take too much credit for it. It just went away. In fact, I don't even think we filed a proof of claim, which might have been a bar in the first place, but we have -- and there are shareholders that filed claims -- I mean, those are going to go away or have gone away.

So, I mean, there are changes in the -- in that area, but let me just try to address one other tiny matter I want to get to, and I don't want to hold Your Honor to this. You know, there are a lot of things I said that I wish we had invisible ink and -- and couldn't quote it back, and that's happened to me in a lot of different contexts in my life recently where I wish I hadn't said what I said, and sometimes you say it because it's true at the time and subsequent facts make it unachievable, but Your Honor indicated -- I don't know if it was in the September hearing or whenever -- that, you know, your view of the matter was that this case really only

commenced once we got the ruling on the Novell judgment, which was in July, and you can't -- you're powerless to give us 18 months from July, and we're not asking for that, but, you know, in essence, what we are is now -- what are we, six, nine months from that, only halfway exclusivity, and you can't give us more but we're asking for another, you know, few weeks.

Now, let's address the -- the many, many comments that were raised, and I'm not doing this in any particular order, because I just took notes as they were speaking. About the losses every quarter, Mr. Petrofsky was the first to raise that and everybody has since followed up and then they extrapolated from that, that there is a remedy for losses every quarter, and that's called conversion, dismissal, appointment of a Chapter 11 trustee, any of the above, and yes, that's true, but that -- that would have been true six months ago too, and I -- and I don't fault them for not bringing it before, and I'm not wishing them to bring it now, but the fact of the matter is if we have -- if we have to go that route, we will. The motion is filed. Evidence will be taken, and we'll have our day in court like they say we're entitled to. Not only are we entitled to it, we must have.

And what I'm telling you by way of opening argument will be supported or not as the case may be by the record, the actual record. We'll bring in Mr. McBride to testify after he's been deposed and so forth, and he'll show that we had

$100,000 of revenue this month in -- in Mobility (phonetic). I didn't bother you with those numbers, because at this point, it's insignificant, but by the time we get to a hearing, it may be quite significant, and so if it's to be, it's to be, and we'll deal with it.

Is that me?

THE COURT: I hit the mic. I'm sorry.

MR. SPECTOR: Okay. Mr. Petrofsky raised this $500,000 figure. The only thing that comes to my mind is the hold backs, 80 percent of your fee application, 20 percent hold backs. I think that's probably what the 500,000 is.

I have no idea -- I have no idea what the $2.0 million is all about. As I understand it from my client, you know, they are paying their ongoing trade debt as -- as it comes in. There isn't any such number. It may be an item of accounting that I can't explain, but, you know, when we have our day in court and we're now on notice of that and we'll explain that away or we won't.

We are not going to be calling witnesses in light of the -- the point made by Mr. Levin. It's a valid point. We only talked about in December, which is when the motion was filed, facts that hadn't come about yet, and so I think it's fair -- I think his point is well taken that we -- he invited us to and I will accept, file a new motion for the May 14th date, let him take his discovery, and we'll bring on the -- the

case if we can fit it in before that time.

THE COURT: When you say file a new motion, just so I'm clear --

MR. SPECTOR: Exclusivity motion.

THE COURT: Okay.

MR. SPECTOR: The one we filed in December didn't include all the facts that I -- I rendered in my opening statement today, and he properly complained of lack of notice, how can we try that today, he didn't even know about it.

THE COURT: Right.

MR. SPECTOR: And I don't mean to ambush him. I didn't intend to.

THE COURT: But that leaves us with the conundrum of where are we today insofar as you can extend exclusivity only if it so exists. Does it exist today?

MR. SPECTOR: Well, we'd just asked for a continuation of this hearing and will be supplemented with a new motion, an amended motion for the new date. Under our local rules in Delaware, you know, Your Honor, if you file a motion in time, you don't need a bridge order.

THE COURT: Right.

MR. SPECTOR: So I -- I relied on that rule. Let's see. There was some argument made by Mr. Lewis that we're totally focused -- it was totally focused on litigation. Well, you would think that we would be focused on litigation but not

the detriment of other parts.

