

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Chapter 11
THE SCO GROUP, INC., .
et al., . Case No. 07-11337(KG)
Debtors. . (Jointly Administered)
. Jan. 8, 2008 (10:03 a.m.)
. (Wilmington)

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

Proceedings recorded by electronic sound recording;
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	Direct	Cross	Redirect	Recross
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WITNESS:

Justin Swenson

9

1 THE CLERK: Please rise.

2 THE COURT: Good morning.

3 ALL: Good morning, Your Honor.

4 THE COURT: Thank you, you may be seated. Ms.
5 Werkheiser, good morning.

6 MS. WERKHEISER: Good morning, Your Honor. For the
7 record, Rachel Werkheiser from Pachulski, Stang, Ziehl &
8 Jones on behalf of the debtors. With me today, Your Honor,
9 is Ms. Robson from Berger Singerman.

10 THE COURT: Welcome, good morning.

11 MS. ROBSON: Good morning, Your Honor.

12 MS. WERKHEISER: She's previously been moved *pro hac*
13 *vice* into this Court.

14 THE COURT: Yes.

15 MS. WERKHEISER: Thank you, Your Honor. And also
16 with me is the operations manager from the company, Justin
17 Swenson.

18 THE COURT: Mr. Swenson, good morning.

19 MS. WERKHEISER: With that, Your Honor, I believe
20 there's only one matter left on the agenda which is the
21 motion of the debtors to assume non-residential real property
22 releases with GRE Mountain Heights Property LLC and Canopy
23 Properties, Inc., and I'll turn the podium over to Ms.
24 Robson.

25 THE COURT: Thank you. Thank you, Ms. Werkheiser.

1 MR. WERKHEISER: Thank you.

2 MS. ROBSON: Good morning.

3 THE COURT: Ms. Robson, good morning.

4 MS. ROBSON: Good morning, and thank you, Your
5 Honor. The contested issue here - We've been able to resolve
6 with Novell the issue of the Utah lease. So my understanding
7 is that they're not going to be prosecuting the objection to
8 the Utah lease so we're going to be litigating the issue of
9 whether the New Jersey lease was an exercise of the debtors'
10 sound business judgment. The case law explains that the
11 business judgment test is not a difficult test to meet, and
12 it's not intended to allow for the second guesses of the
13 debtors' business judgment. The Court is simply to determine
14 whether the proposed decision benefits the estate. Here, I
15 think, we'll provide ample evidence that the proposed
16 assumption of the New Jersey lease, as amended, does satisfy
17 that test. Your Honor, Mr. Swenson will testify that the
18 company -

19 THE COURT: Are we going to proceed by a proffer and
20 then a cross-examination or do you prefer - Let me - Good
21 morning, Mr. Lewis.

22 MR. LEWIS: Good morning, Your Honor, thank you.

23 THE COURT: Let me just ask if I may, Ms. Robson -

24 MS. ROBSON: Sure, of course.

25 THE COURT: - forgive me. Let me interrupt and ask

1 -

2 MR. LEWIS: Good morning, Your Honor. Just for the
3 record, Adam Lewis of Morrison & Foerster and Michael Nester
4 of Young, Conaway -

5 THE COURT: Yes, good morning, Mr. Nester.

6 MR. LEWIS: - for Novell.

7 THE COURT: And Mr. McMahon, I don't want to leave
8 you out. Good morning.

9 MR. McMAHON: Thank you, Your Honor. Good morning,
10 happy New Year.

11 THE COURT: Same to you, thank you.

12 MR. LEWIS: Your Honor, we have withdrawn our
13 objection as to Utah for the simple reason that we now see
14 what it looks like, and it seems reasonable to us.

15 THE COURT: Right. At the time that the objection
16 was filed, we did not have the amended lease.

17 MR. LEWIS: That's right, and given the space, and
18 given the three-month horizon where the debtor can terminate
19 the lease on three months' notice and the rent, we think
20 that's reasonable and don't intend to pursue the issue. But
21 we are still concerned about New Jersey. The debtor has made
22 some efforts to talk to us about alternatives. Nothing has
23 panned out, unfortunately. The debtor's not able to, we're
24 told, to change the deal in any way that would be acceptable.
25 In terms of how to proceed, I'm more or less prepared to

1 leave it up to the debtor how it wants to do this -

2 THE COURT: Okay.

3 MR. LEWIS: - if it wants to make a general proffer
4 and let me cross-examine or if it wants to make its own
5 record first and let me cross-examine, it's really up to the
6 debtor how it thinks it wants to present its case.

