

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Chapter 11
THE SCO GROUP, INC., *et al.*, .
Debtors. . Case No. 07-11337(KG)
. (Jointly Administered)
. June 17, 2008 (2:03 p.m.)
. (Wilmington)

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

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1 THE CLERK: All rise.

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

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

5 THE COURT: Good afternoon.

6 MR. O'NEILL: James O'Neill and Rachel Werkheiser
7 appearing from the Pachulski firm on behalf of the debtors
8 and also appearing with our co-counsel Arthur Spector, Dan
9 Lampert, and Grace Robson in the matter.

10 THE COURT: It's good to have everyone back.

11 MR. O'NEILL: And the Court will also recall our
12 client representatives, Darryl McBride and Ryan Tibbets (both
13 phonetical), appearing today.

14 THE COURT: Good afternoon.

15 MR. O'NEILL: Your Honor, going down the agenda for
16 today, I'm going to go a little bit out of order. Number 1
17 is continued. Number 3 on the agenda is our quarterly fee
18 hearing.

19 THE COURT: Yes, I'm prepared to approve those.

20 MR. O'NEILL: Thank you, Your Honor, we do have a
21 form of order, and I can hand it up the Court would like the
22 order?

23 THE COURT: That would be fine, that would be
24 helpful.

25 MR. O'NEILL: It has been circulated, and I don't

1 believe there's any additional comments.

2 THE COURT: Excellent.

3 MR. O'NEILL: If I could hand that up to you now,
4 Your Honor.

5 THE COURT: Thank you, thank you, Mr. O'Neill.
6 Okay, fine.

7 MR. O'NEILL: Thank you very much, Your Honor. I'm
8 going to turn the podium over to Mr. Spector who's going to
9 handle number 2, our exclusivity extension request.

10 THE COURT: Yes, thank you.

11 MR. O'NEILL: Thank you.

12 THE COURT: Good afternoon.

13 MR. SPECTOR: Good afternoon, Your Honor. It's a
14 pleasure to be back.

15 THE COURT: Good to have you back.

16 MR. SPECTOR: Just for the record, I don't know if
17 Mr. O'Neill mentioned that we have another participant by
18 telephone.

19 THE COURT: We have a few on the telephone -

20 MR. SPECTOR: Oh, okay.

21 THE COURT: Mr. Feltman, Mr. Singer, Mr. Robinson,
22 and Mr. Petrofsky.

23 MR. SPECTOR: Thank you.

24 MR. FELTMAN (TELEPHONIC): And, Your Honor, this is
25 Jim Feltman on behalf of Mesirow.

1 THE COURT: Yes.

2 MR. FELTMAN (TELEPHONIC): If the issues, Your
3 Honor, that pertain to Mesirow were addressed by the Court
4 and if there's no other reason for me to continue, I would
5 like to be excused.

6 THE COURT: You certainly may. Anyone else who is
7 on the phone strictly for the fee applications may also be
8 excused.

9 MR. FELTMAN (TELEPHONIC): Thank you, Your Honor.

10 MR. SPECTOR: I think that might include Mr.
11 Robinson as well.

12 THE COURT: Perhaps Mr. Robinson.

13 MR. ROBINSON (TELEPHONIC): Thank you, this is Mr.
14 Robinson.

15 THE COURT: You're welcome to remain on the phone or
16 to go do something more useful.

17 MR. ROBINSON (TELEPHONIC): If you don't mind, I
18 think I'll take this as a leave of absence.

19 THE COURT: Very well.

20 MR. ROBINSON (TELEPHONIC): All right, thank you.

21 THE COURT: Thank you.

22 MR. SPECTOR: Thank you, Your Honor. I'm glad I got
23 that resolved.

24 THE COURT: Yes, thank you for bringing that to my
25 attention.

1 MR. SPECTOR: "Resolution of the balance of the
2 District Court action is paramount to the prospects of these
3 Chapter 11 cases." That's quotes, Your Honor, that's not the
4 debtors' words, those are the Novell's words, page 8 of its
5 relief from stay motion, docket entry number 89. "Debtors
6 simply cannot file a confirmable plan of reorganization until
7 they know what liability they have to Novell." That, Your
8 Honor, too, is a quote. That's a quote from Your Honor in
9 the order - the opinion, I should say, granting limited
10 relief from the automatic stay, page 11.