Frankly, the management of SCO had a decision tree, and one of them was do we shut everything down, hoard cash, come up with a plan that just says we can turn a profit every month until we get to the denouement with the 10th Circuit, however long that takes, or do we continue to grow a business that's got long-term viability, and they made a choice, and the choice was get Mobility out there, let it start working, development UNIX virtualization, do these things like we're a real company and we are and keep our customers satisfied, and that required people to work on that, and that ran the cash balance lower than it would have been if they had taken the other decision tree, decision option, but as a result, we have a real company doing real business. Mobility sells real products, and when you get -- when you get to the hearing, there will be testimony about the revenue.

Novell -- pardon me. UNIX is a real business. It still generates revenue. The problem is -- and I'm assured by Mr. McBride very recently that the company on an operating basis does -- is in the black. It's the reorganization expenses that overlay it that makes it a loss.

Now, we'll have to examine that. I didn't put that in my opening, because I'm not prepared today to -- to go into the kind of things that we'll have to be addressing in any kind of motion that is contemplated, but if -- you know, the

evidence will come in at that time that the company is a business operating, generating revenues, and but for the reorganization expenses, is in the black.

We can implement not just a sale-based plan. I would rather, if I -- if I had a vote on this, rather, had we done this sooner, had eschewed all possibilities of sale because of the -- you know, we're not in a good position to sell with all the unknowns.

Now, I should tell you that without going into too much detail, both suitors with SCO right now have offered sufficient money to pay creditors in full including the Novell judgment in full. That's not from our cash. That's from cash generated from the sale of the UNIX business.

Now, UNIX business, how can we sell the UNIX business with all the problems we've had that Your Honor pointed out way back a year ago? Well, there is a thing that we wrote up in that first time called the Novell exception, and it was problematic until July 16th ruling which made it much more viable, and as a result, as I said at that time, when we had that ruling, it would clarify a lot, and it did clarify a lot, and so there are people willing to take the UNIX business with the Novell exception. That part isn't the part we're talking about. We have other issues, but that's on the table, and we -- you know, so I just want to say that even if we don't have the cash in hand, even a Chapter 7 trustee can -- you know, in

brief operation, can sell those assets for sufficient money, just the business UNIX to pay the creditors in full.

So -- and, of course, I'm now giving an opening statement on a motion that isn't before Your Honor, but I have to.

Let's see. The MORs are late. No. We got extensions on those from the U.S. Trustee who was gracious enough to give it with -- the company is a public company. It has it's 10K and 10Q. We have been cutting staff to try, you know, keep our head above water and some of those staff that were let go were accounting staff, and when the auditors are in and so forth, it can only be pulled in one direction, and with that, Mr. McMahon has been kind enough to allow us an extension when we needed it. So they're not really late, although, again, I'm presaging a defense to a motion that hasn't been filed.

Okay. There is one other thing I think I should address that wasn't specifically raised, but I think it's worth bringing it up now.

Every business executive deposed in the Novell litigation, including executives of Novell as high as the CEO who were there when the transaction of the Santa Cruz operations took place, the sale of this property, every one of them testified that it was the intent and understanding of the parties that the UNIX copyrights were transferred to Santa Cruz

operations as part of the transaction. That's in the case and it's in the appeal brief that SCO has filed.

Accordingly, SCO would love to see what the jury has to say about this transaction if there is a reversal. Don't tell us, please, well, you know, the best you can get is a remand for trial. We'd love that. We'd love that. We'd love to see what Novell is going to offer us when that day comes and there is going to be a jury trial, and we'd love to see what the jurors are going to say about this transaction when the evidence gets before them. We know what the market thought about it, because the company was worth $35.0 million then before the rug was pulled out from under us, and we -- we would be very happy taking our chances at a trial a year from now or 18 months from now because the company will be greened up by then, and I say it in both senses. There will be cash available, because people will be willing to finance us. They might want to buy new stock in the company now that things are set on the proper track.

Mr. Lewis addressed that the management is not only focused entirely -- and he really -- this is something he really wasn't right on -- is focused entirely on litigation to the detriment of the business. I've already shown or I haven't shown but explained why the evidence will show otherwise, but he intimated maybe strongly and maybe more than just intimation that a neutral should be appointed to look into the merits of

the business and the litigation prospects.

