B256 (Form 256 – Subpoena in a Case under the Bankruptcy Code) (12/07)

# UNITED STATES BANKRUPTCY COURT

District of Delaware

In re The SCO GROUP, INC,., et al.,
Debtor

**SUBPOENA IN A CASE UNDER THE BANKRUPTCY CODE**

Case No. * 07-11337

Chapter 11

To: unXis, Inc.
c/o Corporation Service Company
2711 Centerville Road, Suite 400
Wilmington DE, 19808

☐ YOU ARE COMMANDED to appear in the United States Bankruptcy Court at the place, date, and time specified below to testify in the above case.

| PLACE OF TESTIMONY | COURTROOM |
|---|---|
| | DATE AND TIME |

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

| PLACE OF DEPOSITION (See Schedule A hereto) | DATE AND TIME |
|---|---|
| Potter Anderson & Corroon LLP, Hercules Plaza, 1313 North Market Street, Wilmington, DE 19801 | July 15, 2009 9:00 am |

(The deposition will be recorded by stenographic and audiovisual means.)

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): (See Schedule B hereto)

| PLACE | DATE AND TIME |
|---|---|
| Potter Anderson & Corroon LLP, Hercules Plaza, 1313 North Market Street, Wilmington, DE 19801 c/o Laurie Selber Silverstein, Esq. | July 13, 2009 9:00 am |

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

| PREMISES | DATE AND TIME |
|---|---|
| | |

Any organization not a party to this proceeding that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Rule 30(b)(6), Federal Rules of Civil Procedure, made applicable in bankruptcy cases and proceedings by Rules 1018, 7030, and 9014, Federal Rules of Bankruptcy Procedure.

| ISSUING OFFICER SIGNATURE AND TITLE | DATE |
|---|---|
| Laurie Selber Silverstein | 7/6/09 |

ISSUING OFFICER'S NAME, ADDRESS, AND PHONE NUMBER
Laurie Selber Silverstein, Esq., Potter Anderson & Corroon LLP, Hercules Plaza, 1313 North Market Street, Wilmington, DE 19801 (302) 984-6000 (counsel for International Business Machines Corporation).

* If the bankruptcy case is pending in a district other than the district in which the subpoena is issued, state the district under the case number.

## PROOF OF SERVICE

| | | |
|---|---|---|
| UNXIS, INC<br>SERVED | DATE<br>7/6/09 | PLACE<br>2711 CENTERVILLE RD<br>WILM DE 19808 |

| | |
|---|---|
| SERVED ON (PRINT NAME)<br>MARY DRUMMOND | MANNER OF SERVICE<br>By HAND AT 4:35 PM |
| SERVED BY (PRINT NAME)<br>JOHN A GARBER | TITLE<br>PROCESS SERVER |

## DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on 7-6-09
DATE

SIGNATURE OF SERVER

230 N MARKET ST, WILM DE 19801
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Subdivisions (c), (d), and (e), as amended on December 1, 2007, made applicable in cases under the Bankruptcy Code by Rule 9016, Federal Rules of Bankruptcy Procedure:

(c) Protecting a Person Subject to a Subpoena.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt.

The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

## Schedule A

## Subject Matters of Testimony

**TOPIC NO. 1**

The proposed sale to unXis by debtors of their assets.

**TOPIC NO. 2**

Communications between/among debtors (or anyone representing or affiliated with debtors) and unXis, Stephen Norris or Stephen Norris Capital Partners (or anyone representing or affiliated with them).

**TOPIC NO. 3**

Offers or bids to acquire, or expressions of interest in acquiring, any or all of debtors' assets.

**TOPIC NO. 4**

Debtors' financial and other performance since 2003.

**TOPIC NO. 5**

Debtors' efforts toward, and prospects for, rehabilitation.

**TOPIC NO. 6**

Any valuation of debtors and/or any of their assets.

**TOPIC NO. 7**

Debtors' litigations with IBM, Novell, Red Hat, and AutoZone.

**TOPIC NO. 8**

Any document produced to IBM in connection with the subpoena to which this Schedule A is attached.

## Definitions

1. The term "AutoZone" shall mean AutoZone, Inc., and any affiliated entities.

2. The term "communication" shall mean any transmittal of information, whether oral or written, including correspondence, electronic mail and other internet transmissions, web pages, Internet Relay Chat logs, telex, facsimile transmissions, telecopies, recordings in any medium of oral communication, telephone and message logs, notes or memoranda relating to written or oral communications.

3. The term "concerning" shall mean relating to, referring to, reflecting, describing, evidencing, referencing, discussing or constituting.