11 THE COURT: Yes.

12 MR. SPECTOR: We're here today, Your Honor, on a
13 motion of the debtors for a continuance or an extension of
14 the deadlines to file and to file exclusivity - pardon me, a
15 deadline of the exclusivity for filing a plan and the 60 days
16 after that for solicitation of ballots. And, as Your Honor
17 and Novell has pointed out - both have pointed out in the
18 past, an important benchmark in this case will be the ruling
19 from the Utah District Court as to the issue of how much this
20 debtor, SCO, the main debtor, owes, if anything, to Novell.
21 That's the bogey. But there are other elements for a motion
22 for an extension of exclusivity. One is the complexity of
23 the case, and I will admit that this Court has seen far more
24 complex cases than this little bitty SCO case, but this is a
25 unique case, maybe the term complex is too narrow a term for

1 these elements. It is a unique case. I don't think the
2 Court has seen many cases like this. The complexity is
3 derived from the uncertainties that this company has. It has
4 suffered a devastating litigation blow at the beginning of
5 the case which certainly, in the popular press and probably
6 in the minds of management, put into question the continued
7 viability of the company. Faced with that devastating
8 litigation result, we have now not much different than what
9 you see in the mass tort cases at the company litigation,
10 raises the stakes and makes this case more unique than the
11 routine Chapter 11 case. Because of the uncertainties that
12 come with this litigation, this case has complexities to do a
13 deal to get the company out of bankruptcy is more complex
14 than in the usual case. One of the other elements for
15 establishing cause for an extension is that this is not an
16 ulterior plan to beat down the opposition by creditors.
17 There is a case, a famous case I recall, called Lake in the
18 Woods. It was a District Court opinion by the Eastern
19 District of Michigan, a place I'm familiar with, by a
20 District Judge who denied exclusivity extensions because it
21 was oppressive in the facts of that case. I don't think this
22 case qualifies for that kind of consideration. I think the
23 facts will show that we're not trying to beat up Novell or
24 IBM or any of the other creditors. Another issue is an
25 element that's good faith progress towards a reorganization.

1 Novell in its objection, by the way, the only objection, took
2 issue with that, and I can't fault them for spinning it the
3 way they spin it. It looks like a series of false starts,
4 but what we're doing here, Your Honor, is we're trying to
5 create a reorganization in a very difficult environment, not
6 just the environment of the financial markets where we need
7 large millions of dollars to exit if we go with that route,
8 but also because we have parties that are involved that have,
9 you know, difficulties they have to get their arms around,
10 the uncertainties we're talking about, and what - you cannot
11 fault the Board for trying its best to do not just any deal
12 that comes around. You only know the deals that come before
13 the Court.

14 THE COURT: Exactly.

15 MR. SPECTOR: You don't know what deals have been
16 turned down and what deals we're trying still - or not still,
17 but we have tried to make come to fruition. What we have
18 today, however, is we have a hundred million dollar deal from
19 someone of the caliber of Steve Norris and his friends that's
20 still viable, still talked about, not before you yet, not out
21 for a vote yet, but you have to admit that from where we were
22 when we filed this case September 14th, adrift with the
23 company's future uncertain, we now have progress in the sense
24 of something coming up with a deal that could pay everybody
25 in full. No prejudice to creditors. Aside from the

1 historical financial information that the Court has in the
2 form of the MORs and that's only through April, the May one
3 isn't due until June 20th, and the June one, which we think
4 will have material improvements, won't be due till July 20th.
5 We think we have succeeded in bettering our projections, the
6 company has. The April projections - the April results were
7 better than projected, and if we could - if we were permitted
8 to, and we're not because the company is publicly traded and
9 we can't talk about future financial matters on an open
10 record, but we think we can show that the prospects are
11 greater than originally anticipated and that the likelihood
12 of any prejudice coming about by this rather short extension
13 is almost nil. The length of the case: When we filed this
14 motion, it was only eight months old, and we've already had
15 two major events, the aborted York deal, which would have led
16 to a plan if we could have concluded that, and a much more
17 lucrative deal with the SNCP group, and we have not in any
18 way abandoned that, and we are still working towards that,
19 and we get to the major issue about unresolved contingencies
20 and prospects for a viable plan. Novell makes a lot of the
21 fact that, Well, we never said we needed this resolution
22 before. Testimony, if the Court will entertain testimony,
23 will explain in detail why we do have an expectation that the
24 unresolved contingencies have now suddenly, in the last month
25 or so, intruded. The Court and Novell, were of that opinion

1 originally, and we worked around it. We worked a deal that
2 if we had other reasons - remember, we started out, it was an
3 equity deal, and when we came to Court, the deal was suddenly
4 changing for our better to be an asset sale, to take that
5 deal and put it together took some time to unwind the idea of
6 an equity sale and an asset sale created some time pressure.
7 They also had a due diligence period, and they were in the
8 due diligence period and the evidence will show when certain
9 questions arose about the business model that they were going
10 into, and because of those questions, the due diligence
11 period was churning and we had till May 11th to file a plan.
12 Well, May 11th came and certain things had changed between
13 when we were in court on April 2nd and the deadline of May
14 11th, and Mr. McBride, if he's required to, will testify about
15 the nature of those changes, but as an - not as an offer of
16 proof but as an opening statement, I'll submit that the
17 changes are as follows: From April 2nd through April 27th, we
18 all knew there was going to be a trial in Utah over the
19 amount of Novell's damages, which they had asserted was \$40
20 million or thereabouts. The debtor, probably the investors
21 that were looking to buy, and basically the marketplace had
22 one expectation only that whatever Novell was going to ask
23 for, it was likely to receive at trial, given the history
24 that they've experienced in the courtroom till now. So, the
25 bogey that they're trying to solve around was a \$40 million

