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UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE
Case No. 07-11337 (kg)

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In the Matter of:

THE SCO GROUP, INC., et al.

Debtors.

- - - - -x

United States Bankruptcy Court
824 North Market Street
Wilmington, Delaware

March 2, 2011

2:07 PM

B E F O R E:
HON. KEVIN GROSS
U.S. BANKRUPTCY JUDGE

ECR OPERATOR: GINGER MACE

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HEARING re Motion of the Chapter 11 Trustee for Order (1) Authorizing the Marketing, Auction and Sale of Substantially all of the Debtors Software Business Assets Consistent with Form Asset Purchase Agreement and Free and Clear of Liens, Claims and Encumbrances, (2) Authorizing Assumption, Assignment, and Sale of Certain Executory Contracts and Unexpired Leases, (3) Approving Bidding Procedures in Connection with Auction, (4) Establishing Sale Hearing Date and (5) Granting Related Relief

Transcribed by: Hana Copperman

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A P P E A R A N C E S :

BLANK ROME LLP

BY: BONNIE G. FATELL, ESQ.

STANLEY TARR, ESQ.

LISA CASEY SPANIEL, ESQ.

EDWARD N. CAHN, ESQ. (TELEPHONICALLY)

REPRESENTING: Edward N. Cahn, Chapter 11 Trustee

YOUNG CONAWAY STARGATT & TAYLOR, LLP

BY: SEAN T. GREECHER, ESQ.

REPRESENTING: Novell, Inc. and SUSE GmbH

MORRISON & FOERSTER LLP

BY: ADAM LEWIS, ESQ.

REPRESENTING: Novell, Inc. and SUSE GmbH

U.S. DEPARTMENT OF JUSTICE

BY: JULIET SARKESSIAN, ESQ.

REPRESENTING: Office of the United States Trustee

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POTTER ANDERSON & CORROON LLP

BY: R. STEPHEN MCNEILL, ESQ.

REPRESENTING: IBM Corp.

MEIER & FINE, LLC

BY: MARILYN FINE, ESQ. (TELEPHONICALLY)

REPRESENTING: Richard Bolandz

DAY PITNEY LLP

BY: AMISH R. DOSHI, ESQ. (TELEPHONICALLY)

REPRESENTING: Creditor, Oracle America, Inc.

ALLEN & OVERY, LLP

BY: LISA KRAIDIN, ESQ. (TELEPHONICALLY)

PHILIP D. LEE, ESQ. (TELEPHONICALLY)

REPRESENTING: Special Counsel to the Canadian Nortel Group

SCO

BY: RYAN TIBBITS, ESQ. (TELEPHONICALLY)

REPRESENTING: SCO

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ALSO APPEARING:

ADAM MEISLIK (TELEPHONICALLY)

ALAN P. PETROFSKY (TELEPHONICALLY) In Pro Per/Pro Se

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P R O C E E D I N G S

THE COURT: Good afternoon, everyone. Thank you and please be seated.

UNIDENTIFIED SPEAKER: Good afternoon, Your Honor.

THE COURT: It's good to see all of you.

MR. TARR: Good afternoon, Your Honor. For the record, Your Honor, Stanley Tarr of Blank Rome.

THE COURT: Yes, Mr. Tarr.

MR. TARR: On behalf of the Chapter 11 Trustee. Your Honor, the trustee, Edward N. Cahn, is participating in today's hearing telephonically.

THE COURT: All right. Mr. Cahn.

THE COURT: Good afternoon, Judge.

MR. CAHN: Good afternoon, sir.

MR. TARR: I'm joined in the courtroom by my colleagues at Blank Rome, Bonnie Fatell and Lisa Casey Spaniel. From SCO, Your Honor, in the courtroom is a declarant, Bill Broderick, and on the phone is SCO's general counsel, Ryan Tibbits. From Ocean Park Advisors, the trustee's financial advisors, we're joined in the courtroom by another declarant, Bruce Comer. And, finally, Your Honor, from the buyer, UnXis, Richard Bolandz is also in the courtroom.

THE COURT: Thank you. Good afternoon, everyone. And, Mr. Lewis?

MR. TARR: And I'm sorry, and I should --

1 THE COURT: Oh, I'm sorry, Mr. Tarr.

2 MR. TARR: And I should mention his attorney is also
3 present on the phone as well.

4 THE COURT: Thank you, Mr. Tarr. Mr. Lewis, good to
5 see you again. Mr. Greecher.

6 MR. LEWIS: Thank you, Your Honor. Adam Lewis of
7 Morrison & Foerster and Sean Greecher of Young Conaway for
8 Novell.

9 THE COURT: Yes. Thank you, sir. Welcome back.

10 MR. LEWIS: Thank you, Your Honor. It's a pleasure to
11 be here.

12 THE COURT: It's good to have you here.

13 MR. TARR: Well, Your Honor, the trustee, his
14 professionals, debtors' management and the buyer are all glad
15 to finally be here in front of Your Honor --

16 THE COURT: Yes.

17 MR. TARR: -- on this matter and trust that you're
18 feeling better.

19 THE COURT: Coming along. It's been a tough couple of
20 months, I must say, but we're getting there. Thank you.

21 MR. TARR: Terrific. Your Honor, if I may, the only
22 matter on today's agenda is the trustee's motion for an order
23 authorizing the sale of substantially all of the debtors'
24 software business assets and authorizing the assumption,
25 assignment and sale of certain executory contracts and

1 unexpired leases.

2 THE COURT: Yes.

3 MR. TARR: Your Honor, I propose that the presentation
4 of the trustee's motion proceeds as follows. A brief history
5 of background regarding this Chapter 11 cases, the proffer of
6 Mr. Comer's testimony regarding the sale process, although he
7 is available in the courtroom if necessary.

8 THE COURT: All right.

9 MR. TARR: Mr. Comer's proffer will be followed by my
10 colleague, Bonnie Fatell, who will offer the declaration of
11 Richard Bolandz from the buyer. After the presentation, with
12 respect to Mr. Bolandz, Ms. Fatell will offer Bill Broderick,
13 another declarant, for direct examination. And then, Your
14 Honor, Ms. Fatell will address the Novell objection.

15 THE COURT: All right.

16 MR. TARR: If that's an acceptable course to Your
17 Honor I will continue.

18 THE COURT: That is acceptable, certainly, Mr. Tarr,
19 and are there any objections outstanding other than Novell's at
20 this point?

21 MR. TARR: There are, and if it pleases the Court I'll
22 get to that in turn.

23 THE COURT: Okay. Very well.

24 MR. TARR: Thank you.

25 MR. DOSHI: Your Honor, on the phone, may I be heard

1 for a moment?

2 THE COURT: Who is this?

3 MR. DOSHI: Your Honor, Amish Doshi on behalf of
4 Oracle America, Inc. In response to Your Honor's inquiry I
5 think our -- Oracle's objections and reservation of rights --
6 we have reached an agreement, and before moving into what
7 appears to be a contested hearing I was just wondering if we
8 can have our agreement on the record, and if it's acceptable to
9 Your Honor if I can be excused, assuming it's acceptable to
10 Your Honor.

11 THE COURT: Let me ask Mr. Tarr if that's acceptable
12 to you in your presentation.

13 MR. TARR: Your Honor, that's fine. What I can do is
14 give the status of objections that are non-Novell --

15 THE COURT: All right.

16 MR. TARR: -- and allow for administrative, I guess,
17 convenience for others on the phone to, perhaps, leave.

18 THE COURT: Absolutely. Let's do that, Mr. Tarr.
19 Thank you for your flexibility.

20 MR. TARR: Terrific. With respect to Oracle, Your
21 Honor, Oracle filed a reservations of rights and an objection
22 to the notice of cure amounts. Both were filed on the docket.
23 Although the trustee has not been able to completely resolve
24 all of the concerns asserted by Oracle prior to today's hearing
25 trustee expects to do so prior to closing. In any event, the

1 Trustee and Oracle have reached the following agreement with
2 respect to Oracle's reservation of rights and the objection,
3 and I had indicated to counsel for Oracle that I would read it
4 into the record if that's okay, Your Honor.

5 THE COURT: Absolutely.

6 MR. TARR: The agreement is as follows.

7 "First, Oracle's reservation of rights shall remain in
8 place until further agreement or Court order.

9 Second, to the extent the trustee and the buyer
10 receive Oracle's consent to the transfer of any agreements
11 prior to closing such consent would be included as part of this
12 Court's record, pursuant to a certification of counsel.

13 Third, if the Oracle agreements are not transferred to
14 the buyer prior to closing they shall remain with the estate
15 subject to the trustee's rights to seek to assume or reject in
16 the future."

17 And, finally, Your Honor,

18 "If the trustee believes it has a basis for
19 transferring any Oracle agreements to the buyer over Oracle's
20 objection the trustee shall seek Court approval prior to
21 transfer of any such agreement to the buyer."

22 That's the agreement.

23 THE COURT: All right. Mr. Doshi?

24 MR. DOSHI: Your Honor, just two clarifications, Your
25 Honor, and, obviously, all of Oracle's rights are reserved to

1 the extent any further Court order or motion is filed. And,
2 just to clarify, Oracle America, it also includes -- it's part
3 of successors in interest, because Oracle America is a
4 successor to, among others, Oracle USA, Oracle Corporation, BEA
5 Systems, Inc. and Sun Microsystems.

6 THE COURT: All right. Mr. Tarr, I assume those are
7 acceptable modifications.

8 MR. TARR: Absolutely. That's our understanding, Your
9 Honor.

10 THE COURT: All right. All right, Mr. Doshi.

11 MR. DOSHI: Thank you. May I be excused, Your Honor?

12 THE COURT: You certainly may.

13 MR. DOSHI: Thank you.

14 THE COURT: Good day to you.

15 MR. TARR: The second objection, Your Honor, was an
16 objection filed by EMC Corp. as to the notice of cure amounts.
17 I'm not sure if anyone's on the phone. The trustee has
18 resolved the objection with EMC in any case. The Office of the
19 General Counsel for EMC has stated that they don't wish to
20 terminate the source code agreement with the debtors, and,
21 therefore, there is no objection to assumption and assignment.

22 THE COURT: All right. I don't see anyone on the
23 phone for EMC. Anyone on the phone for EMC? All right. Thank
24 you, then, Mr. Tarr.

25 MR. TARR: Okay. Then with respect to, Your Honor,

1 Canadian Nortel Group, Your Honor, a reservation of rights was
2 filed by the Canadian Nortel Group. In the reservation Nortel
3 states that it has no objection to the proposed cure amount or
4 to any contemplated assumption or assignment. However,
5 Canadian Nortel Group reserves its right under applicable law
6 and within their own Canadian proceedings to repudiate any
7 agreements in the future. Accordingly, the trustee notes the
8 reservation on the record but believes no issues remain
9 outstanding.

10 THE COURT: All right. Does anyone for Nortel wish to
11 be heard?

12 MS. KRAIDIN: Good afternoon, Your Honor. It's Lisa
13 Kraidin from Allen & Overy on behalf of the Canadian Nortel
14 Group.

15 THE COURT: Ms. Kraidin, good to talk to you.

16 MS. KRAIDIN: Nice to talk to you as well. I don't
17 think that we have anything further to say because our papers
18 do say it all, and Mr. Tarr has reflected what is in the
19 papers. So, for the record, we do not object to the proposed
20 cure amount, but, as Mr. Tarr said and as we've stated, the
21 Canadian Nortel Group does reserve all rights under applicable
22 law and in its own Canadian insolvency proceedings to repudiate
23 any of the agreements in the future.

24 THE COURT: All right. Yes. I've heard of that case.

25 MS. KRAIDIN: I think you have.

1 THE COURT: Well, thank you, Ms. Kraidin. I don't
2 know. You're welcome to be excused or you're welcome to remain
3 on the phone.

4 MS. KRAIDIN: I think I will be excused then. Thank
5 you very much.

6 THE COURT: All right. Good to hear from you. Thank
7 you.

8 MS. KRAIDIN: Sure.

9 THE COURT: Bye-bye now.

10 MR. TARR: Terrific. Your Honor, the next objection
11 was filed by Hewlett-Packard. Your Honor, Hewlett-Packard's
12 objection is resolved in connection with an insertion of
13 language into a paragraph in the sale order. So if it's okay
14 with Your Honor we'll note the specific language at the
15 appropriate time.