Your Honor, they didn't use the word, although it seems to me if you're looking into the -- the validity of its business and the going forward ability of the business and looking for -- to the viability of its claims against IBM and Novell, that perhaps the proper word that wasn't raised here is an examiner, and frankly, Your Honor, I don't know why he didn't ask for it sooner and I'm not speak -- I don't have authority of my client, the Board of Directors or anybody else or the ability to tell you what budget would need to do that, but I think that's the -- probably when a motion comes in, I may want to say we'll counter that with a consent to the appointment of examiner. I think it's something that ought to be kept on the table. It's one of the available choices Your Honor would have, and if -- as I said, the purpose is what is the -- what kind of business is this? Is it really a business? An examiner would be there rather than somebody to kill the business, which is if you convert the case to a 7, oops, there really was a business, sorry about that, oops, this really was a valid cause of action which is now gone. Billions of dollars down the tubes. Maybe we should take a half step instead of a full step. Again, I'm arguing a motion not before Your Honor.

Let me take a minute to -- to check with co-counsel to see if there is anything else I want to address so I do

not --

THE COURT: Certainly, Mr. Spector.

MR. SPECTOR: -- back and forth with you. I'd rather get it all.

THE COURT: Thank you.

(Pause)

MR. SPECTOR: I think I've concluded my remarks in response.

THE COURT: All right.

MR. SPECTOR: Thank you.

THE COURT: Thank you, sir. Response.

MR. LEWIS: Judge, did Mr. Petrofsky wants to speak.

THE COURT: Oh, I'm so sorry. Mr. Petrofsky, did you wish to be heard first sir, in response I mean?

MR. PETROFSKY: Oh, thank you, but no.

THE COURT: All right. Thank you, Mr. Petrofsky.

MR. LEWIS: Oh, I thought Mr. Petrofsky had taken --

THE COURT: Oh, he did not. No, sir. I was trying to turn on my fan here. It gets warm sitting here. Mr. Lewis, yes, sir.

MR. LEWIS: Your Honor, I don't think I'm inclined to respond to a lot of the comments we've just heard. I don't think it serves any purpose --

THE COURT: Right.

MR. LEWIS: -- at this juncture. It's pretty obvious

I think that we're going to at least hear a motion to convert soon or -- or appoint a Chapter 11 trustee, and so I think what I want to focus on now is exclusivity again.

THE COURT: Yes.

MR. LEWIS: And I want to draw an analogy to the notion -- in discussing the notion that we're somehow going to have a continued exclusivity motion. This is really a new exclusivity motion. It's not a continued exclusivity motion.

The exclusivity motion that was filed in December was filed based upon a plan that we have heard this morning and we knew all along anyhow is not real. It's -- it's a placeholder. It's nothing more than that.

So we're not talking about a continued exclusivity motion. We're really talking about a new one, because the old one doesn't have anything to support it anymore, and a new one is out of time. It's as simple as that. I think exclusivity has expired if for no other reason than that, and I would object -- I mean, the debtor can file its motion if it wants to, but I -- or file an amended motion, but one of the objections that we would be bringing would be it's not an amended motion. There is no more exclusivity.

I think it's -- it's important for this Court to rule today that there is no more exclusivity so that as counsel for IBM so ably pointed out, the debtor doesn't get a free head start on other people if there is anyone else who wants to file

a plan. There has been plenty of time. A month and a half is not going to give the debtor a great chance to come up with something new and get a plan confirmed. In fact, the notion that somehow we can have a confirmation hearing on a plan after a proper hearing on a disclosure statement without appropriate discovery in this case and all of that get done by the middle of May just doesn't fly. It's just not going to happen, Your Honor.

So I would suggest the Court -- I would ask the Court to rule that exclusivity has terminated as of today, and as far as a motion to appoint a trustee or convert to Chapter 7 or if the debtor wants to suggest an examiner, which I think is a very different thing, because examiners can't make decisions.

THE COURT: Right.

MR. LEWIS: And what we need here is a neutral party making a decision. We may be -- have our axe to grind, and I don't deny that we do. So does the debtor. That doesn't put us or the debtor in a different place. A neutral might be in a different place.

So that would be the only thing I would add this morning, Your Honor, and perhaps we could get a hearing and maybe specially set, and if I may be so bold, this happens now and again. If the Court is inclined to set a hearing date in -- in April with some briefing schedule, I will be away from about the 10th to the 20th. So something outside of that would

be helpful towards maybe the end of April, but obviously, subject to your calendar and everyone else's schedules.