1 bogey. Suddenly, on April 27th, two days before the trial in
2 Utah, Novell lets out that really the most they're really
3 seeking is about half of that, 19 million or so. I mean,
4 that's a big number. That's more than the debtor has,
5 there's no question about that, but to acquiring companies,
6 that changes the metrics of how they're going to do their
7 deal. Second thing happens, the trial occurs, four-day
8 trial. Surprisingly, things came out from the viewpoint of
9 the debtor, better than anticipated. No, we don't have a
10 ruling, and maybe we're taking a risk saying this, but in the
11 viewpoint of the debtor, supported by observers, the trial
12 went well for the debtor. The third thing that happened was
13 on May 2nd the Judge said he's going - with undue delay, he's
14 going to give us a ruling, which was interpreted to be just
15 guesswork, you know, and there's some reason for the
16 guesswork, but, you know, by the end of May, maybe the middle
17 of June. Then we said, Well, okay, if it comes out
18 favorably, we may want to change the deal materially, both
19 sides may want to change the deal materially. Let's see, and
20 what is it that business people hate the most? Uncertainty.
21 They were willing to do a little bit of game playing to get
22 the plan that we had proposed out when they dealt with
23 uncertainty and expected a \$40 million bogey. Now all of a
24 sudden, that was in play, seriously in play. So, the Judge
25 says he's going to give us a ruling without undue delay; why

1 rush this? Just wait a few weeks, see what it is, and we can
2 solve that. That was the impetus, at that point, all
3 discussions from May 2nd through May 11th kind of like, it was
4 stymied at that point. There was no point, and so that's
5 when we decided we had to file a motion for an extension, and
6 it's tied to the Judge's ruling, obviously now. Finally,
7 we're on your page and it's because of business reasons. So
8 that's where we are, and if we get a ruling, we would go back
9 to the table with the same people, SNCP Partners, and say,
10 Okay, now we know the parameters of this, and there's other
11 issues that that ruling could presage clarification on, and
12 if we get into the granularity of it, we'll have Mr. McBride
13 testify about that, and then we can say, Okay, let's
14 negotiate the final terms of this deal now, and then document
15 it. Remember, I promised you, and I will not go back on it.
16 I will not file a plan unless I've got definitive documents
17 this time, and that can't be done in the 10 days that Novell
18 in its response suggests if the Court were willing to grant
19 us our relief, give us only 10 days from the date of the
20 ruling or on the outset - on the outside, August 11th. So, if
21 you drop as impractical in the extreme the suggestion of 10
22 days past the ruling date, then really what they're saying
23 is, Okay, Judge, if you're not going to deny the motion,
24 grant it. So, because we asked for August 11th and they're
25 suggesting August 11th, and frankly, August 11th if we get a

1 ruling soon, will work, but we don't want to promise you that
2 we won't be back August 3rd when the Judge ruled on August 2nd
3 and now we have to digest it. So, you know, that's a
4 reality. We anticipate it and I said I'd tell you why we
5 though maybe a month or six weeks. When the Judge issued his
6 ruling on the summary judgments in August, last year, there
7 were thousands of documents, pages. It was an enormous
8 record. He heard arguments for weeks, weeks of arguments,
9 and he had a tremendous amount of work he had to do, and he
10 got that done with, I think, it was a 138-page opinion or
11 something in six months. Six months is a long time, but not
12 given the enormity of the work he did. This was a four-day
13 trial. He's the trier of fact. It was significantly
14 shorter, and he volunteered this time to say he'll get it
15 done in undue delay. I think it was a fair assumption that
16 we'd have a ruling somewhere by the middle of June, which is
17 where we are now, and with that in mind, we fixed a middle of
18 August date, roughly to the anniversary day of the month. It
19 was a guesstimate, but as I say, it all does depend on the
20 date of the ruling. So, Your Honor, I think we can show
21 cause under the elements for an extension, and if the Court
22 wants to examine this more carefully of course, we have
23 witnesses who can testify as to the details thereof. Thank
24 you.

25 THE COURT: Thank you very much. Would anyone else

1 like to be heard? Mr. McMahon or Mr. Lewis? Mr. Lewis,
2 welcome back to court.

3 MR. LEWIS: Thank you, Your Honor. It really is a
4 pleasure to be back here. It's true that when we made our
5 stay relief motion we said we thought a ruling from the
6 District Court was important. At that point the debtor was
7 trying to sell assets and it was unclear what assets it owned
8 or didn't own, and the Court understood that, and we
9 understood that, and we all knew too that the size of the
10 claim might be important. That was the state of the record
11 at that time. The debtor then made its first motion for an
12 extension of exclusivity. This motion was dated January 2nd,
13 not long after the Court ruled, and in this motion, at
14 paragraph (14) the debtor said, Filing a plan now is in the
15 face of the Court's doubts about the efficacy of doing so
16 would be a waste of precious estate assets. The debtors have
17 determined not to force the issue but to ask the Court to
18 give them more time to allow the anticipated trial, not to
19 formulate a plan, but to allow the anticipated trial to
20 narrow the issues and dispute with Novell before the debtors
21 are required to file their plan. Sensible. Now the debtors
22 are saying, paragraph (17) of the current motion, The debtors
23 believe that their plan should reflect the results of the
24 Utah District Court's recently concluded trial and that
25 filing an amended plan now would waste the estate's assets.