16 THE COURT: Okay.

17 MR. TARR: Lastly, Your Honor, is the matter of
18 Dinkumware. The letter was included in the binder --

19 THE COURT: Yes.

20 MR. TARR: -- that Your Honor received. I'm unaware if
21 Dinkumware is represented in court today or on the phone.

22 THE COURT: I don't see anyone on my list. Is anyone
23 here for Dinkumware? No.

24 MR. TARR: Okay. Well, Your Honor, Dinkumware had
25 sent a letter to trustee's counsel, which, as I indicated, was

1 provided to the Court. The letter indicated that the debtors,
2 that there was a certain agreement with the debtors that had
3 been terminated on May 7, 2001. The debtors have investigated
4 Dinkumware's claim and responded to Dinkumware evidencing the
5 fact that the agreement was never terminated. There is no
6 valid cure objection, as the amounts under the agreement were
7 paid in advance, and Dinkumware has only raised an objection in
8 speaking with the debtors' management based upon an ipso facto
9 provision in the agreement, which they believe allows them to
10 terminate the agreement solely upon knowledge that a licensee,
11 i.e. the debtors, has filed a bankruptcy petition. As this
12 Court is well aware, Bankruptcy Code Section 365(e)(1) does not
13 allow such a conclusion. Accordingly, we would ask that this
14 Court overrule this objection, absent the assertion of a valid
15 objection at this point.

16 THE COURT: All right. Anyone wish to be heard? I
17 know no one has indicated that they're representing Dinkumware,
18 but this is your opportunity. I have the read the objection.
19 I understand the debtors' position, and I will overrule their
20 objection.

21 MR. TARR: Thank you, Your Honor. That concludes,
22 again, the non-Novell objections, unless there is someone else
23 present in the court or on the phone.

24 THE COURT: Anyone else? All right. Thank you, Mr.
25 Tarr. Thank you for taking care of these expeditiously, and

1 now we can proceed, I think, with the main show for the day.

2 MR. TARR: Sure. As I indicated previously, Your
3 Honor, the only matter on today's agenda is the sale motion.
4 As Your Honor is aware, the trustee seeks the relief requested
5 in the sale motion pursuant to Bankruptcy Code Sections 363 and
6 365. The trustee believes that there is a sound business
7 purpose for the relief sought, that the proposed sale price is
8 fair, that the trustee has provided adequate and reasonable
9 notice, and that the buyer, UnXis, has acted in good faith.

10 Accordingly, Your Honor, the trustee believes that the
11 evidence presented today, together with the declarations filed
12 in support of the sale motion, meet the standard for granting
13 the relief requested by the sale motion and believes that the
14 transaction before this Court is within the discretion of the
15 trustee's business judgment.

16 If I may beg this Court's indulgence I will spend a
17 few minutes going through the certain context that preceded the
18 filing of the sale motion.

19 THE COURT: Certainly, Mr. Tarr.

20 MR. TARR: As this Court is aware and as described in
21 paragraphs 7 to 12 of the sale motion in early 2004 the SCO
22 Group, Inc. commenced a slander of title action in the District
23 Court for the District of Utah, arising from Novell, Inc.'s
24 public claims that it, rather than SCO, owns the copyrights to
25 technology underlying the UNIX operating system. Thereafter,

1 Novell asserted counterclaims and SCO added new claims against
2 Novell. Following competing motions for summary judgment, on
3 August 10, 2007 the Utah District Court issued an opinion
4 granting summary judgment that severely limited SCO's case
5 against Novell. SCO appealed the District Court's decision to
6 the Tenth Circuit Court of Appeals, and on August 24, 2009 the
7 Tenth Circuit affirmed in part, reversed in part, and remanded
8 for trial on the remaining issues.

9 Pursuant to the Tenth Circuit's remand a jury trial
10 was held in Utah District Court between March 8, 2010 and March
11 26, 2010. On June, 2010 the District Court issued its
12 memorandum decision, an order denying SCO's renewed motion for
13 judgment as a matter of law or, in the alternative, for a new
14 trial, as well as its findings of fact and conclusions of law.

15 Finally, Your Honor, as noted in the sale motion, the
16 debtors have filed an appeal of that ruling in the Tenth
17 Circuit.

18 The trustee and his professionals were aware that the
19 outcome of a jury trial would have a material effect on the
20 valuation of the debtors' software business assets. At the
21 same time, it was critical for the trustee to stabilize the
22 cash flow of the debtors' business, with the aid of post-
23 petition financing, which was approved by this Court, and the
24 restructuring implemented by the trustee's professionals.

25 By May, 2010, May of last year, the trustee, through

1 his professionals, knew that the debtors had a long enough
2 runway to run a sale process and OPA was instructed -- again,
3 the financial advisors for the trustee -- OPA was instructed to
4 proceed on that path.

5 Although Mr. Comer's testimony will provide more
6 detail, if I could just provide some summary points, Your
7 Honor. The sale motion was filed on August 9th of 2010. On
8 August 23, 2010 this Court entered the sale procedures order
9 authorizing the marketing, auction and sale of substantially
10 all of the debtors' software business assets.

11 Pursuant to the sale order a copy of such order was
12 served on the U.S. Trustee's Office, counsel for the lenders
13 under the credit agreement, any person who has entered an
14 appearance or requested notice in these cases, all entities
15 known to have expressed interest in a transaction for the
16 software business assets within the year prior, all entities
17 known to have a present interest in such assets as of the date
18 of the sale procedures order, all regulatory and taxing
19 authorities with an interest in the software business assets,
20 all parties to executory contracts, all known unsecured
21 creditors of the debtors, and all persons or entities entitled
22 to receive notice pursuant to bankruptcy rules, local rules and
23 other applicable law.

24 Also, Your Honor, pursuant to the sale procedures
25 order, initial milestone dates were established. An initial

1 bid deadline of October 5, 2010, the initial auction date,
2 which, if necessary, was scheduled for October 25, 2010, and
3 the initial sale hearing, which was scheduled for November 8th.
4 On or before October 15th, pursuant to the sale procedures
5 order, the debtor served cure notices with respect to the
6 debtors' intent to assume and assign parties' contract and a
7 proposed cure amount, if any, to all the necessary parties.

8 On January 6th the trustee filed modified bid
9 procedures to set the final bid deadline for January 14, 2011.
10 In that order, Your Honor, the minimum amount for deposit was
11 raised to 100,000 dollars, and the final auction date was
12 scheduled for January 19th.

13 Consistent with the modified bidding procedures
14 contract parties were given notice of the highest bidder by
15 January 21, and a modified APA was filed on the docket by
16 January 24th. The modified bidding procedures also set
17 February 7, 2011 at 4 p.m. as the objection deadline for all
18 objections to the transactions, generally, and any objections
19 based on the grounds that a contract counterparty has not
20 received adequate assurance of future performance with respect
21 to an assumed contract.

22 Unless the Court has questions at this juncture, Your
23 Honor, I would move to proffer the testimony of W. Bruce Comer,
24 III relating to the sale process conducted by the trustee.

25 THE COURT: Is there any objection to proceeding by

1 proffer, Mr. Lewis?

2 MR. LEWIS: No, Your Honor. I'd like to examine Mr.
3 Comer, but absolutely not.

4 THE COURT: All right. Thank you. That's fine. All
5 right. Thank you, Mr. Tarr. You may proceed with the proffer.

6 MR. TARR: Thank you. Your Honor, Bruce Comer is
7 present in the court today and if called to testify would
8 testify as follows. He is the founder and a managing director
9 of Ocean Park Advisors, LLC, a position which he has held since
10 2004. He has broad experience in the software and technology
11 industry, including as an adviser, investor and in mergers and
12 acquisitions. OPA was retained by the trustee as financial
13 advisor and investment bankers as of September 15, 2009. In
14 that capacity he is familiar with the debtors' day-to-day
15 operations, business and financial affairs.

16 In May, 2010, OPA began gathering information from the
17 debtors to commence marketing the debtors' assets and software
18 business assets, and by authorization of the trustee the formal
19 marketing of the debtors' software business assets started on
20 July 19, 2010.

21 Prior to commencement to the marketing of such assets
22 OPA, in conjunction with the debtors' management and counsel
23 for the trustee, prepared a brief marketing summary, a teaser,
24 a confidential information memorandum, a list of potential
25 purchasers and a data room for potential purchasers to conduct

1 due diligence.

2 Mr. Comer would further testify that OPA worked with
3 the debtors to prepare and place public notices of the sale of
4 the debtors' software business assets, including a press
5 release announcing the sale on September 17, 2010, a legal
6 notice in The Salt Lake Tribune, Desert News and utahlegals.com
7 during the week of September 17th through the 23rd, 2010, and a
8 quarter-page color advertisement in the September 27, 2010
9 issue of Computerworld. A lot of numbers there.

10 In discussion with the debtors' management and
11 industry contacts OPA developed a list of over 100 potential
12 bidders that included strategic buyers as well as private
13 equity investors. OPA and the debtors' management ensured that
14 bidders who participated or expressed interest in the debtors'
15 prior sale process or processes were included. OPA sent
16 teasers to 107 parties, of which 78 were potential bidders and
17 the rest were so-called intermediaries. OPA directly contacted
18 via telephone or electronic mail ninety-three potential bidders
19 about their interest in acquiring the debtors' software
20 business assets.

21 Throughout the five month period of marketing efforts
22 the debtors entered into eighteen non-disclosure agreements
23 with interested parties.

24 OPA engaged in discussions with all parties that had
25 submitted a bid by the initial bid deadline of October 5, 2010

1 or had indicated that they were close to submitting a bid.
2 Neither of the bids received by that date, Your Honor, the
3 initial bid deadline, was acceptable or qualified.

4 Accordingly, the trustee and his professionals
5 determined that it would be best to extend the initial bid
6 deadline a few days, until October 11th, in order to have
7 qualified bids for the auction. By the second bid deadline OPA
8 had received five preliminary and, I stress, unqualified bids.
9 The initial auction date was adjourned, and from mid-October
10 through late December of 2010, a so-called extended marketing
11 period, OPA attempted to clarify and qualify the bidders. In
12 consultation with the trustee, during the extended marketing
13 period OPA attempted to contact every party that had initially
14 signed an NDA and had completed some amount of diligence but
15 who had not submitted bids by the second bid deadline.
16 Throughout the extended marketing period OPA continued to
17 search for other potential bidders beyond the initial list of
18 potential purchasers. OPA was receptive to unsolicited calls
19 from all parties who had contacted the debtors about its
20 assets. Some of those parties conducted additional diligence
21 or reevaluated their interest in submitting a bid for the
22 debtors' software business assets. One of those parties
23 ultimately made a deposit and submitted a bid.

24 In December, 2010 -- I'm not sure if it's two or three
25 bidders --

1 (Pause)

2 Your Honor, in December, 2010 two bidders, including
3 UnXis, were conducting detailed diligence and refining their
4 bids. As of January 14th of this year the trustee, through
5 OPA, had received two bids, and I will describe them, Your
6 Honor. The first, UnXis, submitted a bid which included
7 600,000 dollars in cash and two-year warrants to purchase three
8 percent of the outstanding UnXis common stock. The UnXis bid
9 excluded the net working capital of the business worth, in
10 OPA's estimate, from 700,000 to 900,000 dollars. UnXis also
11 agreed to pay up to 50,000 dollars of cure costs. Furthermore,
12 the UnXis bid included the acquisition of all of the non-debtor
13 foreign subsidiaries and provided for the employment of all
14 current employees in those non-debtor foreign subsidiaries.

15 The liability of having to wind down those entities,
16 Your Honor, has not been determined, but OPA preliminarily
17 estimates that these costs would easily exceed 500,000 and
18 possibly exceed 1,000,000 dollars That's exclusive of time and
19 expenses related to professionals, Your Honor.

20 Importantly, prior to the final auction date UnXis
21 deposited the full amount of the purchase price into escrow
22 with the trustee's counsel.

23 In contract, Your Honor, the second bidder submitted a
24 bid of eighteen dollars in cash. Similarly to the UnXis bid
25 the second bid also excluded the net working capital of the

1 business, included the acquisition of all foreign subsidiaries
2 and provided for the assumption of all current employees.

3 An auction occurred on January 19, 2011. UnXis and
4 the second bidder attended. At that auction the second bidder
5 declined to submit a bid above its existing bid. Accordingly,
6 thereafter the trustee determined that UnXis was the highest
7 and best bidder. The trustee then entered into the asset
8 purchase agreement by and between The SCO Group, Inc. and SCO
9 Operations, Inc. and UnXis, Inc.

10 Mr. Comer is familiar with the negotiations that led
11 to the terms of the proposed transaction with respect to the
12 debtors' software business assets. The negotiations among the
13 debtors' management, the trustee's professionals and UnXis were
14 at arm's length and in good faith and such negotiations were
15 vigorous.

16 Mr. Comer is unaware of and has no reason to suspect
17 any bid collusion or other improper conduct by UnXis in
18 connection with the sale process. To the best of his knowledge
19 UnXis is not affiliated with nor an insider of the debtors.

20 There are sound business reasons for the trustee to
21 enter into the agreement and for this Court to enter the
22 proposed sale order. Mr. Comer would testify that extensive
23 marketing has been undertaken to sell the debtors' software
24 business assets, that there are sufficient funds in the estate
25 to pay cure costs that are not paid by the buyer. In Mr.