7 THE COURT: Okay.

8 MR. LEWIS: Either way I'm prepared to cross-
9 examine.

10 THE COURT: Thank you, Mr. Lewis.

11 MS. ROBSON: Your Honor, my preferred method of
12 proceeding would be to proffer testimony first of Mr.
13 Swenson.

14 THE COURT: That is acceptable to the Court.

15 MS. ROBSON: Okay, thank you, Your Honor.

16 THE COURT: Thank you.

17 MS. ROBSON: If called to testify, Mr. Swenson would
18 testify to the following: Justin Swenson is the operations
19 manager for SCO Operations, Inc. The company - In that
20 capacity, he is responsible for the researching and
21 assistance with the negotiation of the company's leases. In
22 that position he began with the company exploring new lease
23 options for New Jersey in approximately March of 2007. They
24 looked at approximately 12 to 15 different premises.
25 Considerations and comparisons were done with respect to the

1 location and proximity to where the employees live. The
2 number of employees, i.e., the headcount of the employees
3 versus the space needed, the space and configuration needs
4 for the company, for example, New Jersey houses the company's
5 lab for their engineers to do testing and the like and
6 requires certain specifications that are not normal for a
7 corporate premises. So, for example, they require excessive
8 amounts of power compared to normal offices. So, while it's
9 not impossible to have such configurations done in a new
10 space that would require build-out and other modifications to
11 a new premises. The company also considered and compared the
12 price of a new lease, including what the monthly rent would
13 be, the term of the lease, requirements for deposits, and the
14 like, as well as the expense to move their premises,
15 including the physical move, IT expenses that might be
16 incurred in connection with the move, possible build-out to
17 accommodate for their engineering lab, and none of the New
18 Jersey alternatives had terms for less than three years nor
19 the configuration for their lab. So, at a minimum, any
20 alternative would require a build-out as well as moving
21 expenses and IT expenses. Therefore, the company did
22 negotiate what they considered favorable terms to extend
23 their current lease by a three-year term as well as get an
24 option for another three-year term. Your Honor, I'd like to
25 point out - That's the end of my proffer, however, there are

1 additional legal issues that may come up to the extent that
2 the lease is not approved as amended. New Jersey statutes do
3 provide for a holdover tenancy which is double the rent. I
4 believe that the lease, as currently drafted, provides for
5 one and a half times rent, but in any event, we would be
6 considered a holdover tenant as of January 1st of this year,
7 and I would also proffer that the company estimates it would
8 take between three and four months to negotiate and move into
9 a new space from the present time. So, during that time
10 period, we would be liable for double rent under the hold-
11 over statute as an administrative expense as well as incur
12 moving costs and any build-out and IT expenses.

13 THE COURT: Thank you very much.

14 MS. ROBSON: Thank you.

15 THE COURT: And you certainly - you will have an
16 opportunity to make argument after the cross-examination.

17 MS. ROBSON: Okay, thank you, Your Honor.

18 THE COURT: Mr. Lewis. Mr. Swenson is available in
19 the courtroom to be cross-examined, and I assume you're
20 calling him to the stand.

21 MR. LEWIS: Yes, Your Honor, thank you, I would like
22 to call Mr. Swenson, please.

23 THE COURT: Mr. Swenson, if you would remain
24 standing so that you can be sworn. Thank you, sir.

25 THE CLERK: Please raise your right hand, state your

1 full name, spelling your last name for the Court.

2 THE WITNESS: Justin Mark Swenson, S-w-e-n-s-o-n.

3 THE CLERK: Thank you.

4 JUSTIN SWENSON

5 having been duly sworn testifies as follows:

6 THE CLERK: You may be seated.

7 THE COURT: Thank you. Mr. Lewis, you may proceed.

8 MR. LEWIS: Thank you, Your Honor.

9 CROSS-EXAMINATION

10 BY MR. LEWIS:

11 Q. Good morning, Mr Swenson.

12 A. Good morning.

13 Q. Thank you for taking the time to come here and testify.

14 I'm sure that you have much better things to do, and maybe it
15 will turn out you did. You've heard Ms. Robson's description
16 of the testimony that you would give on direct examination by
17 her under oath; did you not?

18 A. That's correct.

19 Q. And do you affirm that that would be in fact your
20 testimony?

21 A. That's correct.

22 Q. Okay. So, let me begin a little bit by going back to the
23 beginning of that testimony, Ms. Robson stated that you were
24 responsible for leasing activities and took part in some of
25 the negotiations that she later summarized, very briefly.

1 What exactly was your role with respect to leasing in
2 general?

3 A. I assisted and basically was the liaison between
4 executive management and landlord and our agent negotiations
5 for leases.

6 Q. Okay, and so, do I understand from your testimony just
7 now that the SCO Operations, Inc., which I take it is the
8 party that conducted the negotiations; is that right?