1 As Yogi would say, Deja vu, all over again. But what
2 happened in the meantime? The debtor filed a plan. Did
3 exactly what it said in its original motion it didn't plan to
4 do until there was a trial. It filed a plan. The plan was a
5 hundred million dollar plan. It didn't matter whether our
6 claim was 20 million or 40 million. It would have covered
7 either. That's what they said. The problem with the plan
8 was not that it didn't cover the alternatives, the problem
9 with the plan was something that I disagree with counsel
10 about, whether SNCP was real. The Court will remember our
11 concerns about the disclosure statement. Who are these newly
12 formed people? What's the deal? How reliable is the
13 financing commitment from them? What is their source of
14 money? There are a lot of issues like that. That's why it
15 got withdrawn, and when the debtor withdrew the plan in this
16 Court at the last moment, the debtor said nothing about
17 needing to have the trial finished. The debtor said, Oh,
18 well, in the middle of getting ready for this plan, the
19 debtor and SNCP or the plan sponsor decided to change the
20 structure and we're working diligently on that now. But of
21 course, due diligence had been going on all along. So, what
22 we've heard today is a lot of new reasons why the old reasons
23 weren't really reasons at all, and I'm concerned we're going
24 to hear the same thing again and again and again. Yes, in
25 the perfect of all possible worlds, we would have had the

1 trial results, but the debtors already abandoned that theory.
2 It's not said anything really in its motion, in making the -
3 in proposing the prior plan, in withdrawing the prior plan,
4 why it can't proceed with whatever it is it plans to do,
5 whatever structuring that it had to do. It was just talking
6 about structuring and new documents, you may recall, if you
7 reread counsel's remarks from that transcript of the hearing,
8 I think it was on April 1st. So, what we see as a case in
9 which the debtor tries to portray a series of rushes
10 resolving this case, as feeling its way along. That's not
11 really what's happened at all. The debtor has come into
12 court hoping to get this case ended in a way that was
13 satisfactory to it. Those hopes were dashed. I don't know
14 that we're going to see anything more convincing the next
15 time around. Maybe we will. I certainly hope so. But I
16 think it's time to put a short leash on this debtor. Ruling
17 or no ruling, we all hope the District Court in Utah will
18 rule sooner than later. I have no idea personally whether
19 what Mr. Spector says about what happened at trial is true or
20 not. We've heard optimistic accounts from the debtor of
21 other things in the past, as the Court knows, that turned out
22 to be totally unfounded, but I wasn't there, and I'm not
23 prepared to argue that point, nor am I prepared to examine
24 Mr. McBride on that point because what's he going to tell me?
25 He's either going to have to testify about what his lawyers

1 told him essentially or he's going to have to invoke
2 attorney/client privilege. I can't imagine a bigger waste of
3 our time this morning than arguing over what the prospects
4 are for the Utah court litigation and whether it's really
5 more promising than the debtor had hoped, or that somehow
6 Novell's prospects have decreased. The dollar figures are
7 what they are. I don't plan to argue those either, but I
8 just don't see the point this morning of trying to inquire
9 into what is a completely speculative piece of information
10 about what the Court might or might not do now that it's got
11 the matter under submission. I think the really important
12 point here is, we've heard a sequence of stories, where this
13 case is going, how it's going to get there, never fulfilled.
14 In the meantime, we've spent scads of money on fees, the
15 debtors' fees, the debtors' professionals' fees, the debtors'
16 advisors' fees, my fees, which isn't necessarily a bad thing
17 but it is for Novell, I suppose. The fees of other people,
18 Mr. McMahon's time. This debtor - Yes, the case is less than
19 a year old, but a year's a long time, and there are, as the
20 Court knows, a lot of cases that say, pending major
21 litigation is not a reason to extend exclusivity or debate
22 for an extension of exclusivity, and I think that would apply
23 here too, and the debtor has shown it can propose a plan,
24 apparently, whatever other weaknesses the plan might have
25 had. That does take into account the possible outcomes, and

1 if the debtor had wanted to do something much more carefully
2 tailored it should not have opposed stay relief in the first
3 place. We would have had a trial sooner. We might have had
4 a result sooner. We're living with the consequences of a
5 series of strategic choices the debtor made, and I think it's
6 time now to say to the debtor, Sure, you can have some more
7 time, but this is it, and maybe 10 days is too soon after a
8 decision, maybe 15 days, maybe 20 days, maybe 30 days, but it
9 can't be that complicated. They've had all this time to talk
10 about how to structure this deal, and in fact, they were
11 restructuring it as we appeared in court on April 1st. They
12 don't need another 30 or 45 days after a ruling by the
13 District Court to know what they're - they could have wrapped
14 the prior plan around with the status of this case today.
15 The problem with the prior plan was it was completely
16 unsubstantiated as a deal. So I ask the Court to tell the
17 debtor to - if the Court grants this extension, to say to the
18 debtor, this is the last extension I'm granting, and I'm
19 going to ask you to file a plan within 30 days after we get a
20 ruling from the District Court regardless of whether that
21 comes before or after this extension expires. I want a plan
22 on file by August 1st or whatever it's going to be, and I want
23 us to go from there because we don't even know if the
24 District Court's going to rule in a way that's plain to
25 everybody about what it means. You know, it may be a clear