1 Comer's professional opinion the market has been thoroughly
2 tested over five months in respect to the debtors' software
3 business assets, and UnXis's bid is the highest and best bid
4 for such assets.

5 Mr. Comer would testify that with respect to the APA
6 with UnXis Schedule 2.1(a) sets forth the acquired assets.
7 Schedule 2.1(c) sets forth the excluded assets. Section 2.2 of
8 the agreement sets forth the grant of the sublicense to UnXis.
9 Section 3 sets forth the 600,000 dollar purchase price in cash,
10 which is, again, currently being held in escrow by the trustee,
11 plus upside in the form of warrants if UnXis meets its
12 financing target.

13 And, finally, Your Honor, Section 6.8 sets forth that
14 the buyer will offer employment to all of the hired employees
15 as defined thereunder, including medical, dental and other
16 benefits for such employees.

17 I would also note that the U.S. Trustee has asked us
18 to note on the record that this transaction doesn't contemplate
19 the sale of avoidance actions, for the record.

20 Briefly, Your Honor, with respect to the debtors'
21 financial condition currently, there is a secured post-petition
22 indebtedness of 2,000,000 dollars, which, as discussed before,
23 was approved by this Court. As Your Honor will recall, two
24 phases of restructuring have been implemented by the trustee,
25 the first in March/April of 2010 and the second this year,

1 January/February of this year.

2 The restructurings relate primarily to headcount and
3 employee cuts, since seventy-five percent of the debtors' costs
4 are employee related salary and benefits.

5 Over the time since the trustee's appointment in these
6 cases in August, '09 the number of employees have decreased
7 from sixty to less than thirty today.

8 As of this week the debtors' net working cap consists
9 of account payables in the amount of 60,000, account
10 receivables in the amount of 680,000 and cash in the amount of
11 900,000. I would note, Your Honor, that all those numbers are
12 exclusive of -- I should be more specific. With respect to
13 account payables it's exclusive of SVRx professional fees,
14 admin costs, et cetera. That number just represents the
15 operating business.

16 THE COURT: Okay.

17 MR. TARR: And, then, with respect to the cash amount,
18 that's exclusive of what has been set aside in reserve in
19 respect of SVRx royalties.

20 Mr. Comer trustee believes that it's critical for
21 these estates that the transaction before this Court goes
22 forward without delay for the benefit of the software business,
23 the debtors' employees, the debtors' customers, including
24 various governments around the world, large financial
25 institutions, large retailers, universities across the globe

1 and many others.

2 Currently, Your Honor, a capital infusion is necessary
3 to allow the business to stabilize and grow. The trustee and
4 his professionals have restructured as much as they can without
5 causing harm to the future ability of the debtors to continue
6 the software business. Revenues are declining, and it's
7 imperative that this sale occur now or there will be
8 irreparable harm to the software business in terms of the
9 debtors' ability to sustain its products, its customers and its
10 employees.

11 That concludes the proffer of Mr. Comer's testimony,
12 Your Honor.

13 THE COURT: All right. Thank you. Thank you, Mr.
14 Tarr. Mr. Lewis, are you going to cross-examine, Mr. Comer?

15 MR. LEWIS: I would like to, Your Honor, please.

16 THE COURT: You certainly are entitled to, and, Mr.
17 Comer, if you'll come forward, sir. Mr. Comer, if you will
18 remain standing in the witness stand while you're sworn that
19 would be --

20 THE WITNESS: Okay.

21 THE COURT: -- helpful. Thank you.

22 THE CLERK: Raise your right hand and state your full
23 name for the Court, spelling your last name, please.

24 THE WITNESS: W. Bruce Comer, III. Last name is
25 Comer, C-O-M-E-R.

1 (Witness duly sworn)

2 THE COURT: Thank you, Mr. Comer.

3 CROSS-EXAMINATION

4 BY MR. LEWIS:

5 Q. Good afternoon, Mr. Comer. I think we've met before in
6 this setting.

7 MR. LEWIS: Your Honor, I propose --

8 THE COURT: Yes?

9 MR. LEWIS: -- to examine Mr. Comer largely based upon
10 his declaration.

11 THE COURT: All right.

12 MR. LEWIS: His proffer has pretty much tracked it,
13 maybe added a little bit to it, so I may switch back and forth,
14 but the declaration makes a handy document to work from.

15 THE COURT: All right.

16 MR. LEWIS: So, if I may, Your Honor, I'd like to hand
17 Mr. Comer a copy so he has it handy, and the Court, if the
18 Court wants one I have some extras here.

19 THE COURT: I know I've got it in here.

20 MR. LEWIS: Okay.

21 THE COURT: That would be fine. You certainly may
22 approach the witness.

23 MR. LEWIS: Thank you, Your Honor.

24 THE COURT: Thank you, Mr. Lewis.

25 Q. Mr. Comer, let's just start by having you authenticate

1 your declaration. Does that look like a true and correct copy
2 of the declaration that you had filed in this case?

3 A. Yes, it does.

4 Q. Thank you. Mr. Comer, how much has Ocean Park been
5 compensated so far in this Chapter 11 case? Do you know
6 approximately?

7 A. I'd have to go check my records. I don't know right off
8 the bat.

9 Q. Somewhere over 600,000 dollars, isn't it?

10 A. It's several hundred thousand dollars.

11 Q. Yes. I think it's over 600,000, just looking at the
12 latest operating report. Does the employment agreement
13 approved by the Court provide for any kind of success fee with
14 respect to this transaction?

15 A. Yes, it does.

16 Q. Will you tell the Court what that is?

17 A. There were a couple of retainers and, then, there's a
18 success fee. There's a formula, but there's a minimum of
19 150,000 dollars.

20 Q. Okay. So that 150,000 would come out of the proceeds of
21 this transaction.

22 A. That's correct.

23 Q. Now, does Ocean Park have any prospective arrangements or
24 business with the buyer here, UnXis, or [unc-sis]?

25 A. No.

1 Q. Okay. At the auction on the 19th, isn't it true that the
2 other bidder declined to overbid, at least according to it,
3 because it believed that the bidding process had not gone
4 according to the procedures set up by the Court?

5 MS. FATELL: Objection, Your Honor. I'm not sure the
6 relevance of that. The other bidder has not filed an
7 objection, has not appeared in this court, and I don't see why
8 that's a relevant issue.

9 MR. LEWIS: Your Honor, I'm not appearing here for the
10 other bidder. The debtor is purporting to argue that this is a
11 good faith transaction, and I think whether there was possibly
12 irregularities in the process is relevant, whoever complained
13 about them. And I think Mr. Cahn will confirm that there were
14 such complaints. Isn't that true?

15 THE COURT: Well, I'm going to -- I will allow the
16 question.

17 MR. LEWIS: Thank you, Your Honor.

18 A. Sure. Could you repeat the question?

19 Q. Sure.

20 A. It's sort of two different questions, there, so I wouldn't
21 mind resetting it.

22 Q. At the auction on the 19th, the other bidder declined to
23 bid, did it not, because it said there had been irregularities
24 in the auction process?

25 A. Yes, but they had sort of declined to bid even before

1 they'd registered that issue. We'd given them some time --
2 actually, most of the weekend, to up their bid. We informed
3 them what the topping bid was, and they chose not to. And then
4 they sort of threw out some issues with irregularity, which,
5 frankly, we guess may have been related to them getting their
6 deposit back as quickly as they could.

7 Q. Okay, one of their complaints, was it not, was that
8 documents, revised documents were being sent to them at the
9 last moment?

10 A. Yes, that's true. But the economics were communicated to
11 them in plenty of time.

12 Q. Okay.

13 A. And we'd actually postponed the auction a couple hours to
14 make sure they had enough time to respond.

15 Q. Now, have you valued the warrants?

16 A. No.

17 Q. Have you made any attempt to value the warrants?

18 A. No, we didn't think -- one, it wasn't a crux issue in the
19 auction itself, and it's so contingent on other funding, it'd
20 be a pretty difficult exercise to put a specific number on it.

21 Q. Let me ask you to elaborate by what you mean that it
22 wasn't a crux issue at the auction. What does that mean?

23 A. Well, even prior to that, we had one bidder who was --
24 their bid was 600,000 dollars. They had put the full purchase
25 price in escrow with Blank Rome. They were offering to cover

1 an additional 50,000 dollars of cure costs, so the difference
2 between the bid -- the other bidder was very aggressive at
3 pushing liabilities onto the estate from lease -- in the
4 negotiation, they were very into pushing the leases in Utah,
5 New Jersey, and we just thought that the estate would be
6 saddled with a lot of expenses. And then their figure, which
7 they didn't give to us, so they left the purchase price blank
8 until the very last minute -- I think it was the last couple of
9 days or maybe a few hours before the bid deadline, they put in
10 eighteen dollars, which almost, to us, made it question whether
11 they were really being serious or not, whether they were trying
12 to be almost a vulture investor that was going to come in, and
13 if they were the only last-person standing, try to grab the
14 assets.

15 Q. Do you have any clue at all what those warrants are worth?

16 A. I could give you -- I haven't done that work. I don't
17 know.

18 Q. Okay. So essentially, the purchase price here is 600,000?

19 A. As we stated in my declaration, the buyer's leaving behind
20 the networking capital, and they're also taking all of the
21 employees and the foreign subsidiaries which would have a great
22 cost to the estate if we had to wind those down.

23 Q. I understand. That was -- the other buyer was doing that
24 as well, right?

25 A. That is correct.

1 Q. Okay. Now, you heard Mr. Tarr's summation of your
2 proffered testimony and you heard his discussion of the current
3 cash and payable of the debtors, excluding professionals and
4 other administrative expenses. Does that tell you that this
5 estate is administratively insolvent right now?

6 A. Yes, I think it probably is.

7 Q. Okay. Expect that to get better or worse?

8 A. It's going to get worse. It's been getting worse ever
9 since we were involved starting September of '09. It's been a
10 struggle.

11 Q. In fact, isn't it true that out of this transaction,
12 there's going to be very little money for anyone, if any money
13 at all, other than the two million dollar lender?

14 A. Well, I think it's tough -- when we brought this offer, as
15 you can imagine, as an investment banker, financial advisor,
16 when we brought this offer to the trustee himself, we had to
17 explain it. And I think you have -- in this case, you have to
18 look at the costs of a wind-down, the employees, the benefit to
19 the employees, the customers, the people using the software,
20 the support of the software of an ongoing concern, and then the
21 cost of the estate were it to have to wind this thing down and
22 take care of the employment costs in Europe and the various
23 jurisdictions and do things properly, it would take much longer
24 and cost a lot more that has to be set aside. So the default
25 for the estate is not a zero, and we can waive things, you

1 know, the estate can waive things away. It would be to take
2 care of those costs which all -- the buyer, here, is assuming
3 all the employees, all the leases, and then the purchase price
4 and the network and capital.

5 Q. So to be clear, the two million dollar lender is
6 benefiting, some administrative claimants may benefit some, the
7 employees are benefiting, but no creditors?

8 A. Well, we haven't figured out what precisely is going to be
9 left or what's going to be left, but it's going to be fairly
10 limited after the administrative claims and the debtor loan.

11 Q. Well, you've testified you think the estate's
12 administratively insolvent now. How is there going to be any
13 money left for unsecured creditors?

14 A. Oh, unsecured?

15 Q. Yeah.

16 A. Okay. I -- no, nothing for unsecured creditors, you're
17 correct.

18 Q. Either way, whether this sale goes through or not?

19 A. That's right.

20 Q. So this sale is for the benefit of the secured creditor,
21 for the benefit of the administrative claimants, and for the
22 benefit of employees. But not for the benefit of general
23 unsecured creditors?

24 A. That is -- and customers and the people using the
25 software.

1 Q. Other third parties?

2 A. Yes.

3 Q. Yes. But not the creditors?

4 A. The unsecured creditors, that's right.

5 Q. Right. Now, I'm just curious. Well, let me ask you this
6 question a little bit differently. On a kind of general level,
7 you're intimately familiar with the transaction, right?

8 A. Yes.

9 Q. Okay, what's the debtor going to be left with, in general,
10 once this transaction is done?

11 A. We're going to be left -- the purchase price, the 600,000
12 dollars, the accounts receivable, which will be collected by
13 the buyer. That value, as of today, is about 680,000 dollars,
14 actually. The cash balance in the company after the cure
15 amounts -- the net amounts of the cure are paid, and so that's
16 the -- that's what will be left over.

17 Q. Any intellectual property?

18 A. No. That's going to the buyer.

19 Q. Any employees?

20 A. No, because the buyer's taking all the employees.

21 Q. So in essence, the debtors will be out of business when
22 this transaction closes, except for the purpose of winding up
23 their estates?

24 A. That is correct. The operating software business, that is
25 correct. There will be no operating assets left.

1 Q. Okay. Now, you've described the -- you mentioned the
2 sublicense in this transaction. What's that a sublicense of?
3 What license is that a sublicense of?