9 A. That's correct.

10 Q. That SCO Operations, Inc., which I'll just refer to as
11 Operations if I need to -

12 A. Okay.

13 Q. - talk about them again specifically. That Operations
14 worked through a real estate broker of some sort to - or
15 leasing agent to find a new lease?

16 A. That's correct.

17 Q. And was it the same leasing agent throughout the period
18 from March of 2007 until now?

19 A. Yes.

20 Q. Okay. Who was that party?

21 A. The gentleman's name is Charlie Dillon with the Staubach
22 group out of New Jersey.

23 Q. Has the debtor used Mr. Staubach in the past?

24 A. I believe so.

25 Q. Okay. Would that be for its extension of the original

1 lease term?

2 A. That's correct.

3 Q. Okay. That was in 2005 or thereabouts?

4 A. I believe so. I wasn't affiliated with that lease.

5 Q. Okay. Was that because you weren't with the company or
6 you had no role?

7 A. It wasn't because I wasn't in the role of negotiating the
8 leases at that time.

9 Q. Okay. Now, do I understand from your testimony that you
10 had no direct contact with the landlord, that the debtor -
11 that the operations contacts with the landlord were instead
12 through Mr. Dillon?

13 A. I would have contact directly with the landlord with
14 connection with the agent on our behalf as well. So it would
15 be conference calls or meetings with the landlord directly.

16 Q. Okay. Now, the proffer of testimony indicates that
17 Operations began its leasing efforts in March of 2007; do you
18 recall that?

19 A. That's correct.

20 Q. Can you describe the course of those negotiations very
21 generally? Now, I'm only talking about New Jersey. We don't
22 need to worry about Utah.

23 A. As far as negotiations, it was more of a tour at the time
24 in March to evaluate the opportunities for new leases and
25 also to help probably put ourselves in an advantage with the

1 current landlord to let him know that we would seek other
2 opportunities if needed to kind of help in our negotiations
3 if we decided to stay at the current residence.

4 Q. Okay, and how long did that tour last?

5 A. Most part of the day including discussions with the
6 current landlord at the end of the day.

7 Q. So this occurred in March of 2007?

8 A. That's correct.

9 Q. Okay. So, in March of 2007, you toured other potential
10 spaces with Mr. Dillon?

11 A. Yes.

12 Q. And then after looking at those and considering them
13 some, you had a meeting with the current landlord.

14 A. Just to talk briefly about, you know, renewing in the
15 current space and what our options were going to be
16 potentially.

17 Q. What was the landlord's reaction to -

18 A. Very favorable. He wanted to retain us as a tenant.

19 Q. Okay, and did you discuss at all at that point what sort
20 of terms?

21 A. Not at all.

22 Q. Okay.

23 A. Let me just say, with the exception of possible, at a
24 minimum, trying to reduce the term to three years, staying to
25 a three-year term at that point.

1 Q. Okay, and the original lease was for how many years?

2 A. The original lease?

3 Q. Yes.

4 A. I believe it's five years. I haven't reviewed that on
5 the original lease document.

6 Q. And the renewal is three years?

7 A. We had a - I believe - and it wasn't at my point with
8 negotiations, they entered into a one-year extension lease
9 prior to the expiration of the 2007 lease.

10 Q. Okay, but what was the next step that you took with
11 respect to the New Jersey lease - "you" being operations?

12 A. Basically to evaluate the properties and the
13 opportunities. As we toured the buildings there wasn't a
14 whole lot of opportunity for a drop-in type of situation. We
15 would have had to modify the current spaces. Either they
16 were too small, too large a space that we were needing. They
17 weren't a custom fit to the current business.

18 Q. And over what period of time did this activity take
19 place?

20 A. It would have been taking place during my visit up to at
21 least another month of evaluation, but primarily on entering
22 of those premises, you could identify whether it was going to
23 be sufficient for the business as is or would meet
24 modification.

25 Q. So would it be fair to say that the process you just

1 described now, the initial tour, initial conference, and some
2 followup with other potential properties was concluded
3 somewhere around the end of April of 2007?

4 A. It was probably concluded then. Based on factors within
5 the company we just - we kind of ceased further negotiations
6 with any party at that point because of current litigation
7 that was pending.

8 Q. Okay. So that would include ceasing negotiations with
9 the current landlord as well; is that right?

10 A. That's correct.

11 Q. And when you say "because of the litigation", can you
12 tell the Court how that related to whether to continue
13 discussions with potential landlords?

14 A. Well, if I understand correctly, based on the litigation
15 that was pending, coming up in August or September with
16 Novell, the executives didn't want to enter into any lease at
17 that time or up to that point based on the current litigation
18 and the rulings that were to come either in our favor or not
19 in our favor.