THE COURT: I always take into consideration counsel's schedules.

MR. LEWIS: Yeah. I was just sort of saving time, Your Honor.

THE COURT: Sometimes it becomes, you know, impossible, too many --

MR. LEWIS: Of course.

THE COURT: -- too many moving schedules, but certainly, I take -- I take --

MR. LEWIS: Okay. Thank you, Your Honor. I have nothing to add.

THE COURT: All right. Anyone else?

(No verbal response)

THE COURT: I hear no one else. If you don't mind, just for a personal reason, I'm going to take about a five-minute recess, and then I'll come back out and rule. Thank you.

(Recess)

THE CLERK: Please rise.

THE COURT: Thank you again, everyone. Please be seated. Thank you. I took that break, because my little mind was spinning so fast, I was afraid I was going to lift up off the ground here in a minute, because a lot has been said, and I

do understand the debtors are faced with a lot of obstacles and are doing the best they can, but the fact is that either exclusivity has already terminated. A motion was filed many months ago, but, you know, our whole concept of the bridge order is that a motion when filed operates as a bridge order, in effect, as a bridge order, but that the motion will then be brought on promptly and won't be left, you know, sitting indefinitely as this one was. So I think that the concept of the bridge order is simply not applicable in this -- under these circumstances.

Moreover, I just don't have cause, and I don't -- I don't have cause to extend exclusivity in any event, and I don't think that -- nothing I've heard suggests that anything will change in the next very very short term, which is what I would be talking about in any event.

So I do think that I'm going to have to deny the motion to extend exclusivity to the extent it hasn't already terminated, although again, I do believe that it has terminated.

Having said that, I do think that it is appropriate to schedule a hearing on whatever motions will be brought. I've heard reference to a motion perhaps to convert, a motion for the appointment of a Chapter 11 trustee. I'm not sure what will be before me, and I know -- and I'm not asking the parties to tell me right now, but I do think we ought to set down a

hearing date with I think also a date certain for the filing of any such motions, and I would like to give the parties at least a little bit of an opportunity to take some very limited discovery to the extent you think it's necessary. So --

MR. LEVIN: Your Honor, were you suggesting --

THE COURT: Yes.

MR. LEVIN: -- discovery before or after the filing of the motion?

THE COURT: Well, I think you have to have a motion on file before you take discovery. Otherwise, it's too -- it's just too indefinite as to what discovery is even relevant to that particular motion. So let's just look first to the hearing date, because I want to allow a significant amount of time.

Mr. Lewis, you said you're out from April 10th to 20th?

MR. LEWIS: Yes, Your Honor.

THE COURT: So we're going to be looking at a date after that, and --

MR. SPECTOR: May I suggest a date some time after May 6th, Your Honor?

THE COURT: After May the 6th?

MR. SPECTOR: Yeah. Mr. Tibbits, who will be instrumental on any motion that comes down, will be very much involved in preparation for the oral argument in the 10th

Circuit. So if we could --

THE COURT: Oh.

MR. SPECTOR: -- scheduling a hearing.

THE COURT: That's right. You have that on May the 6th.

MR. SPECTOR: Yes. That's May the 6th, Your Honor. If we could get past that date, and then we can concentrate on this, whatever is coming down the pike.

THE COURT: I don't think a couple of weeks is going to make a huge difference, because the earliest that I could have done this in any event, and I mean the earliest, was the 30th of April. So why don't we do this. I have a wide open day which I think I ought to allow, May the 13th, if that works for people, and I -- if that doesn't work for you, don't be bashful. Speak up.

MR. SPECTOR: Do you mind if I turn my Blackberry on?

THE COURT: Please, no. Not at all. Check your schedules, and we'll make sure that that date works. I have some other possibilities as well, but that's --

MR. LEWIS: What are the other possibilities, Your Honor?

THE COURT: Well, I could possibly do it May the 11th. That's a good possibility at this moment.

MR. LEVIN: I currently have a hearing in New York on the 13th, but --

THE COURT: oh.

MR. LEVIN: -- it's likely -- highly likely not to go forward, and it's a morning hearing and would be done and I could probably be here for a two or three o'clock hearing on the 13th if you prefer, but I can do it on the 11th definitely.