1 win for somebody. It may be a clear loss for somebody. It
2 may not be either, and as a consequence, we may be back here
3 saying - and hearing again, well, we need to figure this out,
4 we need to figure that out, but the case just keeps going on
5 and on and on and the money keeps getting used, and in the
6 meantime a cloud remains over a lot of these York businesses,
7 and we ought really know where we're going. Thank you, Your
8 Honor. I appreciate the time.

9 THE COURT: Mr. Lewis, if I may just ask one quick
10 question?

11 MR. LEWIS: Yes, please.

12 THE COURT: Is there any prejudice that you would
13 point to if the extension is granted? Prejudice to Novell?

14 MR. LEWIS: Your Honor, if we extended to August 1st,
15 I think the answer is, it's not a very long extension
16 anymore, but I think there is prejudice in the sense that if
17 the Court doesn't make that the final extension, you are just
18 in effect inviting the debtor to buying more time whenever it
19 comes to this Court and tells this Court, Well, there's this
20 uncertainty, there's that uncertainty, we've got major
21 litigation going. So I don't think I can say, you know, the
22 next - what is it, 40 days from now, 43 days from now is
23 going to sink the ship, but there is an effect on the ability
24 of my client and SUCI (phonetical), my other client, and on
25 other parties engaged in this business to do their business,

1 and I think it's time that everybody moved on. Thank you.

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

3 Good afternoon.

4 MR. McMAHON: Your Honor, good afternoon. Joseph
5 McMahon for the United States Trustee.

6 THE COURT: Yes.

7 MR. McMAHON: With respect to this motion, Your
8 Honor, we didn't file papers, but I would appreciate the
9 Court taking our comments into account.

10 THE COURT: Yes, sir.

11 MR. McMAHON: We just take a practical view of
12 exclusivity. Picking up on the Court's last question with
13 respect to prejudice. Certainly, the law's informative. Mr.
14 Spector recited some factors for the Court to consider. Your
15 Honor's question regarding prejudice is another thing to look
16 at, but on a very practical, broad-based view, Your Honor.
17 Exclusivity is about providing a breathing spell for the
18 debtor to negotiate with key constituents in the case. It's
19 a privilege. It's not a right and, you know, in that vein,
20 Your Honor, I think that the question we have to ask is
21 taking a look at what's occurred from the petition date when
22 the debtors filed these cases to today, is exclusivity doing
23 what it's intended to do? Just as a practical matter, and
24 our office has concerns. We actually do not believe that
25 exclusivity is really providing a benefit to the creditor

1 constituency at this juncture. And let me clear as to the
2 reasons why.

3 THE COURT: Okay.

4 MR. McMAHON: Part of that is just simply how this
5 case is set up, and the parties have correctly identified the
6 reasons why we're at where we're at on a certain level.
7 First, you have a litigation case at its core. We have the
8 practical reality that our office was not able to perform an
9 official committee of unsecured creditors due to insufficient
10 interest. That remains the case today. So, I think
11 practically what you have going on here, Your Honor, is the
12 debtor is, I guess, without a - I would call a fiduciary to
13 negotiate the terms of a plan with. That's not to say that
14 it should be doing its duty in terms of coming forward with a
15 proposal that is confirmable for the Court, but there are
16 some, I guess, just realities about the way this case is laid
17 out such that really what you're talking about is the primary
18 negotiation, if you will, Your Honor, is going on in this
19 very courtroom, effectively. There's the Utah element, and
20 the parties have already talked about that extensively, but I
21 have to agree on behalf of my client with Novell that the
22 process of us getting from point A to point B starts with the
23 debtors coming forward, and soon, with a binding proposal.
24 We can argue about whether or not we're even at stage in the
25 last go around, so that we can get this process moving in

1 some positive directions. And I don't think that, you know,
2 exclusivity in and of itself is going to provide any benefit
3 insofar as encouraging the debtor to do that at this stage.
4 I just think it's, you know, we've been up to the plate two
5 times in this case already. We've been told about the fact
6 that Stephen Norris is, you know, still out there. We have
7 his proposed asset sale. We may get to it at some point. I
8 think that at the core of what Novell is asking for is a
9 deadline for the filing of a disclosure statement and plan
10 that hopefully is confirmable, and the reality is that in
11 terms of Your Honor's question regarding prejudice, I would
12 have to agree with the - I guess the general observations
13 that Novell's counsel made regarding costs, regarding time in
14 Chapter 11. This is a duty of a debtor in possession to come
15 forward with this document. It's not something it can delay.
16 It's required to do so at the earliest possible moment in a
17 Chapter 11 case. Now, I appreciate the fact that the debtor
18 has, you know, tried, I guess on two occasions, to bring
19 something before this Court, but the rather, like I say,
20 quick dispatch from which this Court, I guess, we moved on
21 from those two proposals suggests that, yes, I mean, we are
22 at a point in this case where we need to get it moving in
23 some direction. This case does not have to stop in its
24 tracks for Utah to proceed. In fact, I agree with Novell
25 that the last go around that we had disproves that statement