4 A. I'm -- I was the financial advisor, here, and the marketer
5 of the business, so I'd probably leave that to the attorneys
6 who crafted that.

7 Q. Do you have any idea what it is?

8 A. Yeah, I can sort of understand, but I'm really not the
9 person -- that's not my role in this transaction.

10 Q. I understand that, but you've been involved in it, you
11 probably heard discussions about it, right?

12 A. Sure.

13 Q. So tell me what's being sublicensed.

14 MS. FATELL: Objection, Your Honor. I think the
15 witness has already said twice now that this is a legal
16 document and -- although he didn't use that word -- but that
17 this is a legal issue and he's not comfortable speculating and
18 putting in his own words what it means, so I don't know that
19 this is the right witness to try and elicit that testimony.

20 THE COURT: Will there be another witness who will be
21 qualified to answer the question, Ms. Fatell, do you know?

22 MS. FATELL: Mr. Broderick is more familiar with the
23 contracts and licenses, so counsel can ask him.

24 THE COURT: Mr. Lewis, you'll --

25 MR. LEWIS: Your Honor, it's true that Mr. Comer's not

1 a lawyer, but you don't have to be a lawyer to tell people what
2 assets you're keeping and what assets you're licensing. I'm
3 not going to ask him to go into the terms of the license and
4 what it means and all that other stuff but --

5 THE COURT: Yes.

6 MR. LEWIS: -- there's no reason why he can't tell us
7 what his understanding it.

8 THE COURT: Yeah, I'll overrule that objection --

9 THE WITNESS: Sure.

10 THE COURT: -- and allow you to answer.

11 THE WITNESS: Sure.

12 A. So my business -- so maybe if you wouldn't mind repeating
13 the question?

14 Q. Sure. What license is the sublicense of?

15 A. So my understanding, and I'm not an intellectual property
16 attorney, is that while SCO doesn't -- may not have the
17 copyright which was found out by the jury trial, it has been a
18 public company operating for decades, now, and it has an
19 implied license or a sublicense or some right to operate its
20 business, and it has been doing so for many decades, did it as
21 a public company. And so it has that access to the historical
22 source code bina -- you know, the licenses, et cetera, that was
23 the long chain of intellectual property that was developed over
24 thirty years ago.

25 MR. LEWIS: I have no further questions for this

1 witness, Your Honor. Thank you.

2 THE COURT: All right, thank you. Thank you, Mr.
3 Lewis.

4 Anything further? Any redirect or --

5 MR. LEWIS: Oh, I'm sorry, Your Honor. Let me just,
6 if I may?

7 THE COURT: Sure.

8 Q. The proffer of testimony indicated that this debtor's not
9 affiliated -- the buyer's not affiliated in any way with the
10 debtors. The buyer is going to be getting a lot of the
11 debtors' employees including some of its senior employees,
12 right? Mr. Nielsen and so on?-

13 A. Oh, correct, yes.

14 Q. Yeah. Okay.

15 MR. LEWIS: Thank you, Your Honor.

16 THE COURT: All right, Mr. Lewis.

17 MR. LEWIS: Appreciate it.

18 THE COURT: Thank you. Of course.

19 Ms. Fatell?

20 MS. FATELL: Thank you, Your Honor. Just very brief
21 redirect. Bonnie Fatell, for the record.

22 REDIRECT EXAMINATION

23 BY MS. FATELL:

24 Q. Just a follow up to the last question. Are you aware, has
25 the buyer had any discussions with any of the -- members of any

1 of the employees of SCO with respect to employment contracts or
2 arrangements, going forward?

3 A. No, we've pushed that off, so that has not occurred yet.

4 Q. There was a question about the two million dollar lender
5 and all of the money going to the two million dollar lender.

6 Is that your understanding that all of the sale proceeds will
7 go to the two million dollar lender?

8 A. No.

9 Q. Can you explain that a little bit?

10 A. That goes back to the terms of the debtor loan that was
11 put in place, and so there's a provision for some sales
12 proceeds to be paid, and then it was actually a fairly complex
13 structure, but essentially, some of the proceeds would go to
14 pay the loan back; others would be -- would go to pay off
15 administrative claims and be left in the estate to take care of
16 the estate's business.

17 Q. There was a question about whether the debtor would be
18 left with any assets, and you very specifically said there
19 would be no operating assets. You are familiar with the
20 litigation that's been going on with Novell, correct?

21 A. That's correct.

22 Q. And that's on appeal right now?

23 A. Um-hum.

24 Q. So the debtor continues to have some interest in that
25 litigation?

1 A. Absolutely. And there may be some holding companies and
2 other assets, but the operations -- I guess what I was
3 referring to was the customer-facing operations and assets will
4 go to the buyer.

5 Q. Okay, and are you aware --

6 A. The litigation claims -- or, the claims were all -- were
7 one of the excluded assets in the transaction.

8 Q. Okay, and that includes the Novell litigation as well as
9 the pending IBM litigation and any other litigation?

10 A. All claims that we're aware of.

11 MS. FATELL: Your Honor, I don't have any other
12 questions. Thank you.

13 THE COURT: All right, thank you, Ms. Fatell.
14 Anything further?

15 MR. LEWIS: Nothing, Your Honor. Thank you.

16 THE COURT: All right, Mr. Comer, thank you, sir. You
17 may step down, now.

18 MS. FATELL: May I have one moment, Your Honor.

19 THE COURT: You bet.

20 MS. FATELL: Your Honor, the trustee would next like
21 to proffer the testimony of Mr. Richard Bolandz who's a
22 representative for the buyer --

23 THE COURT: All right.

24 MS. FATELL: -- if that's acceptable.

25 THE COURT: Mr. Lewis, any objection?

1 MR. LEWIS: No objection, Your Honor.

2 THE COURT: And obviously, you can reserve the right
3 to cross-examine.

4 MR. LEWIS: Thank you, yes.

5 THE COURT: All right.

6 MS. FATELL: Mr. Bolandz is in the courtroom, Your
7 Honor.

8 THE COURT: Yes.

9 MS. FATELL: And his attorney, Marilyn Fine is on the
10 telephone.

11 THE COURT: Very well, and I see that we also have his
12 declaration, of course, in support.

13 MS. FATELL: Correct, Your Honor.

14 Your Honor, if called to testify, Mr. Bolandz would
15 state as follows. He has been engaged by UnXis to serve as the
16 company's CEO if the sale is approved by the court. He has
17 actual knowledge regarding UnXis' management team, its
18 shareholders, and it's strategic plans for the future. He's
19 been involved in the negotiations for this acquisition of the
20 debtors' software assets and the execution and delivery of the
21 asset purchase agreement.

22 As CEO, Mr. Bolandz brings to UnXis over twenty years
23 of professional experience as a senior executive in the
24 information technology industry which includes the management
25 of complex software development, technology commercialization,

1 corporate development and restructuring, business process,
2 reengineering, and development of global distribution channels.

3 As CEO, Mr. Bolandz states that it's his intention
4 that UnXis will continue to support existing customers, perform
5 on existing contracts, continue to support the global network
6 of business partners, strategic alliances, and value-added
7 resellers, that he will provide a substan -- there will be
8 provided a substantial infusion of capital for product
9 modernization, and UnXis will retain most of the debtors'
10 employees and management team including, but not limited to the
11 chief marketing and sales officer, the chief technology
12 officer, and the chief financial officer.

13 UnXis will have a world-class advisory board of
14 directors including but not limited to William Bancroft, who's
15 a VP and general manager of Unisys global outsourcing and
16 infrastructure services, Jane Cavalier, the president of
17 BrightMark Consulting, Craig Feied, the director of the ERI
18 Institutes for Innovation in Medicine -- that last name is
19 spelled F-E-I-E-D -- Jody Westby, Esq., chief executive officer
20 of Global Cyber Risk, and Denis Pombriant, managing principal
21 of the Beagle Research Group.

22 UnXis is a Delaware corporation which was formed on
23 June 12th, 2009 for the specific purpose of acquiring the
24 software assets of SCO. The company was initially organized by
25 two directors and officers: Eric LeBlanc and Steven Norris.

1 Mr. LeBlanc is a partner in MerchantBridge Group which is an in-
2 net-based information services company in the Middle East and
3 has been involved in the information technology industry since
4 the early 1980s. Mr. Norris has experience in public and
5 private financing, mergers, and acquisitions.

6 Mr. Bolandz would further testify that the company has
7 authority to issue 200 shares of stock, and as of this date,
8 100 shares have been issued: 50 shares to GulfCap Partners,
9 LLC and 50 shares to MerchantBridge Holdings (Cayman) Limited.
10 If the transaction is approved, UnXis will issue additional
11 shares to its seed investor, a Mr. Stan Solomonson, who's a
12 businessman who operates an unrelated business known as Future
13 Foods and a personal acquaintance of Mr. Bolandz.

14 On behalf of UnXis, together with Eric LeBlanc, they
15 have negotiated the acquisition -- Mr. Bolandz -- excuse me --
16 has negotiated the acquisition of the SCO assets and has
17 conducted due diligence through Ocean Park Advisors over the
18 last several months. The UnXis asset purchase agreement dated
19 as of January 19th, 2011 provides that UnXis will pay the cash
20 purchase price of 600,000 which has already been funded into
21 the trustee's escrow account and will contribute up to 50,000
22 dollars to cure delinquencies necessary to assume executory
23 contracts.

24 All of the negotiations for acquiring the SCO software
25 business have been arms' length and in good faith. Through

1 Ocean Park Advisors, UnXis has accessed information in the data
2 room from the transaction, participated in telephone calls with
3 Ocean Park Advisors and the trustee's counsel and others at SCO
4 in order to gather more information about the company's
5 operations prior to submitting its bid. Neither Mr. Bolandz,
6 or to the best of his knowledge, any member of the UnXis team
7 has any relationships with Ocean Park Advisors or the trustee.

8 Upon closing on the acquisition of the SCO software
9 business assets, they expect to generate sufficient cash flow
10 from operations to pay the company's current liabilities, as
11 they become due. Also, UnXis is in the process of raising
12 additional capital to fund any shortfalls in operations, to
13 engage in a restructuring, corporate development, and the
14 development of necessary upgrades in product modernization.

15 In accordance with the terms of the asset purchase
16 agreement, they intend to close on the transaction no later
17 than March 30th, and if possible, much earlier.

18 Mr. Bolandz will testify that they believe that if the
19 sale does not close, without a major capital infusion, SCO will
20 be unable to continue to operate, and there will be irreparable
21 harm, not only to SCO but to the enormous number of national
22 and international businesses in over eighty countries which
23 rely on the SCO operating system to conduct their day-to-day
24 business. Failure to continue the SCO business will have a
25 huge economic and financial impact worldwide.

1 In addition to this proffer, Mr. Bolandz acknowledges
2 filing the declaration that Your Honor has before you, and the
3 information set forth therein is true and correct. And the
4 resumes and biographies attached thereto remain the same
5 parties that they intend to be putting on the board and hiring.

6 THE COURT: All right.

7 MS. FATELL: And that would complete the proffer, Your
8 Honor.

9 THE COURT: Thank you. Thank you, Ms. Fatell.

10 Mr. Lewis, would you like to cross-examine?

11 MR. LEWIS: I would like to examine Mr. Bolandz,
12 please.

13 THE COURT: You certainly may.

14 Mr. Bolandz.

15 If you'll just remain standing in the witness stand,
16 we'll have you sworn and testify in a moment. Thank you.

17 THE CLERK: Raise your right hand and state your full
18 name for the Court, spelling your last name.

19 MR. BOLANDZ: Richard Alexander Bolandz,
20 B-O-L-A-N-D-Z.

21 (Witness sworn)

22 THE CLERK: You may be seated.

23 CROSS-EXAMINATION

24 BY MR. LEWIS:

25 Q. Good afternoon, Mr. Bolandz.

1 A. Good afternoon.

2 Q. I'm Adam Lewis. I'm counsel for Novell.

3 MR. LEWIS: Your Honor, I'd like to follow the same
4 process here by handing the witness a copy of his declaration,
5 if that's okay?

6 THE COURT: Of course. And I have it right in front
7 of me. Thank you, Mr. Lewis.

8 Q. Mr. Bolandz, I'd like to ask you, to begin with, if you
9 would just look at that declaration and tell me if it looks
10 like the one that you filed and signed?

11 A. Yes.

12 Q. Thank you. Mr. Bolandz, the license -- the sublicense
13 that this agreement applies for is a nonexclusive license; is
14 that right?

15 A. I'm not aware of the terms of the sublicense.

16 Q. Have you ever read the sublicense?

17 A. Term license is a term of art.

18 THE COURT REPORTER: Excuse me, Your Honor?

19 THE COURT: Yes.

20 THE COURT REPORTER: Could you have speak --

21 THE COURT: I'm sorry, yes.

22 Mr. Bolandz, if you'll -- that's great. Move that
23 forward so you're speaking into it and we'll pick up your
24 testimony better.