20 Q. Let me see if I can get you to expand on it a little bit,
21 and if a question isn't clear, please tell me.

22 A. Okay.

23 Q. Don't try to speculate. It's my job to ask you clear
24 questions.

25 A. Okay.

1 Q. What was the - Did the executives explain their rationale
2 to you about what the pendency of the litigation meant, how
3 that would affect whether you wanted to -

4 A. No, I interpreted -

5 Q. Let me also say, it's important to let me finish my
6 question for a couple of reasons. First is, you want to be
7 sure to hear exactly what my question is, and secondly the
8 reporter can't take down people talking on top of each other.

9 A. Okay.

10 Q. So, did they explain to you their rationale of what the
11 potential outcomes would mean in terms of a new lease and why
12 that, therefore, meant that they didn't want to continue
13 leasing efforts?

14 A. No. The only understanding I knew is that we were to
15 kind of cease on negotiations at that point, and there was a
16 personal interpretation it was based on pending litigation.

17 Q. Okay. So, you're telling me it was your interpretation -
18 Let me see if I can rephrase this. Is it your testimony that
19 you got the clear message that you shouldn't pursue
20 negotiations for the present somewhere towards the end of
21 April and that your interpretation of the reasons was that
22 the management wanted to see how the litigation that was
23 coming up turned out before they resumed their negotiations?

24 A. Correct.

25 Q. Okay. Who were the managers you were talking to about

1 this at that time?

2 A. Burt Young, the CFO; Mike Olsen, the controller, VP of
3 finance.

4 Q. Okay. Anyone else?

5 A. Those were the two primary contacts.

6 Q. Okay, Mr. Young, as I recall, is no longer with the
7 company; is that right?

8 A. That's correct.

9 Q. Is Mr. Olsen still with the company?

10 A. He is not.

11 Q. He is not either?

12 A. He is not.

13 Q. So, you entered a kind of hiatus in terms of negotiations
14 with your landlord somewhere towards the end of April; is
15 that right?

16 A. Yeah, I mean, we were still talking to the agent. The
17 agent was still calling to see if we had determined what
18 direction we were going and we had backed off as a company,
19 but the agent was still actively involved in trying to
20 complete a transaction.

21 Q. Okay. But in context, being the company and the agent,
22 the company's position was essentially, Go ahead and do
23 whatever you're going to do, but we're not doing anything for
24 the moment; is that right?

25 A. That's correct.

1 Q. Okay. When did that hiatus come to an end, if ever?

2 A. As we moved closer to the terms of the lease, I continued
3 to push forward to try to, you know, I was always actively
4 pursuing opportunities just because I knew it was ultimately
5 going to term out. I would say, after the litigation of the
6 IP issue or the UNIX copyrights with Novell, shortly
7 thereafter, we started to ramp up again on the leasing
8 opportunities.

9 Q. Would that have been just about the time the company
10 filed its bankruptcy petition?

11 A. Yeah, it was shortly after that.

12 Q. Shortly after it filed its petition?

13 A. Yeah, that's correct.

14 Q. Okay. Tell me exactly what you did to restart
15 discussions for a new lease.

16 A. At that point it was determined that they didn't want to
17 move at that point because of the build-out costs and all of
18 the relevant costs associated with a move, all of those costs
19 associated there.

20 Q. "They" being management?

21 A. That's correct.

22 Q. And who in management was it your understanding made that

23 -

24 A. At that -

25 Q. - decision?

1 A. I'm sorry. At that time it was Sandy Gupta.

2 Q. Okay. So, Mr. Gupta - is it a Mr.?

3 A. Yes.

4 Q. Mr. Gupta told you at that point that the company had
5 made a decision to stay in its existing premises; is that
6 right?

7 A. That's correct.

8 Q. And for the reasons you just discussed, build-up costs,
9 moving costs, and so on.

10 A. In addition to relocation of staff. I mean the moving
11 and having staff commute to a new area was also a big factor
12 as well.

13 Q. Okay. So at that point, which was shortly after the
14 bankruptcy was filed, the company didn't make any further
15 efforts to negotiate with other potential landlords; is that
16 right?

17 A. That's correct.

18 Q. Okay. And the only negotiations, therefore, were with
19 the existing landlord.

20 A. That's correct.

21 Q. And when did those negotiations with the existing
22 landlord actually resume?

23 A. I honestly can't recall a specific date. It was probably
24 in the October time line.

25 Q. Somewhere in October.

1 A. Yeah.

2 Q. Uh-huh. The beginning of October or late October?

3 A. I would say mid-part of October.

4 Q. Mid-part of October, okay. When Mr. Gupta told you about
5 the company's decision to remain in the existing premises,
6 was there any discussion between you and him about how long
7 the company might continue in existence - Let me rephrase
8 that. That's a bad question. Did you discuss at all the
9 question whether you should push for a shorter renewal term
10 in light of the company's current circumstances of its being
11 in bankruptcy and facing adverse judgments from Novell?