1 as a general matter, and we have to get from point A to point
2 B, and that process starts with the debtor coming forward
3 with a confirmable proposal, and if it's incapable of doing
4 so, Your Honor, then perhaps another party in interest in the
5 cases should have an opportunity to do so. It's a very
6 simple way of looking at things from our view. Is
7 exclusivity doing what it's intended to do in these cases?
8 And, there's no negotiation going on here insofar as the way
9 Your Honor having experience in mediation matters understands
10 negotiations to occur. The occur outside this building,
11 outside of this courtroom. This case is progressing, I
12 think, basically in the confines of this courtroom from the
13 standpoint of the actual negotiation, if you will, of what's
14 going on with the progress of the case. So, with that
15 observation, Your Honor, I would just reserve the right to be
16 heard at the conclusion of the evidence.

17 THE COURT: Thank you, Mr. McMahon.

18 MR. SPECTOR: Your Honor, I'm constrained to object
19 to the remarks of the United States Trustee. I don't
20 frequently do that, and I ask that they be stricken. This is
21 not a situation, we had a few comments to make. This was a
22 broadside attack. It was an objection never put in writing.
23 We had no expectation that we would be having to respond to
24 the U.S. Trustee's broadside, not a specific argument on a
25 particular point, but an attack on the debtor from beginning

1 to end of this case. We object to that. We have no ability
2 to respond to those types of arguments without any advance
3 writings. The reason why there has to be a deadline and
4 we've always granted the U.S. Trustee extensions when he's
5 asked for it. This was unexpected, and we do take offense at
6 that. Getting to the merits -

7 THE COURT: Let me just say -

8 MR. SPECTOR: Sure.

9 THE COURT: I accept Mr. McMahon's arguments. As
10 far as I'm concerned, he represents an important, you know,
11 constituency as far as the integrity of the process is
12 concerned, and they're his arguments. I don't think -
13 they're factual matters that the Court can take into
14 consideration, and I do so.

15 MR. SPECTOR: Fine. I had to say that for the
16 record, Your Honor.

17 THE COURT: I understand.

18 MR. SPECTOR: You notice I didn't stop him or object
19 when he started to speak.

20 THE COURT: Understood, and I appreciate that.

21 MR. SPECTOR: There are a couple of factual things
22 that were stated that have responses, and some of them are
23 the factual allegations are incorrect.

24 THE COURT: Well, let me just ask you this -

25 MR. SPECTOR: Sure.

1 THE COURT: - because as I understand the
2 situation, and the situation is that the litigation has a
3 major impact upon the negotiations with potential buyers, and
4 those negotiations then have a direct and significant impact
5 upon the plan that you'll file, and there's no question,
6 regardless of how people's positions may or may not have
7 changed in this case, my position remains the same, and that
8 is, there has to be a conclusion to the litigation before the
9 debtor's in a position to finalize, to make the best business
10 deal it can, which in turn will hopefully result in a
11 confirmable plan.

12 MR. SPECTOR: Exactly, Your Honor.

13 THE COURT: And to the extent that exclusivity is
14 removed from the debtor, that would only further interfere
15 with the debtors' ability to negotiate the plan, with the
16 deal and thus the plan.

17 MR. SPECTOR: I'd like to share some more insight.
18 Number one, we didn't just withdraw the plan, we just didn't
19 proceed on it that day. It's a nomenclature thing, perhaps,
20 but before the Chapter 11 was filed, the debtor was in
21 negotiations with another party with his horrendous ruling,
22 and they just couldn't get past it. The only option then was
23 the Chapter 11. At that point the debtor didn't look like it
24 was in a position to be sold to anybody or nobody was going
25 to touch it with the situation it had, and we went into an

1 11, and we don't file 11s in my firm unless there's some
2 expectation of getting out of an 11 as an operating company
3 or even as a 363 sale, but not just buying time converting.
4 We had a concept of a standalone plan. We still have a
5 concept of a standalone plan and based on the numbers we're
6 getting in the business end of the deal, it's more likely now
7 then it was when we started. Yet the duty of the Board of
8 Directors, the management of the company, is not just to get
9 a plan and get out of Chapter 11, but to get a plan that's
10 the best plan possible for its constituents, and that's where
11 I come back to Mr. McMahon's point. The creditors in this
12 case are not the only constituents. We have not resolved
13 that the equity holders are out of the money in this case.
14 But for the litigation claims, they're very much in the
15 money. Not only that, if the litigation claims go not just
16 in the defensive posture that we win, that we don't owe them
17 any money, it almost automatically means we're very flush
18 because we started the lawsuits. We're the plaintiff, and if
19 we get the ruling that we think we deserve from the Tenth
20 Circuit, the ball's in the other court now. Now, all of a
21 sudden we're looking for hundreds of millions of dollars,
22 perhaps, from the other side of the table, and so we don't
23 perceive that our sole role here is to take care of the two
24 and a half to three million dollars of creditors. We've got
25 equity holders who bought stock in this company over the