25 A. -- is a term of art. My understanding is it is the rights

1 to continue doing business that SCO had and Caldera before it,
2 and the three or four iterations going back to the original
3 UNIX at AT&T.

4 Q. And is it your understanding that -- let me get this --
5 I've heard so many different pronunciations of your company's
6 name. Can I get the official pronunciation from you?

7 A. [unc-sis].

8 Q. UnXis. Thank you. Is it your understanding that UnXis
9 will have the exclusive right to do that kind of licensing and
10 business? Or is it your understanding that SCO will continue
11 to have that right, as well.

12 A. Well, SCO will cease to exist as an entity.

13 Q. So your answer is?

14 A. The answer is SCO would not have that right as well.

15 Q. Okay. Who are the officers and directors of UnXis now?

16 A. Eric LeBlan and Steven Norris and myself.

17 Q. And what other positions?

18 A. Steven Norris is the chairman, vice chairman, Eric LeBlan,
19 and CEO would be me.

20 Q. Is there a president?

21 A. No.

22 Q. Secretary? So three directors -- two directors --

23 A. At this point, three.

24 Q. Three. Now, in your proffer and in your declaration as
25 well, you talk about how UnXis plans to fund operations out of

1 cash flow. Do you recall that?

2 A. Short-term operations out of cash flow. But the company
3 has been --

4 Q. Let me --

5 A. -- disinvested.

6 Q. Let me try to take this step by step. And just try to
7 answer my questions. And if I've left something out, I'm sure
8 your counsel can bring it out. But I prefer if you just answer
9 what I ask you, if that's okay.

10 So you say short-term. What is short-term? How many
11 months?

12 A. I would think at least six months to be able to get the
13 company restructuring plan in place and organize financing.

14 Q. Okay, and you've created projections for doing that?

15 A. Yes.

16 Q. Written projections, done an analysis, you've got a
17 business plan?

18 A. The business plan is underway.

19 Q. Underway as in preparation of it?

20 A. As in -- as in a competitive strategy has been developed.

21 Q. Um-hum.

22 A. A business plan, you're talking about three-dimensional
23 financial modeling. We're not down to four decimal places.

24 Q. Are you down to any decimal places?

25 A. Yes.

1 Q. And what money does UnXis have committed to it right now,
2 legally, as you understand it? Binding commitments.

3 A. 600,000 dollars.

4 Q. No other money?

5 A. UnXis was a special purpose entity formed strictly for
6 acquiring this asset.

7 Q. And UnXis, as I understand it, is going to run the
8 business, is that right?

9 A. That's right.

10 Q. Okay, so my question is, does UnXis have any other
11 committed financial resources at the moment, other than
12 whatever it may generate from operations?

13 A. We have letters of intent, which basically require that
14 the asset is owned by UnXis.

15 Q. And once the asset is owned by UnXis, are those authors of
16 those letters of intent committed to providing further
17 financing, legally, as you understand it?

18 A. Legally, as I understand it? I can't answer that question
19 legally. I'd have to defer to my attorneys.

20 Q. Not of concern to you whether or not it's legally binding
21 once the assets are acquired?

22 A. Well, letters of intent are just that: intent.

23 Q. So your understanding is that it's not legally binding.
24 They could walk from them if they wanted to, even after
25 acquisition?

1 A. Yes.

2 Q. Okay, that's what I'm trying to get at. Thank you.

3 So in fact, other than the 600,000 dollars that UnXis has
4 deposited for the purchase price, it has no other financial
5 resources at the moment?

6 A. That's correct.

7 Q. And no other binding legal commitments for financial
8 resources.

9 A. Back to the legal thing again. Letters of intent.

10 Q. Which people can walk from if they choose to?

11 A. That's correct.

12 Q. Okay. Now, in talking about the shares in your
13 declaration, you talk about that it's your understanding that
14 there are so many shares authorized.

15 A. Um-hum.

16 Q. Why do you use the phrase, "it's your understanding"? Do
17 you not know?

18 A. That is my understanding.

19 Q. Do you not know whether there are so many shares?

20 A. Well, understand is to know.

21 Q. Okay. Now, at the end of your declaration, in paragraph
22 9 -- you might want to take a look at this -- you make some
23 statement about how you don't understand why Novell is
24 objecting and you'd really like to work with Novell, and so on.
25 Do you see that?

1 A. Yes.

2 Q. Okay. Have you or anyone on behalf of UnXis, to your
3 knowledge, reached out to Novell or anyone on behalf of Novell
4 to talk about getting along?

5 A. No. I have not.

6 Q. To your knowledge, has anyone done that on behalf of
7 UnXis?

8 A. I have no way of knowing.

9 Q. So you'd like to do this and you can't understand why
10 Novell is objecting, not working with you, but you haven't
11 asked Novell why that is?

12 A. Well, we don't own the assets. We're not really in a
13 position to be making any deals with Novell about anything.
14 The -- my view is that Novell is in a complementary, not
15 competitive business, not being in the operating system space.
16 And it does provide a suite of software tools which support our
17 direct competitors, Microsoft and Analytics (ph.). So other
18 than for not wanting sheer anticompetitive behavior, Novell
19 would have access to 1.5 server installations that we have if
20 we work together.

21 MR. LEWIS: No further questions, Your Honor. Thank
22 you.

23 THE COURT: All right, Mr. Lewis. Thank you.

24 Ms. Fatell.

25 REDIRECT EXAMINATION

1 BY MS. FATELL:

2 Q. Good afternoon, Mr. Bolandz.

3 A. Good afternoon.

4 Q. Bonnie Fatell, for the record. I want to focus primarily
5 on the financing for this acquisition. You stated that 600,000
6 dollars is firm; you have letters of intent. Can you -- let me
7 back up for a minute. Can you give us a little bit of -- some
8 insight into your background in the area of acquisitions?

9 A. My work has been involved in advising private equity
10 groups, valuating the companies, the technologies, developing
11 their competitive strategies, and transition management through
12 restructurings and building companies from a patent.

13 Q. And has that involved either yourself going out and
14 raising funds or working with some of the investors to pull the
15 funds together?

16 A. My role in the fundraising process is generally to be
17 there to discuss the technical issues involved in whatever the
18 product or service might be, interfacing with the technical
19 advisors on the side of the capital partners.

20 Q. Okay, and in your declaration, you indicated, I believe,
21 that MerchantBridge and, I believe -- I don't have it in front
22 of me -- is it GulfCap Partners --

23 A. Yes.

24 Q. -- are right now, I guess, supporting this company in some
25 regard, is that accurate?

1 A. Well, MerchantBridge and Steven Norris Capital Partners,
2 now have been involved in this process for years and invested,
3 you know, a significant amount of, you know, time and expense
4 in evaluating, pursuing, conducting due diligence, et cetera.
5 I entered this process in just, I don't know, a year ago.

6 Q. And have you done business with either of those entities
7 before?

8 A. I had done business with Steven Norris Capital Partners
9 and prior to Steven Norris Capital Partners, Mr. Norris was
10 with Washington Capital Advisors, and both of those people,
11 I've done business with -- both of those entities.

12 Q. Do you have any reason to believe that UnXis will not be
13 able to raise the funds necessary to go forward in operating
14 and developing and building this company?

15 A. I do not. The only reason that it wouldn't go through is
16 if we don't control the asset. Investors are not interested in
17 putting up money if there's no asset to put it up for.

18 Q. And when you say you have no reason not to think it won't
19 go through, what do you base that on?

20 A. Well, if the sale -- if this sale is not approved?

21 Q. No, if the sale is approved, you have reason to believe
22 that your financing will come through.

23 A. Yes, absolutely.

24 Q. What do you base that on?

25 A. Absolutely. Based on the relationships of Mr. Norris and

1 Mr. LeBlan with the investors. These are long, decades-long
2 relationships with the same investors over series of successful
3 ventures. It's not -- these are not unknown entities.

4 Q. Okay.

5 MS. FATELL: I have no further questions, Your Honor.

6 THE COURT: All right, thank you, Ms. Fatell.

7 Mr. Lewis?

8 MR. LEWIS: Nothing, Your Honor. Thank you.

9 THE COURT: All right.

10 You may step down, Mr. Bolandz. Thank you, sir.

11 Thank you.

12 THE WITNESS: Thank you.

13 MS. FATELL: Your Honor, we'd like to call William
14 Broderick to the stand, please.

15 THE COURT: All right. Mr. Broderick.

16 Good afternoon, Mr. Broderick. If you'll --

17 MR. BRODERICK: Good afternoon, Your Honor.

18 THE COURT: -- do as your predecessors and remain
19 standing while you're sworn.

20 THE CLERK: State your full name for the Court,
21 spelling your last name, please.

22 MR. BRODERICK: William Michael Broderick,
23 B-R-O-D-E-R-I-C-K.

24 (Witness sworn)

25 THE CLERK: You may be seated.

1 THE COURT: Thank you, Mr. Broderick.

2 DIRECT EXAMINATION

3 BY MS. FATELL:

4 Q. Good afternoon, Mr. Broderick.

5 A. Good afternoon.

6 Q. I'd like to start first with your personal background. If
7 you could give the Court some insight into your professional
8 experience in the past?

9 A. Okay. I went -- my -- in 1966, I went to my freshman year
10 in college out in Missouri. When I completed my freshman year,
11 I returned to New Jersey and enlisted in the Army. I spent two
12 years and seven months in the Army, the last year and a half
13 with the 101st Airborne Division in Vietnam. The first half of
14 that time in Vietnam was with an infantry company; the second
15 half was with a recon unit. When I returned to the States, I
16 was discharged from the Army and re-enrolled in college. In
17 1973, I received a B.A. in business from William Patterson
18 University and I went out to California. In 1975, I received
19 an MBA from University of Santa Clara and came -- went back to
20 New Jersey and started my career.

21 Q. And who did you start working for?

22 A. My first employer was Trans World Airlines. I worked with
23 them in New York, London, and Paris. I spent five years with
24 the airline. Returned to the States and got a job with -- at
25 the time, they were called Perkin-Elmer. It was their data

1 systems. They were a computer manufacturer. They subsequently
2 changed their name to Concurrent Computer Corporation. I spent
3 ten years with Perkin-Elmer/Concurrent, and then I took a job
4 with AT&T's UNIX System Laboratories in December of 1991.

5 Q. Okay, and after that, you foll -- basically, can you
6 describe for us, you followed the UNIX system as it progressed
7 through its various acquisitions?

8 A. Yes, I did. When I was at -- when I first was at UNIX
9 System Laboratories, I was manager of sales operations
10 reporting to the vice president of sales. I was responsible
11 for planning for the sales organization, running interference
12 between the salespeople and financing contracts people, and you
13 know, pretty much what the vice president didn't want to do.

14 Novell purchased us in '92, '93, and shortly after that --
15 I went to Novell, and shortly after that, I became a contract
16 manager and I was sent out to Greensboro, North Carolina,
17 where -- it was AT&T's location where their contracts managers
18 were. I went through training down in Greensboro and training
19 back up in New Jersey with our -- our lawyers who handled the
20 contracts. And I worked as a contracts manager for Novell. In
21 '96, the asset purchase agreement closed with Santa Cruz
22 Operation, and I moved over with all the other people to Santa
23 Cruz Operations as a contracts manager, a licensee of the UNIX
24 software, dealing with the same customers, working with the
25 same internal people. We just all picked up -- we didn't pick

1 up; we didn't even move offices. We just kept on doing, we
2 just got new business cards.

3 And then in 2003, Santa Cruz -- 2001, Santa Cruz sold the
4 business to Caldera, and I moved over to Caldera with the
5 people that were in the UNIX group, and we continued to license
6 UNIX. Again, it was same office, same people, just new
7 business card, doing business exactly the same way we were
8 doing it before.

9 And then in two -- early -- late 2002, early 2003, I left
10 the employ of Caldera and was put on -- and worked with them on
11 a contract basis, a consulting basis, and then -- for about a
12 six month period, and then was rehired -- by then, it was the
13 SCO Group -- working as a -- my title was director of software
14 licensing. And I was licensing the software as I had done at
15 Novell, Santa Cruz, and Caldera.

16 Q. Are you presently employed by SCO?

17 A. I am not an official employee. I'm on contract again, and
18 my contract is up at the end of this month.

19 Q. For those of us who are not as computer savvy as some, can
20 you describe for us what it is that SCO does?

21 A. They develop and market the UNIX operating system. And an
22 operating system is, you have a computer and you have the
23 applications, which is really what you want the computer to do.
24 It could be running dental office records, it could be doing
25 financial transactions. The operating system sits on the

1 computer between the computer and the application, and the
2 operating system tells the computer how to handle the
3 application. So you've got the three parts, and they work
4 together. The application is trying to get the work done, and
5 the operating system tells the computer how to do it.