12 A. We knew with the current landlord there was no option for
13 less than three years.

14 Q. So, you didn't make any further effort to discuss that
15 with the landlord after that?

16 A. It was discussed with the agent, Charlie, but he inferred
17 that there was no option for less than three.

18 Q. So, let me be really clear here. Just - Did you ask Mr.
19 Dillon to talk to the landlord about reducing the renewal
20 term from three years in light of the company's current
21 circumstances in late October or did you simply talk to him
22 about the issue and learn from him that he felt there would
23 be no point in doing that?

24 A. We spoke. He felt like there would no option in doing so
25 based on two factors: that we were up against our deadline of

1 terminating the lease and the fact that we had already
2 extended our lease by one year, previous year. So, it was
3 the landlord's understanding that we would renew on a, I
4 believe, I wasn't involved with that, but that we would renew
5 on a larger term lease based on the one-year extension
6 previous to the year.

7 Q. Okay. So it's your understanding that no further effort
8 was made with the landlord to induce the landlord to agree to
9 a shorter extension than three years?

10 A. Not directly.

11 Q. Okay. When you say "not directly", that implies to an
12 old salt that there something indirectly, you have something
13 else in mind. Can you tell us what that is if there is such
14 a thing?

15 A. When I say "not directly" is that with communications
16 between myself and the agent, it was just understood that it
17 wasn't an option to do less than three years.

18 Q. Okay.

19 A. So it was never directly communicated to the landlord
20 that it was a request.

21 Q. Okay. And to be clear, the debtor made no effort to find
22 other alternatives once the bankruptcy was filed, for
23 whatever reasons.

24 A. There was discussions but as far as actively pursuing any
25 open leases or available spaces, no.

1 Q. Okay. Now, one of the reasons in the proffer of
2 testimony for renewing this space was the lab space that you
3 needed and a couple of points about that Ms. Robson made as
4 part of your proffer were energy needs, electricity for the
5 lab space, and the specialized nature of the lab space; do
6 you recall that?

7 A. That's correct.

8 Q. And that's your testimony; right?

9 A. Yes.

10 Q. Okay. There were other reasons: where people were
11 located and so on. Given the company's current situation,
12 how much activity is going on at the lab space at the moment?

13 A. The facility holds, I believe, approximately 25
14 headcount. I believe 15 to 18 of those are current
15 engineers. Depending on their time at the office - the
16 engineers keep odd hours, so they're in there all the time,
17 whether the space and capacity of individuals within that
18 space, it's here and there. They're not all within the lab
19 at any one given time, so, they're going in and testing
20 different features or whatever the engineers may need those
21 testing systems and so forth.

22 Q. Could the debtors suspend any portion of their lab
23 activities for the present, while their Chapter 11 case
24 develops?

25 A. I probably can't testify whether that would be the case.

1 My understanding and communications previous to Sandy Gupta's
2 departure was it would be a major disruption and whether it
3 was for a short period or long term, it would severely damage
4 ongoing product improvements.

5 Q. Okay. So, is it your testimony that you had a discussion
6 with Mr. Gupta about the possibility of suspending some or
7 all of the activity at the lab for some short period of time
8 while the Chapter 11 case progressed?

9 A. It wasn't in relation to the Chapter 11 status. It was
10 in relation to the reduction of space or moving - potentially
11 moving equipment and space.

12 Q. Okay. And Mr. Gupta indicated to you that he felt that
13 that would damage the company's prospects if there was even a
14 brief suspension of activity?

15 A. Product development, yeah.

16 Q. I'm sorry.

17 A. On product development.

18 Q. On product development.

19 A. Yeah.

20 Q. Okay. And you mean by "product development" improvements
21 on the products?

22 A. That's correct.

23 Q. That you provide already?

24 A. That's correct.

25 Q. Okay. Now, you talked a little bit - or Ms. Robson for

1 you, talked a little bit about the convenience of the current
2 location for your current employees. In terms of siting,
3 what other alternatives were there for the company as a
4 result of your contacts with Mr. Dillon?

5 A. As far -

6 Q. Where would the other spaces - might the other spaces
7 have been located?

8 A. I believe we took a circumference of about five to ten
9 miles at the current location to try to minimize the impact
10 to the current employees.

11 Q. And were there other alternatives, all things being
12 equal, which they rarely are, within that five to ten miles
13 or was the current space the only space within that five to
14 ten miles?

15 A. Oh, there was - We toured 10, 12, to 18 properties that
16 day within that proximity of our requirements.

17 Q. Okay. Do you have any understanding as to where the
18 company's employees are located generally? Are they located,
19 for example, generally around, scattered around the current
20 location in a circle or to the east or to the west?