1 years and have an expectation of a return. So, what's the
2 best deal for stockholders and creditors? We've said right
3 along, we think that in order to keep stockholders in the
4 game we have to pay the creditors. I mean, there's a no -
5 Maybe that's why there's no committee. We could come up with
6 a plan, and we think we could get it confirmed with a
7 standalone proposal. If Novell has a claim that's, let's
8 say, \$10 million, maybe it will take us five years to pay it
9 off. There are prospects, which I'm not going to tell the
10 Court about, that give us reason to believe we could pay it
11 off. If it comes in, you know, \$40 million, maybe not,
12 pretty sure not. That's why those things matter. There are
13 other things that will come out of that ruling that might
14 help us clarify just what our rights are, not just the dollar
15 amount. Those things are important to know because anybody
16 whose going to invest in our business, if we go with that
17 route, is going to need to know the assurance of that. It's
18 a lot more complex than, Oh, gee, those stumblebums couldn't
19 come up with a plan with York and they haven't shown us the
20 details of the deal with Norris. Well, one of the reasons
21 why we stymied on the deals with Norris is because the world
22 changed when the number went roughly half. The trial took
23 place and the Judge says, We're going to get certainty fairly
24 soon. That's the reason why things have turned around. Your
25 Honor, August 1st, I think, is probably - We asked for August

1 11th. I don't know - We asked for August 11th. We still stand
2 with the August 11th date, however, if Your Honor is inclined
3 to give us a deadline based upon the ruling, we'd be happy to
4 accept that as well.

5 THE COURT: Thank you. Mr. Lewis.

6 MR. LEWIS: Thank you, Your Honor. I think we've
7 just heard that the debtor has a plan to deal with this
8 situation no matter what because the debtor has said, Well,
9 we have a duty to our shareholders because no matter what
10 happens in the District Court, if we win on appeal, even if
11 we lose there, there are going to be hundreds of millions of
12 dollars for them. So the question is, What is it that we're
13 waiting for here? What exactly is it that we have to know?
14 The debtor proposed a plan that took the uncertainties of the
15 outcome into effect, into account. Yes, if we have a ruling
16 at the trial, at least something more specific to focus on,
17 but there are going to be appeals no matter what happens, and
18 everybody's going to have uncertainty until that's all over,
19 and I don't think we're hearing and I don't think the Court
20 would entertain the notion that the debtor could wait with a
21 plan until appeals are resolved because as we all know that
22 will be sometime down the road, even in the Eighth Circuit,
23 and so, we're really talking about where we are right now,
24 and we know what the range of possibilities are right now.
25 Even the debtor knows what the range of possibilities are

1 even if we're just talking about damages. If you take the
2 debtor at what it says about what happened at trial, the
3 damages ranged from somewhere around \$20 million for Novell
4 to hundreds of millions of dollars for the debtor. We know
5 that. We don't need to wait for a ruling for that. And so,
6 my concern here is, we don't really know when we're going to
7 get a ruling, and frankly, while a ruling, I'm sure, would
8 clarify some things, it might also not clarify some things,
9 and in any case we know that it's not going to resolve things
10 because there will be appeals. Whoever wins and whoever
11 loses and maybe it will be some of both, I don't know. There
12 may be appeals, there may be cross-appeals. That's all going
13 to be in the future. Whatever plan the debtor proposes is
14 going to have to deal with that, those uncertainties anyhow.
15 And so, we know - we've heard that the deal with Stephen
16 Norris Partners is still there. We're still talking about
17 presumably a hundred million dollars. That's more than
18 enough to cover whatever there might be here in terms of
19 damages, as the debtor said, in its prior plan, and so - and
20 the debtor and the Court both seem to be of the view that a
21 termination of exclusivity will harm negotiations. I
22 honestly have a different point of view. First of all, we're
23 just talking about terminating exclusivity here, we're not
24 talking about converting this case to a Chapter 7 or
25 dismissing it. And if the parties are under some pressure to

1 negotiate seriously and to absorb certain uncertainties that
2 if we were just an - Remember, we're not in an ordinary
3 business setting here. These aren't two parties at arm's
4 length who only have to worry about themselves. Some
5 uncertainties are inherent in the process of formulation of a
6 plan because there are deadlines, and there are other people
7 you have to answer to and to negotiate with if you choose to,
8 although there haven't been any such negotiations that I'm
9 aware of, and I think if the debtor and whoever it's
10 negotiating with, if it's Stephen Norris - and I want to
11 emphasize the deal was - the change with Stephen Norris
12 didn't happen when Novell reduced its damage claim to \$19 or
13 \$20 million. That happened before the April 1st hearing
14 before this Court when the debtor came in and said the deal
15 had already changed, was being restructured, but the numbers
16 haven't changed. Nothing's changed in that regard. And they
17 were already negotiating documents, we were told, and
18 everybody knew at that time the trial was coming up. So, I
19 ask the Court to rethink the notion that somehow terminating
20 exclusivity or putting a solid outside deadline on it and
21 tying an earlier deadline to a ruling in the District Court,
22 if we really have to wait for such a ruling, if that really
23 is going to hurt anything here or if it won't really in fact
24 improve the prospects of negotiation of a real plan with
25 parties who, while they would like in a perfect world of