6 Q. Can you describe the type of customers that SCO has,
7 people who use its operating -- we call the operating system
8 the UNIX system? Is that what it is?

9 A. UNIX operating system.

10 Q. Okay, and can you describe the types of customers,
11 location, size, et cetera, just generally?

12 A. Oh, sure. UNIX has been a popular and well thought of
13 operating system for the past thirty years. It's used
14 worldwide by individuals, universities -- just about every
15 university in the world has a UNIX license. We have small
16 companies, large companies, mid-size companies use UNIX to run
17 their operations. Governments worldwide, United States
18 government, just about all the departments of the government
19 from Commerce Department, Department of the Defense, Army,
20 Navy, Air Force, National Security Agency, they all have UNIX
21 licenses and they use UNIX. In Israel and Germany and United
22 Kingdom, the governments are using UNIX operating system.

23 Q. And examples of retailers?

24 A. We've got McDonald's, we've got the pharmacies, CVS.

25 Q. Financial institutions, I assume?

1 A. Financial institutions.

2 Q. Okay.

3 A. Wall Street firms.

4 Q. How do customers get the UNIX system?

5 A. There's two ways. We -- the way it originally started out
6 was AT&T licensed the source code. And the source code is
7 human-readable code. It's not the code that sits on the
8 computer that actually runs the application. It's kind of like
9 just getting a huge textbook of the code that you put on the
10 computer and you can manipulate it, work it, add things to it,
11 take things away. Basically, what a licensee would do is take
12 the source code and modify it so it would work on the specific
13 computer they wanted it to work on and possibly modify it so it
14 could work with the application they would want it to work on.
15 And when they first started up, it was companies like Hewlett-
16 Packard, Compaq Computer, IBM, Dell, all the computer
17 manufacturers had UNIX licenses. They would -- they'd get the
18 source code, they'd modify the code so it would work on their
19 computers, and then when they shipped a computer, they sold a
20 computer, it would go with what they call the binary form of
21 the operating system, and that's where they compiled code, and
22 the binary is what sits on the computer and runs it. So every
23 computer that was shipped, every UNIX computer that was shipped
24 out by these computer manufacturers is how the market got the
25 product.

1 Q. And when you talk about a binary system, as I understand
2 it, that would be going into a computer store and taking off of
3 the shelf Quicken or Microsoft Word or something like that,
4 that's --

5 A. Sure, if you go into a store and you buy Microsoft
6 Windows, you're buying a binary.

7 Q. Okay.

8 A. You can only use the code.

9 Q. Okay, now you described the sale -- you mentioned the sale
10 of the software business from Novell to Santa Cruz. Did the
11 way UNIX was operated change at all when that sale occurred?

12 A. You mean the way we licensed UNIX?

13 Q. Yes.

14 A. No, not at all.

15 Q. And how about when Santa Cruz then sold to Caldera. Was
16 there any change there?

17 A. There was no change at all. In fact, we continued to use
18 the same software agreements. All the agreements that we used
19 that were originated with AT&T that went to UNIX System
20 Laboratories, and then through Novell to Santa Cruz Operation,
21 and then to Caldera, those agreements were used virtually
22 intact except the name was changed. In fact, when we changed
23 from Novell to Santa Cruz Operation, in the transition period,
24 it was Novell's instructions to us, use these agreements; just
25 change the name from Novell to Santa Cruz.

1 Q. And these agreements that you're referring to, they are
2 the licenses of the source code?

3 A. Yes.

4 Q. Okay, your declaration was filed --

5 MS. FATELL: If I may have a moment, Your Honor?

6 THE COURT: Of course.

7 MS. FATELL: May I approach the witness, Your Honor?

8 THE COURT: Yes. Yes, Ms. Fatell.

9 Q. If I can direct you to paragraphs 13 and 14 in your
10 declaration, you're describing some various parties in 13 in
11 which there were third-party source code license agreements
12 between SCO and also between its predecessors and these various
13 entities. Can you give us an idea what kinds of license
14 agreements those are?

15 A. Sure. In paragraph 13, these are what we refer to as the
16 technology source code licenses. This is where somebody
17 licenses the source code; they've got the full source code
18 product, and they could modify the product and add things to
19 it, take things away, do whatever they wanted to to get it to
20 work on their computer and do what they wanted. Then they
21 could -- would be able to prepare a binary. And in order to
22 ship a binary, they had to execute an additional sublicensing
23 agreement that covered terms and conditions for issuing the
24 bi -- for distributing the binary. But paragraph 13 has to do
25 with the overall software agreement for licensing the full

1 source code product.

2 Q. And describe those sublicenses for a minute, if you will.

3 A. Well, the sublicense agreement, what people did was, they
4 executed the software agreement which was the terms and
5 conditions -- the overall terms and conditions that a licensee
6 had to agree to in order to use the source code product. The
7 sublicensing agreement, if we have a licensee that wants to in
8 turn develop a derivative work and ship it on their computer,
9 then they would have to take a sublicensing agreement. That
10 was the terms and conditions for the distribution of a product.

11 Q. Okay, and in paragraph 14, are those different types of
12 agreements?

13 A. Paragraph 14 is different. I included these because I
14 wanted to show that all of the agreements went from AT&T to
15 UNIX Systems Laboratories to Novell to Santa Cruz with really
16 just a name change.

17 Now, in 14, there are called reference agreements. And
18 the reason we have the reference agreements, it's to license
19 the full source code product, you're going to pay 2 -- 300,000
20 dollars for that source code product. Some -- there are some
21 companies that are writing applications, developing
22 applications, independent software vendors. They want to be
23 able to see UNIX in order to make their product work with UNIX.
24 They don't want to lay out 300,000 dollars. A lot of these
25 guys start out working in their garage. So what we did was we

1 came up -- well, AT&T came up -- UNIX Labs came up with a
2 reference source agreement. It's a 15,000 dollar annual fee,
3 and they get to look at the code. They can't modify the code;
4 they can't create binaries. It's a read-only. It's like
5 getting the -- it's getting the code almost in a textbook. But
6 they'll pay 15,000, and they can look at the code and do what
7 they need to their product.

8 Q. Okay. To your knowledge, has Novell generally been aware
9 of the SCO licenses with third parties?

10 A. Well, of course. They told us to use their licenses; just
11 change Novell to Santa Cruz.

12 Q. And to your knowledge, has Novell ever told SCO that it
13 couldn't enter into these license agreements with third
14 parties?

15 A. Never.

16 Q. To your knowledge, has Novell ever tried to stop a
17 licensee from using the license source code or the binary code?

18 A. No.

19 Q. Did any of these customers or third parties take an
20 assignment of the 1995 APA with Novell when they entered into
21 these license agreements?

22 A. No, they were simply licensing the source code.

23 Q. Okay. There's been reference made to the sublicense
24 agreement that's attached as an exhibit to the asset purchase
25 agreement with UnXis. Are you familiar with that document?

1 A. Yes, I am.

2 Q. Did you participate in preparing it?

3 A. No, I did not.

4 Q. Have you reviewed it?

5 A. Yes, I have.

6 Q. And is it similar to the existing license agreements that
7 SCO has that you've just described with its customers?

8 A. It's virtually word-for-word. If --

9 Q. And how do you know that?

10 A. I went through the sublicense agreement and I laid out the
11 software -- one of the software agreements from, well, it's the
12 same one from Novell or Santa Cruz, the ones I attached here, I
13 laid side-by-side. And I went through provision by provision
14 in the software -- in the sublicensing agreement, and I could
15 find virtually identical words in the software agreement or
16 sublicensing agreement.

17 Q. Okay. Now, I want to turn to SCO's present relationship
18 with Novell. Do you know whether SCO and Novell currently have
19 a business relationship with one another?

20 A. No, they do not.

21 Q. Does SCO purchase any product from Novell?

22 A. No.

23 Q. Does Novell purchase any product from SCO?

24 A. No.

25 Q. Does Novell make any payments to SCO?

1 A. No.

2 Q. Putting aside the SBRX royalties, does SCO make any
3 payments to Novell?

4 A. The only possible payment they would make is, in the UNIX
5 where 2.1 operating system, which is an operating system from
6 the mid-1990s, it included Netware, and there was a Netware
7 royalty to Novell. Now, if there's a one-off chance that
8 somebody ships a UNIX for a 2.1 product, we'll -- all third-
9 party -- all third-parties that have products, you know, code
10 in that product, we would owe them a royalty. Novell would be
11 one of those parties. But I don't know if it's happening now.
12 I would doubt it. Were later releases than that.

13 Q. So when would you say that the Netware product was an
14 active product in SCO's business?

15 A. Well, we took it out -- I believe we took it out of the
16 UNIX for 7 product, and that was released in the late '90s.

17 Q. In the late '90s, and this is 2011, so the likelihood that
18 there's any payments being made would be small, great?

19 A. Very small.

20 Q. Are you aware of whether Novell provides any reports of
21 any kind to SCO.

22 MR. LEWIS: Sorry, couldn't hear the question.

23 MS. FATELL: I'm sorry.

24 Q. I said, are you aware of whether Novell provides any kind
25 of reports to SCO?

1 A. No.

2 Q. Does SCO provide any reports to Novell? Again, I'm
3 setting SBRX aside.

4 A. No, they don't.

5 Q. Would you say that the relationship that you've just
6 described between SCO and Novell has been consistent since the
7 transfer of the assets in 1995?

8 A. Since the transfer of the assets in 1995, we licensed the
9 source code, we licensed binaries, and there was no contact or
10 interest expressed by Novell on what we were doing.

11 Q. Okay, if SCO is unable to transfer these assets to UnXis,
12 what impact will there be on its customers?

13 A. If SCO goes out of business, the impact is going to be
14 pretty disastrous worldwide. This is an operating system
15 that's used worldwide. We're not selling a lot of product
16 right now, but we have a lot of support relationships in place.
17 The people -- the installed base that's using UNIX needs us to
18 support them. The distributors that distribute our product do
19 a lot of the support of their customers, but we have support
20 agreements, we support those distributors. If those
21 distributors can no longer support their customers, then all
22 those people I described before, small, medium, large
23 corporations, retail outlets, government agencies, they're up a
24 creek for support. If something happens to their operating
25 system, they've got nobody to turn to.

1 Those distributors that are distributing our product will
2 no longer have our product to distribute, so unless they can
3 flip to something else, they're going to go out of business.

4 Q. Why can't these thousands of entities that you just
5 described that have the operating system, why can't they just
6 switch to another operating system?

7 A. For one of the main reasons why UNIX became so popular
8 thirty years ago and has been popular all along just -- by the
9 industry. In order to switch to another operating system, you
10 have to rewrite your application because it has -- you have to
11 tell your application how to work with that operating system.

12 Q. Okay.

13 MS. FATELL: I have no further questions.

14 THE COURT: All right, thank you, Ms. Fatell.

15 Mr. Lewis?

16 MR. LEWIS: Thank you, Your Honor.

17 THE COURT: Yes.

18 CROSS-EXAMINATION

19 BY MR. LEWIS:

20 Q. Mr. Broderick, do you anticipate having a position with
21 UnXis after this transaction closes?

22 A. I don't know. As far as I know, April 1st, I'm
23 unemployed.

24 Q. Have you talked to UnXis about a position?

25 A. No, I have not.

1 Q. Have they talked to you about it?

2 A. No, they have not.

3 Q. Have you communicated any interest to UnXis through anyone
4 else?

5 A. I have, in general conversations with some friends, I said
6 it would be nice to be employed.

7 Q. That sounds pretty unremarkable.

8 A. It's a feeling pretty much a lot of people in this country
9 have right now.

10 Q. So let's go back to what the sublicense is a sublicense
11 of. What's it a sublicense of? What license?

12 A. Which sublicense are you talking about?

13 Q. The sublicense that is being granted to UnXis under this
14 transaction.

15 A. Okay, what they're doing is, the sublicense is a
16 sublicense for what's been defined as the licensed properties.
17 The licensed properties are the intellectual property and
18 copyrights that the Court in Utah said didn't get transferred
19 to Santa Cruz, and SCO does not own, but since the asset
20 purchase agreement closed in 1996, Santa Cruz and Caldera and
21 everybody have been using them and licensing them with no
22 objections from Novell, so we've got a right to license those
23 products. Since those products, we don't have the ownership of
24 those, then what we're doing is we're selling what we own and
25 we are licensing what we don't own the same way it's been

1 licensed since 1996 by Santa Cruz Operations.

2 Q. Okay.

3 A. And before.

4 Q. Now, during all this licensing that's been going on all
5 these years, has SCO been in default under the asset purchase
6 agreement to Novell?