21 A. I honestly don't know.

22 Q. Okay. Who assessed the question of convenience for the
23 employees?

24 A. Sandy Gupta.

25 Q. Okay. Did he discuss that in any length with you or was

1 that simply a conclusion that he provided you that had to be
2 within 10 to 15 miles of the current site?

3 A. He had directly mentioned that it had to be within a
4 close proximity of the current facility in order to
5 accommodate the employees.

6 Q. Okay. But he didn't go into any further detail on that
7 subject with you?

8 A. Just to say that they needed to be within that certain
9 circumference of the current space.

10 Q. Okay.

11 MR. LEWIS: All right, Your Honor, I think I have no
12 further questions.

13 THE COURT: Thank you very much.

14 MS. ROBSON: We have no redirect, Your Honor.

15 THE COURT: Mr. McMahon, any questions?

16 MR. McMAHON: No, Your Honor.

17 THE COURT: Mr. Swenson, I have just one question.
18 In connection with the reduction in space that's contemplated
19 by the amended lease; is there a reduction in the lab space?

20 THE WITNESS: Currently as of today, no. There's a
21 - within the contract it does state that the current lab
22 space can be used in its entirety until the landlord so
23 chooses to demise that space and reduce our actual square
24 footage.

25 THE COURT: Okay.

1 THE WITNESS: But as far as staff in the vacated
2 space, they are now back into the reduced space, and we have
3 no staff working in the vacated space. We are just
4 occupying the entire lab of approximately 3,600 square feet,
5 and based on the landlord's request on demising for a new
6 tenant, that would reduce down to approximately 2,000 square
7 feet.

8 THE COURT: Thank you. All right.

9 MR. LEWIS: Nothing further, thank you, Mr. Swenson.

10 THE COURT: Thank you very much. You may step down,
11 sir. Argument.

12 MS. ROBSON: I think that the business judgment
13 standard has been met here. The company has presented
14 testimony that there's a benefit to the estate in terms of
15 reduced rent, reduced space, and that the decision process in
16 getting to the form of amended lease was an exercise of the
17 debtors' sound business judgment. Again, other factors that
18 militate in our favor are that, to the extent that we are
19 deemed a holdover tenant as of January 1st, we would be liable
20 for between one and a half to two times the current rent, not
21 the amended lease rent, but the current rent, which is
22 approximately \$44,000 in the New Jersey space, so that would
23 be approximately \$88,000 per month while we are in the
24 premises, and it would take approximately four months between
25 negotiating and finding new space let alone the moving

1 expenses, build-out costs, and other affiliated expenses.
2 Therefore, Your Honor, I think you should overrule Novell's
3 objection and grant our motion as proposed.

4 THE COURT: Thank you. Mr. Lewis.

5 MR. LEWIS: Thank you, Your Honor. First of all,
6 before I get into the merits of the motion as such, let me
7 just say, I'm not at all convinced that the New Jersey
8 holdover statutes tell us what the holdover rent would be. I
9 think it's an expensive administration, and it would be the
10 reasonable value of the premises, not what the statute says.
11 At least that's what - And I don't know what the answer there
12 would be, but I don't think you can assume it's two and a
13 half times or one and a half times the current rent or even
14 less for that matter. On the merits, Your Honor, I think
15 what we've heard is that although the debtor decided not to
16 continue to try and negotiate after April of last year
17 because of the cloud over its future, that is to say, because
18 it made no sense to make a major commitment given the cloud
19 over its future posed by the litigation between the debtor
20 and Novell. Once it lost that litigation and went into
21 bankruptcy, it was prepared to go ahead and resume
22 negotiations for a long-term extension. I mean it makes no
23 sense to me, Your Honor, that pre-petition, the cloud over
24 its future, which only was greater by the time mid-October
25 rolled around, a month after the bankruptcy was filed. The

1 cloud over its future was even greater than all of a sudden
2 it made sense to commit to three more years when it didn't
3 make sense to even continue negotiating pre-petition for
4 months after April, and furthermore, the debtor made no
5 effort - the testimony is this morning, made no effort
6 whatsoever to even think about other space and in fact made
7 no effort to do anything until mid-October knowing that the
8 space - that the expiration of the lease was rolling around,
9 that it's in Chapter 11, that it has fiduciary duties to its
10 creditors as well as to its shareholders to the extent that
11 there might be a surplus for the shareholders. You know, I
12 understand the limitations on the sound business judgment
13 test, that it's not particular exacting, but this is no
14 business judgment at all. In fact, it's contrary to the
15 business judgment that they made in April. So, while I
16 understand the dilemma everyone faces here in terms of where
17 they're going to be located, I don't understand how this is
18 an exercise of business judgment, and there are other issues
19 here, Your Honor. For example, we're talking about a Chapter
20 11 debtor accompanying some financial distress in a market
21 that's somewhat down for IP companies and software companies,
22 and yet the debtor set a parameter last April that it never
23 even reconsidered of trying to have space within 10 to 15
24 miles of the current space with the convenience of its
25 employees. Now, I'm in favor of the convenience of