1 arm's length negotiation - you know, the way they talk about
2 a market value appraisal, buyers and sellers at arm's length
3 with no pressure to sell, no pressure to buy, that's not what
4 Chapter 11's about. There is a pressure to sell and a
5 pressure to buy. It's part of the point. It's part of the
6 point of terminating exclusivity. If stymying negotiations
7 were a reason not to terminate exclusivity, you would never
8 terminate it. There would never be a reason to because it
9 would almost invariably stymy investigations except in the
10 worst cases where creditors have lost confidence in the
11 debtor or there's been dishonesty or some other reason that
12 we're not even close to here, but in most Chapter 11 cases,
13 that's not so. So I ask the Court to reconsider what that
14 means and to impose on this debtor some real deadlines that
15 it has to live with, and deadlines sooner than later, and
16 let's see just how fast they can produce a plan if they're
17 really asked to do it, accepting that it won't be their
18 perfect plan, but that's not the objective of the Code.
19 Thank you, Your Honor, I appreciate the time.

20 THE COURT: Absolutely, Mr. Lewis. I appreciate
21 your comments. Mr. McMahon, did you have something further
22 to add? Not so much on the propriety of our objection or
23 not, just on the merits.

24 MR. MCMAHON: Your Honor, nothing really to add
25 other than to, I guess, to thank the Court for hearing us and

1 to reaffirm the fact that under § 307 of the Bankruptcy Code,
2 we have the right to be heard with or without papers.

3 THE COURT: Thank you, Mr. McMahon. Well, here's
4 where I'm coming out on this: I did not lift the automatic
5 stay for the litigation in Utah to proceed to punish the
6 debtor. I lifted that automatic stay because I thought that
7 having the Court ruling, the District Court's ruling on a
8 pivotal piece of the case, of the bankruptcy case was
9 essential to formulating a plan and to formulating, perhaps,
10 a transaction, and at the moment, with that uncertainty, not
11 knowing whether Novell will recover or whether in fact the
12 debtor will recover, it's beyond me how - Could the debtor
13 formulate a plan? Certainly. They did once, they could do
14 it again, but it wouldn't necessarily be beneficial to the
15 debtors' estate to do so, and I think that is a concern, and
16 I do think that the uncertainty of the litigation and
17 awaiting the result of that litigation does create cause to
18 extend exclusivity here. So I'm going to grant the motion,
19 and I'm not going to limit it to this one extension because,
20 in my judgment, that ties the Court's hands as well as the
21 parties' hands, and I think that the Court ought to be able
22 to consider developments in a case as the case continues, and
23 what appears in August may be very different than what
24 appears today. Clearly, the hurdle in extending exclusivity
25 over time will rise, will grow higher, but that isn't the

1 same as saying this is it. You know, I just always remember
2 one of the lessons in law school was never say this is your
3 last argument, and I don't like to tell parties, this is your
4 last extension because sitting here today I don't know how
5 things will appear in August. So, I'm going to grant the
6 motion. I'll grant the extension to August 11 on the basis
7 that I do find cause, and I think under the circumstances I
8 am in a position to enter the order as submitted.

9 MR. SPECTOR: Thank you, Your Honor.

10 THE COURT: And it is without prejudice but clearly,
11 and the debtor knows this, capable counsel knows this, that
12 it becomes more difficult as time goes along to continue to
13 grant extensions for exclusivity, and that may or may not be
14 the case in August.

15 MR. SPECTOR: Thank you, Your Honor.

16 THE COURT: So I will enter this order, and
17 obviously, I'm sure, that the parties will keep me apprised
18 of any developments in the Utah litigation.

19 MR. SPECTOR: Yes, sir.

20 THE COURT: And I know judges mean well to get cases
21 decided quickly, but other matters arise and sometimes what
22 appears to be something that can be done a little more
23 quickly is more complex than the judge realizes until he
24 starts to go back and rethink it and review the record.

25 MR. SPECTOR: Certainly understand that.

1 THE COURT: So with that, unless there's something
2 further, we will stand in recess.

3 MR. LEWIS: Nothing further, Your Honor.

4 THE COURT: Thank you everyone and good day.

5 ALL: Thank you, Your Honor.

6 (Whereupon at 2:51 p.m., the hearing in this matter
7 was concluded for this date.)

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18 I, Elaine M. Ryan, approved transcriber for the
19 United States Courts, certify that the foregoing is a correct
20 transcript from the electronic sound recording of the
21 proceedings in the above-entitled matter.

22

23 /s/ Elaine M. Ryan June 23, 2008
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