7 MS. FATELL: Objection, Your Honor. Calls for a legal
8 conclusion.

9 THE COURT: Mr. Lewis.

10 Q. Are you aware --

11 THE COURT: I'll sustain that because I think it does,
12 and it probably can be re-asked.

13 MR. LEWIS: I'll see if I can rephrase it a bit.

14 Q. During all these years of licensing, has Novell claimed
15 that SCO is in default to Novell, as it now does?

16 A. From the time in 1996 --

17 Q. Yeah.

18 A. -- when the asset purchase -- no, never.

19 Q. In fact, only since this bankruptcy, right? If that?

20 A. No, actually, it was before the bankruptcy. It was
21 when -- it was shortly -- well, if you want to get the time
22 frame, it was shortly after Novell announced that they were
23 going to use Linux as their platform of choice for their
24 Netware product, and SCO came out and made some claims that
25 Linux included some UNIX, and then Novell started coming out

1 with claims that you really didn't buy UNIX.

2 Q. So when the litigation began, essentially.

3 A. Yes.

4 Q. Is that a fair statement?

5 A. Yes.

6 Q. Okay. And during all of this time that all this licensing
7 has been going on, has SCO been in bankruptcy? Or Caldera, or
8 Santa Cruz?

9 A. No.

10 Q. But it is now, right?

11 A. Oh, yeah.

12 Q. And it's trying to sell these assets in the bankruptcy
13 case according to bankruptcy law?

14 A. Sure.

15 Q. Okay. Now, you talk about transactions in the ordinary
16 course in a couple of your paragraphs, that this is just
17 another ordinary course transaction. In how many transactions
18 in the past has SCO effectively conveyed away its business?

19 A. What are we talking about? The sale agreement --

20 Q. Yeah.

21 A. -- to UnXis?

22 Q. Yeah.

23 A. Well, Santa Cruz did it to Caldera.

24 Q. Okay.

25 A. So there's one.

1 Q. Okay. And since then?

2 A. Now.

3 Q. Okay.

4 A. You don't do it every day.

5 Q. In the bankruptcy? In the bankruptcy case, right?

6 A. Oh, in the bankruptcy?

7 Q. Yeah.

8 A. This is the first time in a bankruptcy that the business
9 is being sold.

10 Q. Okay. And would you consider a one-time transaction
11 ordinary course?

12 A. When I refer to ordinary course, I'm talking about
13 licensing of the software.

14 Q. Okay.

15 A. And I was talking about we are -- I'm talking about the
16 license properties and the sublicense agreement, that in
17 licensing those -- those properties under the sublicense
18 agreement to -- thought it was going to get me in trouble --
19 [unc-sis]?

20 THE COURT: [unc-sis], yes.

21 Q. We got that officially, today, Mr. Broderick.

22 A. -- to UnXis, licensing those -- those intellectual
23 property and copyrights to UnXis is in ordinary course of
24 business because they were licensed from 1996 on with no
25 objection from Novell.

1 Q. But does the ordinary course of business include a
2 transaction which puts you out of business? Is that ordinary
3 course of business?

4 A. That's not what I'm saying is ordinary course of business.

5 Q. I understand that, but isn't that what this transaction
6 does?

7 A. Are we talking about the sublicense agreement where we're
8 licensing --

9 Q. The sub --

10 A. The sublicense agreement where we are licensing the
11 copyrights that the Court said we don't have is ordinary course
12 of business. We license those -- we have been licensing those
13 since Santa Cruz closed the asset purchase agreement.

14 Selling the business, ordinary course of business? Well,
15 the business -- I've been sold three times. So I guess in
16 business, you do sell a business, so it would -- I would
17 consider selling a business an ordinary course of business.

18 Q. Okay. Now, can you separate the sublicense from the rest
19 of the transaction? Let me put this question differently.
20 Would there be a transaction with UnXis without the rest of the
21 asset purchase agreement, besides the sublicense?

22 A. I don't know.

23 Q. You don't know. You have no idea whether UnXis would
24 simply take a license and nothing else?

25 A. I don't know.

1 MS. FATELL: Objection, Your Honor. Calls for
2 speculation.

3 THE COURT: I'll sustain the objection.

4 Q. But it would be fair to say, would it not, that SCO has
5 not historically entered into such a sublicense as part of a
6 larger transaction in which it put itself out of business?

7 A. Are you saying historically, SCO has not licensed just the
8 technology and copyrights that the court --

9 Q. No, I obviously asked a bad question. Isn't it true that
10 SCO has never before entered into a sublicense like this as
11 part of a larger transaction in which it also, at the same
12 time, put itself out of business?

13 A. SCO has never -- SCO has not entered into a sublicense
14 like this in the past because Novell never claimed ownership of
15 the copyrights in the past and we didn't have this court order
16 that they do own the pre-APA copyrights. That was never an
17 issue in the past. It was never raised by Novell in the past.
18 Therefore, when we took the software agreements at the time
19 Santa Cruz got the asset purchase agreement, Novell said, use
20 these agreements, change the name from Novell to Santa Cruz,
21 and go do your business. They didn't say you must include
22 something in there that says, you don't own those copyrights.

23 Q. Okay, but it's also fair to say, is it not, that SCO has
24 never entered into a transaction before in which it put itself
25 out of business?

1 A. SCO has never done -- that's true.

2 Q. Okay.

3 A. Otherwise we wouldn't be here because they'd already be
4 out of business.

5 Q. Excellent.

6 Now, under the asset purchase agreement between SCO and
7 Novell and now SCO and -- well, originally Santa Cruz and
8 Novell and now SCO and Novell, do you recall that there's a
9 provision that requires that SCO develop the business that it's
10 buying?

11 A. I'm sorry?

12 Q. Do you recall that in the asset purchase agreement between
13 SCO and Santa Cruz, now SCO and -- I mean, between Novell and
14 Santa Cruz now Novell and SCO there's a provision which
15 requires that the buyer develop the business that it's buying?

16 MS. FATELL: Objection, Your Honor. I don't think
17 there's been a foundation established that this witness is
18 intimately familiar with the provisions of a 1995 asset
19 purchase agreement to be able to respond to that.

20 MR. LEWIS: Your Honor, he can tell us if he's not. I
21 think rather presuming one thing or another let's hear what he
22 has to say. I mean, we've quoted it in our brief, so --

23 THE COURT: All right. I'll overrule the objection.

24 I think it's clear and fair to the witness.

25 A. There was a -- I don't know the exact wording or how legal

1 it was but I know there was an intention. I don't know if it
2 was legally binding but there was an intention in the asset
3 purchase agreement between Novell and Santa Cruz that Novell
4 and Santa Cruz that Novell develop a merged product and Novell
5 would include --

6 Q. You mean SCO, don't you?

7 A. SCO.

8 Q. Would develop a merged product?

9 A. Yeah. S-C-O.

10 Q. Yeah.

11 A. Santa Cruz Operation would continue to develop the units
12 where a product and I believe include Netware in it for that
13 release.

14 Q. Will it be able to do that after this transaction closes,
15 if it closes?

16 A. UnXis will.

17 Q. UnXis will be able to?

18 A. UnXis will.

19 Q. Will SCO be able to?

20 A. No. Because they won't have any people to do it.

21 Q. Okay. Or any intellectual property?

22 A. Or any intellectual property.

23 Q. Okay.

24 A. Same way Novell could not do it after they sold the
25 business to Santa Cruz.

1 MR. LEWIS: I have no further questions, Your Honor.

2 Thank you.

3 THE COURT: Thank you Mr. Lewis. Ms. Fatell?

4 REDIRECT EXAMINATION

5 BY MS. FATELL:

6 Q. Just briefly, I want to try and go back and clarify the
7 questions about SCO putting itself out of business. When
8 Novell sold the UNIX business to Santa Cruz, Santa Cruz then
9 continued in that business you said before, correct?

10 A. I'm sorry?

11 Q. Santa Cruz then continued with the UNIX business?

12 A. Absolutely.

13 Q. And then Santa Cruz sold to Caldera?

14 A. Yes.

15 Q. So Santa Cruz was no longer in that business?

16 A. Absolutely.

17 Q. Did it have any ability to continue to perform under the
18 APA with Novell once it sold the business to Caldera?

19 A. Didn't have the people, didn't have the technology.

20 Q. Did it have the intellectual property?

21 A. No intellectual property, they sold it.

22 Q. And when Santa Cruz sold to Caldera was Santa Cruz able to
23 continue the UNIX business?

24 A. No.

25 Q. It did it have the employees?

1 A. No.

2 Q. Did it have the IP?

3 A. No.

4 Q. So Caldera changed its name to SCO so we're still then
5 talking about SCO. So it wouldn't surprise you that when SCO
6 sold the business to UnXis that SCO wouldn't be able to
7 continue to perform on the UNIX business, correct?

8 MR. LEWIS: Objection, relevance, Your Honor. What
9 would surprise him or not about the consequences is totally
10 irrelevant to this. They're either going to be able to
11 continue in the business if they want.

12 MS. FATELL: Your Honor, there was a point made that
13 once the business was sold SCO would no longer exist and in
14 essence that business -- the implication was that that business
15 would no longer exist. I'm trying to establish that the
16 business will continue to exist in UnXis' hands.

17 MR. LEWIS: Your Honor, the implication was that SCO
18 would no longer be able to fulfill its obligation to develop
19 the business as provided in the APA, that's what the
20 implication was. It has nothing to do with whether the
21 business will exist.

22 MS. FATELL: I withdraw the question, Your Honor.

23 THE COURT: Yes. Yes.

24 MS. FATELL: I have no further questions.

25 THE COURT: All right. Thank you Ms. Fatell. Mr.

1 Lewis?

2 MR. LEWIS: I can't resist having the last one, Your
3 Honor. I came all the way out here for this I might as get it
4 in, huh?

5 THE COURT: Take the chance.

6 MR. LEWIS: Thanks.

7 RECROSS EXAMINATION:

8 BY MR. LEWIS:

9 Q. So Mr. Broderick, when Santa Cruz sold to Caldera did
10 Novell object?

11 A. No.

12 Q. Okay. It's objecting now though, right?

13 A. Excuse me?

14 Q. It's objecting now though, right? You understand.

15 A. About pretty much everything.

16 MR. LEWIS: Okay. Thank you, Your Honor.

17 THE COURT: Thank you Mr. Lewis. Nothing further?

18 All right. Thank you Mr. Broderick you may step down, sir.

19 THE WITNESS: Thank you.

20 MS. FATELL: Your Honor, we're prepared to go to
21 closing. I'd ask if we might just have a brief recess, please.

22 THE COURT: Think that would be wise. Let's take ten
23 minutes or so. If you need more time you'll let me know but
24 ten minutes and we'll be back.

25 MS. FATELL: Thank you, Your Honor.

1 MR. LEWIS: Thank you, Your Honor.

2 THE COURT: Thank you.

3 (Recess from 3:44 p.m. until 3:55 p.m.)

4 THE CLERK: Please rise.

5 THE COURT: Thank you everyone, please be seated.
6 Thank you. All right.

7 Ms. Fatell, is that the end of the evident?

8 MS. FATELL: Yes, Your Honor.

9 THE COURT: Okay. Thank you.

10 MS. FATELL: Your Honor, I'm reminded that we wanted
11 to move our declarations into evidence if we --

12 THE COURT: Oh yes. Any objection Mr. Lewis?

13 MR. LEWIS: No objection, Your Honor.

14 THE COURT: All right. They are admitted as --

15 MS. FATELL: Thank you, Your Honor.

16 THE COURT: -- Debtors' 1, 2 and 3, I guess.

17 MS. FATELL: Yes.

18 (The Declarations were hereby received into evidence as
19 Trustee's Exhibit 1, 2 and 3, as of this date.)

20 THE COURT: Trustee's 1, 2 and 3, excuse me.

21 MR. LEWIS: Your Honor, maybe it would make sense for
22 me to move into evidence the documents that we attached to our
23 brief which are all court documents.

24 THE COURT: Any objection there?

25 MS. FATELL: No, Your Honor. We would move for the

1 same with respect to all of our pleadings, actually.

2 THE COURT: All right. Then both sets of documents
3 are admitted into evidence in support of the motion and/or the
4 objection as the case may be.

5 (The Documents Attached to Novell's Brief were hereby received
6 into evidence as Novell's Exhibits, as of this date)

7 (The Pleadings in Support and/or Objection to the Motion were
8 hereby received into evidence as Trustee's Exhibits, as of this
9 date.)

10 MS. FATELL: Thank you, Your Honor.

11 Your Honor, we're here today on behalf of the trustee
12 for SCO to approve the sale of the software business assets.
13 The standard under Section 363 are very well recognized. The
14 burden is on the trustee to show that there's a sound business
15 reason to sell these assets and we believe that the burden is
16 readily met and the testimony supports that. Mr. Comer stated
17 that the company is running out of money, we've heard that the
18 value is declining, that the failure to sell will result in a
19 shutdown, loss of jobs, a complicated and very costly wind down
20 of the foreign subsidiaries.