1 employees. I've worked a long time myself, but when you're
2 in Chapter 11, you've got to think a little bit differently.
3 In fact, before you're in Chapter 11, when you're in
4 financial distress, you've got to think a little bit
5 differently about the world, and your employees have to think
6 a little bit differently about the world, not just continue
7 life as it was. It's just not the same situation anymore.
8 And yet the debtor has not done that. Hasn't done any of the
9 things you would expect with respect to this lease to do once
10 it was in financial distress because of the judgments and
11 then once it was in bankruptcy. And so, to see this as the
12 exercise of sound business judgment, I think, Your Honor, is
13 just contrary to the record to the witness's testimony. I
14 understand the problem of trying to find some alternative.
15 There was no real effort to assess, Well, can we suspend lab
16 activities for a few months while we see where this case goes
17 and then find some new space. It may well have been damaging
18 somewhat to the company's prospects, and, Your Honor, we were
19 not told that the lab has anything to do with current
20 operations. It only has to do with product development.
21 Well, if you're in financial distress sometimes you have to
22 suspend product development a little bit while you get your
23 house in order if you can. So, what we hear is, essentially,
24 life is as it always was. Life as it was before April of
25 2007, and indeed, if you hear the proffer of testimony, Your

1 Honor, we were told activities started in March of 2007. It
2 was left for the Court to infer that that went on all the way
3 through the bankruptcy, and this was the best we could do.
4 As the Court's now heard this morning, that's not what
5 happened at all. So, Your Honor, I submit that this does not
6 meet the sound business judgment test, and the debtor needs
7 to do what it can about finding some other space to put its
8 essential employees for the moment in until we know where
9 this case is going, because we don't know where this case is
10 going, and what's going to happen here is through this
11 decision and other decisions that are surely going to be like
12 it and already have been like it, for example, the sale
13 motion, we're going to be spending money in this case on an
14 administrative basis in boatloads, and there's going to be
15 nothing left for anybody at the end unless the debtor hits a
16 goldmine in the litigation with Novell, which the record
17 suggests is not going to happen, and that's a poor bet to
18 make for the creditors. And while my client, Novell,
19 obviously has an interest as a competing party on the IP
20 level, it is a creditor and it as a pretty big claim, and
21 it's likely to get bigger. Thank you, Your Honor.

22 THE COURT: Thank you. Ms. Robson.

23 MS. ROBSON: Your Honor, if I may just address a
24 couple of points -

25 THE COURT: Certainly.

1 MS. ROBSON: - as to those raised. The part about
2 the litigation having a cloud over what the debtors'
3 negotiations were going to be. I believe Mr. Swenson
4 clarified that that was just his interpretation of what the
5 reasons were to cease the negotiations at the time not that
6 that was the actual business reason. Again, there were _- I
7 believe Mr. Swenson also testified that no further efforts
8 were made with respect to New Jersey because they had
9 negotiated the terms with the landlord and determined that
10 that space, the current space, was the best suited for the
11 company based upon the circumstances, which not only included
12 convenience to the employees but also reduction in space,
13 reduction in rent, mitigation of, you know, or no moving
14 expenses being involved and no build-out costs. Mr. Lewis
15 also mentioned financial distress and that the market's down
16 for IP companies, but there's been no evidence of that, so,
17 that's just argument without any evidence to support that
18 statement. Mr. Swenson also testified that any suspension of
19 lab activities would be damaging. While there's no monetary
20 amount on that, that is a negative factor, and Mr. Swenson
21 also did testify that upon reviewing the premises in March
22 and going on the tour with the broker that you could tell
23 right away from viewing the premises whether it would be
24 suitable for the company's needs. So, while there was a
25 month or so negotiations there, then it ceased, and then

1 picking it up later a couple months down the road, there's no
2 reason to believe that circumstances would have changed so
3 much between the end of April and September after the case
4 was filed. Anyway, to the extent these leases are not
5 assumed or the assumption are not approved today, any new
6 lease by the debtor would be an administrative expense of the
7 estate. Mr. Swenson testified that he did not believe that
8 there would be - the company would be able to negotiate a
9 lease for less than a five-year term. There's no guarantee
10 that the rent for the amount of space required under any new
11 lease would be more favorable than what's currently been
12 negotiated, and as much as we hate to admit it, while the
13 company is in bankruptcy, landlords may be more hesitant to
14 rent to a client in bankruptcy. So, they may require maybe
15 more onerous deposits, letter of credit, and the like, which
16 is not required under the current lease as amended. Thank
17 you, Your Honor.