THE COURT: All right. Let's now look at the 11th. That's a Monday. I don't know if that makes life difficult for people traveling from the west coast. Mr. Lewis, in your case, are you spending more time in New York now?

MR. LEWIS: Are we looking at the 13th or the 11th now?

THE COURT: The 11th.

MR. LEWIS: The 11th works fine for me, Your Honor.

THE COURT: It does?

MR. LEWIS: Thank you.

THE COURT: Okay.

MR. SPECTOR: That -- I can't say there is any problem on my calendar for that, but the only thing I would say about May 11th is if there is going to be discovery leading up to that date, it will be right in the middle of the argument.

THE COURT: Well --

MR. SPECTOR: That's only five days after the argument. If we're going to be doing depositions, Mr. Tibbits will have to be there and other important people would have to be there. You know, if they're not doing discovery, it's not

going to be a problem. Showing up on the 11th is not a problem. It's the discovery that I'm worried about.

THE COURT: What is the conflict with Mr. Tibbits' schedule? I'm sorry, and forgive me for asking. Mr. Tibbits is with -- is he with the Boyce firm? Oh, our Mr. Tibbits.

MR. SPECTOR: Yes.

THE COURT: I'm sorry. Certainly.

MR. SPECTOR: Yeah. He's the chief legal officer, the general counsel of the firm and has been in charge of the litigation and the briefing.

MR. LEVIN: Your Honor, if we may just have a moment. We're conferring on the issue of discovery.

THE COURT: Of course. You certainly may.

MR. SPECTOR: And for what it's worth, the 13th, I do have a doctor's appointment.

THE COURT: Okay. That one is off.

(Pause)

MR. SPECTOR: If you're going another week, May 18th is open the whole day. May 19th is open.

THE COURT: Okay.

MR. SPECTOR: The 20th is open. I'm fine there. The 21st, that whole week looks like is fine as it now stands.

MR. LEVIN: Your Honor, I think we don't know what we don't know.

THE COURT: Understood.

MR. LEVIN: And therefore, without discovery -- excuse me. Without discovery --

THE COURT: You can remain seated. That's all right. We're picking you up, Mr. Levin. Certainly.

MR. LEVIN: We don't know what we're missing. On the other hand, given the state this case is in, to say we shouldn't have a hearing for two more months, I would have thought this would be something we'd hear in two or three weeks, not two or three months.

If the -- I think May 11th is -- is six weeks already. That's a long time. I understand the issue with the oral argument, but if we were to do this -- well, in any event, I understand the issue with the oral argument. I think it's an unfortunate imposition on this bankruptcy estate and the continuing loss, but be that as it may, if we can have the March operating report on time without an extension, which would be in -- I think April 20th would be the due date -- I think we would be willing to proceed without discovery.

I'm sorry. Let me add to that. If we can have the operating report and any evidence on which the debtor intends to rely by that date, I think we would be willing to proceed on May 11th without any further discovery.

MR. SPECTOR: I don't know about the rest of that, Your Honor. All I know is that the rules -- I don't know why we're talking about two weeks or anything like that. The basic

rule is -- Federal Rules of Bankruptcy Procedure, 2002, provide for 20 days I believe notice of motions to convert or dismiss.

This case has been here for 18 months. The losses they're going to say have been continuing. Why all of a sudden is this on an accelerated track? There is -- nothing untoward is going to happen another week or two either direction except that we'll be pressed.

We obviously will have the burden of proof. We've got to gear up for it. If their motion is filed, you know some time later this week, we've got to go into trial mode at a time when we're very stressed with other affairs.

I would ask, Your Honor, this is a make or break issue in the case. This is not something we should be doing in a couple of weeks. The rules -- there is nothing emergency that requires us to expedite this matter.

I'm not saying we should set it off until September. I'm saying that, you know, if they did it in the normal course, they filed the motion on April 1st, two days from now --

THE COURT: Yes.

MR. SPECTOR: -- normally, the Court -- what would the Court -- I'll ask Your Honor, what would normally be a typical motion to convert or appoint a trustee or something that wouldn't be coming up April 20th or something like that? I assume there would be some -- some lag beyond the normal 20 days, and I'm not asking for the moon. I'm asking for

something like the week of May 18th, 19th, or 20th, 21st. I've got that whole week open, and we'll be past -- significantly enough past the May 6th oral argument that we can then concentrate on this make or break motion.