4. The term "debtors" shall mean and include, collectively and/or individually, The SCO Group, Inc., and SCO Operations, Inc.

5. The term "document" shall be synonymous in meaning and usage to the broadest scope of the term used in Rule 34(a) of the Federal Rules of Civil Procedure. The term "document" shall include without limitation all written, phonic, graphic or recorded matter, including without limitation, information stored on computers, disks, tapes (i.e., magnetic or other storage media), World Wide Web pages, electronic mailing lists or automated fax support systems. The term "document" specifically includes electronic mail, electronic correspondence, or electronic peer-to-peer messages ("e-mail") and any attachments and files created and maintained in electronic form in the normal course of business.

6. The term "IBM" shall mean and include, collectively and/or individually, International Business Machines Corporation and all its directors, officers, authorized agents, employees, consultants, attorneys, sales representatives, distributors,

dealers, direct and indirect contractors, entities that were acquired by or merged with IBM, subsidiaries of IBM, and/or all other persons acting on behalf of IBM.

7. The term "include" or "including" shall mean including without limitation.

8. The term "Novell" shall mean Novell, Inc., and any affiliated entities.

9. The term "person" refers to natural persons or all private or public entities.

10. The term "Red Hat" shall mean Red Hat, Inc., and any affiliated entities.

11. The term "rehabilitation" shall have the same meaning as is understood for the word as used in 11 U.S.C. § 1112(b)(1).

12. The term "sale motion" shall mean debtors' motion for authority to sell property outside the ordinary course of business.

13. The term "Stephen Norris Capital Partners" shall mean Stephen Norris & Co. Capital Partners, L.P., and any affiliated entities.

14. The term "unXis" shall mean unXis, Inc., and any affiliated entities.

## Schedule B

## Documents to be Produced

**REQUEST NO. 1**

All documents concerning the proposed sale to unXis by debtors of their assets.

**REQUEST NO. 3**

All documents concerning communications between/among debtors (or anyone representing or affiliated with debtors) and unXis, Stephen Norris or Stephen Norris Capital Partners (or anyone representing or affiliated with them).

**REQUEST NO. 4**

All documents concerning offers or bids to acquire, or expressions of interest in acquiring, any or all of debtors' assets.

**REQUEST NO. 5**

All documents concerning debtors' financial and other performance since 2003.

**REQUEST NO. 6**

All documents concerning debtors' efforts toward, and prospects for, rehabilitation.

**REQUEST NO. 7**

Any valuation of debtors and/or any of their assets.

**REQUEST NO. 8**

All documents concerning debtors' litigation with IBM, Novell, Red Hat, and AutoZone.

## Definitions and Instructions

### A. Definitions

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14. The term "unXis" shall mean unXis, Inc., and any affiliated entities.

**B. <u>Instructions</u>**

1. Each paragraph should herein be construed independently and, unless otherwise directed, without reference to any other paragraph for the purpose of limitation.

2. The use of any definition for the purposes of this request shall not be deemed to constitute an agreement or acknowledgment on the part of IBM that such definition is accurate, meaningful or appropriate for any other purpose in this action.

3. Unless otherwise specified, the documents requested are the responsive documents in the possession, control or custody of the producing party that were prepared, written, sent, dated, received, applicable or in effect at any time up to the date of the producing party's compliance with this demand.

4. Each requested document shall be produced in its entirety. If a document responsive to any request cannot be produced in full, it shall be produced to the extent possible with an explanation stating why production of the remainder is not possible.

5. Each page or sheet produced by the producing party is to be marked with a consecutive document control number.

6. All documents produced in response to these requests shall be produced in the same order as they are kept or maintained in the ordinary course of business and, where multiple pages or documents are assembled, collated, grouped, or otherwise attached, shall not be separated or disassembled.

7. With respect to any document responsive to this request that is withheld from production based upon a claim of privilege, please provide the information required pursuant to Rule 26(b)(5) of the Federal Rules of Civil Procedure.

8. If, for reasons other than a claim of privilege, you refuse to produce any document requested herein, state the grounds upon which the refusal is based with sufficient specificity to permit a determination of the propriety of such refusal.

9. If there are no documents responsive to any paragraph or subparagraph set forth in the requests, please provide a written response so stating.

10. This request is a continuing one and, pursuant to Rule 26(e) of the Federal Rules of Civil Procedure, requires further and supplemental production by the producing party as and whenever that producing party acquires, makes or locates additional documents between the time of the initial production hereunder and the time of the trial in this action.