18 THE COURT: Thank you. Mr. Lewis, sir -

19 MR. LEWIS: Your Honor, if I may just -

20 THE COURT: You may, certainly.

21 MR. LEWIS: - address a couple very brief remarks.
22 First of all - and they're really related. The idea that -
23 Mr. Swenson testified, that there was no chance to change
24 what the landlord wanted. That may have been true. Why not
25 try? And that relates to the second point. Regardless of

1 what the company's reasons were for ceasing its efforts in
2 April, and it seems pretty obvious what they were, the fact
3 is, it didn't turn to what it must have known as a debtor in
4 possession was a crucial issue the moment it filed its
5 bankruptcy. It filed its bankruptcy with a lot of first day
6 motions. It was pretty well prepared going in to its
7 bankruptcy case, but evidently it didn't both to think about
8 its lease for another month, and the landlord might have been
9 more interested in some kind of adjusted deal right away
10 facing a debtor in possession than it faced when negotiations
11 began again, and they weren't even negotiations, in the
12 middle of October, a month and a half before the lease
13 expired. It's just not an exercise of business judgment,
14 Your Honor. It may be in the end it's what the debtor is
15 stuck with. I certainly hope not because I certainly hope
16 there are alternatives that could be explored, but it's not
17 an exercise of business judgment. It's an exercise of
18 business neglect in my view. Thank you, Your Honor.

19 THE COURT: Thank you very much, Mr. Lewis. You
20 know, normally an issue relating to a headquarters lease is
21 not very hotly contested in a bankruptcy case, particularly
22 where a debtor has occupied the particular space for some
23 time and is already up and running there, and we all know
24 both in business and personally, the expenses attendant to
25 moving and the disruption to business of moving and

1 everything of that nature. Here we have a difficult
2 situation because it's obvious that our debtor is undergoing
3 some difficulty, but I think to make a judgment that the
4 debtor's operations will not continue to improve, that there
5 is not a reasonable likelihood of success in the litigation
6 that is pending with Novell, which obviously the debtor is
7 highly dependent upon, would be, I think, inappropriate for
8 the Court to make such a judgment at this time. And it isn't
9 my job to make an assessment of whether the debtor has done
10 the best it could or if there's a better deal out there to be
11 had. It's not, obviously, the Court's role under all of the
12 cases to substitute its judgment for the debtor's, but simply
13 to make an assessment based upon the facts as to whether or
14 not the debtor has acted within a range of reason which the
15 Court could then decide satisfies that business judgment
16 test, which is a very liberal test as we all know for a
17 debtor to satisfy. So, here I am satisfied, based upon Mr.
18 Swenson's testimony, that the debtor made significant efforts
19 to explore alternatives and that the - although everyone
20 perhaps would have liked to have had a shorter term, the fact
21 that there is a reduction of space and a reduction of rent
22 for that space, is evidence that the debtor made a
23 substantial effort and has reduced the estate's exposure, and
24 on the basis of the testimony, the facts presented, and the
25 standards that the law imposes, I am prepared to approve the

1 debtor's motion on the amended lease for the New Jersey
2 property.

3 MR. LEWIS: Your Honor, just -

4 THE COURT: Mr. Lewis.

5 MR. LEWIS: - a quick note.

6 THE COURT: Please.

7 MR. LEWIS: I'm not making this point in the hopes
8 the Court will change its ruling, but the headquarters lease
9 is the Utah lease. There is no objection on the Utah lease.

10 THE COURT: Exactly.

11 MR. LEWIS: We're comfortable with that.

12 THE COURT: And this is more - But this is, the
13 other - I appreciate that.

14 MR. LEWIS: I'm really not trying to get the Court
15 to reconsider. I just wanted the record to be clear on this
16 point. It is the headquarters lease that we have not objected
17 to based upon what was negotiated there.

18 THE COURT: The Utah headquarters and, of course,
19 the New Jersey property is the second, if you will, operation
20 site of the company.

21 MR. LEWIS: Yes.

22 THE COURT: And I thank you for that -

23 MR. LEWIS: Thank you, Your Honor.

24 THE COURT: - for that clarification. And I
25 misspoke. So, Ms. Werkheiser, if you have a form of order,

1 I'm prepared to enter it.

2 MS. WERKHEISER: May I approach?

3 THE COURT: Yes, you may. Anything further?

4 Counsel, thank you very much.

5 MR. LEWIS: Thank you very much, Your Honor.

6 THE COURT: And I wish you a good day. Thank you.

7 We stand in recess.

8 (Whereupon at 10:49 a.m., the hearing in this
9 matter 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 January 10, 2008
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