MR. LEVIN: Your Honor --

THE COURT: Mr. Levin, yes.

MR. LEVIN: Mr. Spector was prepared to put on the evidence today. I don't know what the problem is. I will be candid with the Court that my client has not authorized us to file such a motion. I wanted to hear what happened at the hearing today and then we will consult. As you said yourself, there may or may not be such a motion filed. We will consult, and we will determine whether to file such a motion.

I will note, however, that Section 1112(b)(3) as amended in 2005 -- I'll quote it just for the record, if I may, Your Honor. I know that you know the -- the statute.

"The Court shall commence the hearing on a motion made under this subsection not later than 30 days after the filing of the motion and shall decide the motion not later than 15 days after commencement of such hearing..."

THE COURT: Yes.

MR. LEVIN: "...unless the movant expressly consents to a continuance."

THE COURT: Yes.

MR. LEVIN: So I will consult with our client. I understand the May 11th date is open. I understand the May -- do I understand correctly that the May 18th and 19th dates are open as well?

THE COURT: Yes. May 18th and 19th are open. Here is what we're going to do then, if you will. I understand the parties' schedules. I understand that there is a significant oral argument before the 10th Circuit, but when you file your motion, I will set this down for a hearing.

Let's do it that way, because at the moment, we're talking to some extent speculatively, and I am well aware of the time restrictions, Mr. Levin. I do appreciate your raising it, but it comes as no surprise to me, because I've had it here before, not in this case but in other cases. The 30 days I think is sacrosanct under the -- under the code, and so we will see based upon when you file your motion and what that motion is.

MR. LEVIN: And we will --

THE COURT: I will set it down with in mind your schedules as well as the possibility, I must tell you, of an April 30th date. I didn't even mention April 30, but if you filed it, for example, on the 1st of April --

MR. LEVIN: I assure you, Your Honor, we will not file it on the 1st of April.

THE COURT: Okay. All right. So let's be looking at

different -- and also, a factor is how much discovery the parties are talking about here. That may become a factor as well and whether there is disruption to either side.

MR. SPECTOR: Your Honor, I think --

THE COURT: Mr. O'Neill?

MR. SPECTOR: Mr. O'Neill has some comments. Rather than pass it through, I'll let him speak for himself.

THE COURT: All right.

MR. O'NEILL: It's just a suggestion for all parties and also for the Court, Your Honor. Perhaps we should wait and see whether such a motion is filed --

THE COURT: Yes.

MR. O'NEILL: -- and then we -- the parties can confer about scheduling and discovery and also reach out to the Court if necessary to have a scheduling conference --

THE COURT: Perfect.

MR. O'NEILL: -- to see what the timing should be, what dates are going to work, what discovery there should be if any is needed rather than try to --

THE COURT: All right.

MR. O'NEILL: -- set those parameters --

THE COURT: That's --

MR. O'NEILL: -- now, and that would give everybody a chance for input and the Court an opportunity to decide issues which we would not be able to decide among ourselves.

THE COURT: And to talk about schedules at that point as well which may be in flux to some extent.

MR. LEVIN: That's certainly acceptable to IBM, Your Honor.

THE COURT: All right. Mr. Lewis?

MR. LEWIS: Your Honor, one other request, and it could -- it's only a request, and even at that, I suppose it isn't extraordinary, and that is that I ask that the parties -- we have heard some dates that are available now, and I would ask that people try to keep those dates open at least so that when we do have a scheduling conference, we don't all of a sudden find out none of us can do it until August.

THE COURT: Right. My schedule fills up, you know, here and there, and I don't like to hold too many dates open, but I will make sure that there is time available.

MR. LEWIS: Thank you, Your Honor.

THE COURT: You bet. All right, counsel. Is there anything further to discuss?

COUNSEL: No, Your Honor.

THE COURT: All right. Thank you all, and I wish you all a good day.

COUNSEL: Thank you.

COUNSEL: Thank you.

MR. SPECTOR: Who's going to be -- are you going to be providing your own order or do you want somebody to do --

THE COURT: I'll do an order. Yes.

MR. SPECTOR: Okay.

THE COURT: I will do an order on this. Thank you.

COUNSEL: Thank you, Your Honor.

(Court Adjourned)

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

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

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