21 We heard from Mr. Broderick that there will be a
22 worldwide impact on governments, financial institutions, top
23 Fortune 100 companies as well as small and medium size
24 companies, various government entities all over the country
25 including throughout our federal government and retailers from

1 McDonalds to CVS, financial institutions, et cetera. So we
2 think that it is clear, Your Honor, that absent approval of
3 this sale it is not just a question of whether there will be a
4 distribution to creditors. We've acknowledged that this
5 company is administratively insolvent, we recognize that. It's
6 not the first time an administratively insolvent company has
7 been sold but we do think that with respect to the estate as a
8 whole it is in the best interest of this estate as well as all
9 the parties that we mentioned that this sale be approved.

10 Under 363(f), Your Honor, this sale can be sold -- the
11 assets can be sold free and clear of liens, the liens would
12 attach to the proceeds, the only secured lender we've heard
13 will -- their liens will attach to the proceeds they don't have
14 a lien for the full amount of their debt. They have not
15 objected to this sale.

16 We've heard testimony that the sale was in good faith,
17 that it was negotiated at arm's length, that there was no
18 collusion. Mr. Comer and others at OPA conducted an extensive
19 and exhaustive sales process over many months. They went for
20 one sale deadline, were not able to get bids by that time, they
21 extended the process and went back to the well and revisited
22 everybody who had had any contact with the company or they had
23 contacted in the past and beat the bushes some more to try and
24 drum up some more interest in these assets.

25 Finally, there were two final bids submitted and we

1 heard that the auction was held. The second bidder who bid
2 eighteen dollars in cash was not willing to increase their bid.
3 They made certain allegations on the record, Your Honor, there
4 was no evidence to support any of their comments about there
5 being any improprieties with respect to the process and I think
6 that from the testimony of Mr. Comer it's clear that this was a
7 very full vetted process. It was done on commercially
8 reasonable terms and it was intended to get the best price that
9 we could for these assets. And with a fully funded cash
10 portion of the bid by UnXis submitted and the assumption of the
11 other liabilities, the continuance of the business, the taking
12 of employees, et cetera and being the only bid we concluded
13 that that was the proper and best interest of the estate to
14 accept that bid. And when I say only bid quite frankly an
15 eighteen dollar bid isn't really a bid and they did not seek to
16 bid any further. So we would request, Your Honor, that the
17 Court make a good faith finding under Section 363(m) in
18 connection with the sale process.

19 With respect to assumption and assignment of executory
20 contracts --

21 THE COURT: Yes.

22 MS. FATELL: -- identified as the assigned contracts
23 there were limited objections, they've been resolve or at least
24 one has been deferred except for the objection of Novell and
25 I'm going to put that objection to the side for one moment,

1 Your Honor.

2 With respect to the other contracts that are being
3 assumed and assigned Mr. Bolandz declaration and his testimony
4 satisfies the requirements of providing adequate assurance of
5 further performance. They've identified UnXis, they've
6 identified the financial backers, the board of directors, the
7 CEO, the CFO, the COO. We've heard testimony about the
8 financial parties that are looking to raise money and their
9 experience in that industry. Mr. Bolandz's experience in this
10 industry and his expectation that once the sale order is
11 approved he does not have any expectation that funds will not
12 be raised to go forward. Nevertheless, Your Honor, there are
13 funds already in the trustee's account to close this sale.

14 There was also testimony that the buyer will fund up
15 to 50,000 dollars of the costs and the estate will fund the
16 balance. There's a total of approximately 100,000 dollars so
17 we believe that we've satisfied the requirement that there'll
18 be sufficient monies to pay the cure amounts.

19 Notice was extensive; probably over 20,000 people
20 received notice. Fortunately my phone number was not on the
21 notice --

22 THE COURT: Yes.

23 MS. FATELL: -- so I didn't receive any of those
24 calls. And so we would ask the Court to find that the
25 assumption and assignment of the executory contracts is

1 appropriate and that anybody who failed to object is deemed to
2 have consented to the assumption and assignment.

3 Now, turning to Novell. First of all, Your Honor, I
4 acknowledge that there has been a great legal battle going on
5 between Novell and SCO. SCO lost at the jury trial and that is
6 up on appeal. And the argument has been heard by the Appellate
7 Court and we are awaiting a result so anything that I say, Your
8 Honor, is bearing in mind that there is any appeal.

9 THE COURT: Thank you.

10 MS. FATELL: Novell has consistently taken the
11 position that the trustee cannot sell these software assets
12 without assuming and assigning the 1995 APA which requires
13 Novell's consent and they refuse to give consent. We believe,
14 Your Honor, as laid out in our papers, both our objection
15 initially with respect to the assumption and assignment issues
16 and then later our reply to the Novell objection, that SCO does
17 not need to have the copyright license, if you will, assigned
18 to the buyer primarily because there is no copyright license.
19 The right to use these copyrights is an intrinsic part of these
20 business assets and they have followed the assets throughout
21 all of the various transfers of these assets from the time
22 Novell had them to Santa Cruz, to Caldera who then became SCO.

23 The Utah District Court did not find that there was a
24 license agreement. There is no four-cornered document that
25 anyone can point to that says this is the license by which SCO

1 uses the copyrighted material. The District Court repeatedly
2 stated in its findings of fact and conclusions of law and I
3 quote, "Copyrights are not required for SCO to exercise its
4 right with respect to the acquisition of UnXis and UnXisWare
5 technologies."

6 And, Your Honor, I didn't provide cites because I
7 think if you open to almost any page you will find the court
8 having stated that. But let's be clear, the court found that
9 SCO does not own the copyrights but it does have the right to
10 use them. And it has done so for over sixteen years. We heard
11 testimony from Mr. Broderick about the form of the license
12 agreement and it is the same form that has been used
13 consistently. In fact it's the Novell form that Novell gave to
14 Santa Cruz and said just change the name, use this form, this
15 is the license agreement with full knowledge SCO has been
16 licensing those copyrights to third parties.

17 Novell itself acknowledges in its objection at
18 paragraph 15 that UnXis will need the copyright licenses to be
19 able to operate the business that it is buying. It describes
20 the trustee's need to convey to the buyer that business
21 critical copyright licenses. Novell wants this Court to focus
22 on the APA and we should take a look at that transaction for a
23 minute. First of all it was a sale.

24 Your Honor, if you were to look at the asset purchase
25 agreement from 1995 in the recitals it says, "The seller is

1 engaged in the business of developing a line of software
2 products currently known as UNIX and UnixWare. The sale of
3 binary and source code licenses to various versions of UNIX and
4 UnixWare. The support of such products and the sale of other
5 products which are directly related to UNIX and UnixWare and
6 that is collectively defined as the business."

7 Under Acquisition Article I it further states that,
8 "On the terms and conditions set forth in this asset purchase
9 agreement the seller will convey, sell, transfer, assign and
10 deliver to buyer and buyer will purchase and acquire from
11 seller all of seller's right, title and interest in and to the
12 assets and properties of the seller relating to the business."

13 It goes on, obviously there are many, many pages to
14 the document and identifies what are excluded assets and what
15 are included assets. But my point, Your Honor, is that it is
16 the business that was sold and all of the right title and
17 interest in and to the assets and properties of seller relating
18 to that business, Your Honor.

19 The course of conduct since that time as testified by
20 Mr. Broderick is that there have been a continuing conduct of
21 the business as it was done by the same group of employees at
22 Novell, with the same form of license agreements, with the same
23 types of customers. That business was continued when it was
24 sold and all of that business and all of its rights related to
25 that business were transferred to Santa Cruz. And similarly

1 when Santa Cruz sold and transferred the business and all of
2 the rights related to that business to Caldera who subsequently
3 became SCO.

4 Novell, again, wants to focus on the APA. It talks
5 about the sale of business and whether they consented or
6 whether they knew it was going to happen or what their rights
7 may have been, Your Honor, I point out that there's actually a
8 right of first refusal in the 1995 APA so clearly Novell
9 anticipated that there would be or might be subsequent sales of
10 that business. And they themselves reserved the right to make
11 an offer on that.

12 Your Honor, it's our position that every time this
13 business was transferred the right to use that copyrighted
14 material transferred as well. Again, the Court hasn't pointed
15 to any document that sets out the terms and conditions. So,
16 Your Honor, what we have to do is look at the conduct of the
17 parties.

18 I struggled, Your Honor, to try and find an analogy
19 here of, you know, what else can I think of that this might be
20 like. Well, let's assume for the moment that someone owns a
21 baking business and they have a secret recipe for their
22 brownies. And they sell that business, lock, stock and barrel
23 to a new purchaser. That purchaser develops that business,
24 expands it, it's now nationally acclaimed, internationally
25 acclaimed, there are restaurants throughout the world that

1 carry that brownie and make their own flavor of that brownie.
2 They might add peanut butter chips, they might put on coconut,
3 whatever, they change that brownie. Nevertheless, that recipe
4 and that brownie still resides with the person who acquired
5 that business.

6 Now, what would happen if the original owner of that
7 recipe suddenly said well, I want my recipe back? I never gave
8 you a license to take that recipe and even though you've built
9 your business and you've licensed it or you've transferred the
10 recipe to other people I never gave you a license so I get to
11 pull that back. Your Honor, there's a course of conduct there.
12 Well, that's the same course of conduct here.

13 Novell has sat by the sideline while this business has
14 transferred at least twice and now it's about to transfer a
15 third time. And there is clearly, because there's no license
16 that anybody can point to and we acknowledge for purposes of
17 this argument that the copyrights the Court found are owned by
18 Novell, so then we must have an implied license, Your Honor.
19 And again, the implied license, what are the terms of that
20 license; we have to look at the course of conduct among the
21 parties.

22 To say that we should go back sixteen years and
23 somehow find that the license is in this APA, Your Honor, it
24 just doesn't make any sense and quite frankly we think that
25 it's a red herring. In fact Novell even admits in paragraph 16

1 of its objection the vagaries of the status of this license
2 when it says the copyright license in "were provided by" the
3 original APA. In paragraph 16 later on they try a different
4 phrase and they refer to it as the copyright license imbedding
5 agreements such as the original APA. Your Honor, even Novell
6 can't point to a license agreement that governs the SCO use of
7 these copyrights.

8 So, Your Honor, to argue that it resides, it's
9 embodied, it's somehow in APA we say that's just not true.
10 There is a body of law out there that you can have an implied
11 license, you look to the conduct of the parties and the conduct
12 of the parties here shows that SCO and its predecessors have
13 licensed this product to others, have sublicensed it to others,
14 others have sublicensed it, they've made their own derivatives,
15 their own flavors of UNIX and therefore we have this implied
16 license. And when you look to, well, what are the rights of
17 that license, again, look to the conduct of the parties. We
18 never had to go to Novell for consent. Santa Cruz didn't get
19 consent to sell. Santa Cruz didn't get consent to sell to
20 Caldera, Caldera didn't get consent to change its name to SCO
21 and continue to license to all of its customers. This was the
22 conduct of the parties; this was how this business has been
23 operated.

24 THE COURT: In order to fund an implied license I have
25 to find knowledge on the part of Novell though, is that

1 correct?

2 MS. FATELL: Your Honor --

3 THE COURT: Knowledge of the transfers.

4 MS. FATELL: You're right, Your Honor. And there has
5 been -- certainly there's been knowledge. I mean, we've heard
6 testimony that Novell has never interfered with that. They
7 proposed their own form of license agreement to be used to
8 continue to license the product. They've acquiesced in all of
9 the transactions that have taken place.

10 THE COURT: Okay.

11 MS. FATELL: Your Honor, Novell tries to argue that
12 the APA, where they allege this license is embedded, is an
13 executory contract and it must be assumed and assigned and the
14 Court has no choice but to deny this sale because they don't
15 consent to the assumption and assignment.

16 Novell quotes the bankruptcy court decision Exide in
17 support of its decision that the APA and all of the related
18 documents are one integrated transaction and they all must be
19 assumed and assigned. But, Your Honor, Novell incorrectly
20 cites that the Third Circuit decision affirmed the bankruptcy
21 court and in fact it reversed it. And the bankruptcy court --
22 sorry, I wanted to get that opinion for a moment, excuse me.

23 If I may, Your Honor, not dissimilar to this situation
24 the court noted that Exide granted EnerSys, which was the other
25 party, a perpetual exclusive royalty free license to use the

1 Exide trademark in its business. And the division worked for
2 almost ten years, each party appeared satisfied with the
3 results of the transaction. The court relied, Third Circuit
4 recognized, that the Vern Countryman definition of executory
5 contract is the definition that the courts in this jurisdiction
6 follow. And it's a contract under which the obligation of both
7 the bankrupt and the other party to the contract are so far
8 underperformed that the failure of either to complete
9 performance would constitute a material breach excusing the
10 performance of the other.

11 The court found in this instance that EnerSys had
12 substantially performed by paying the purchase price and
13 operating the business for over ten years using the assets that
14 were transferred under the agreement and continuing to use the
15 trademark. The court noted that its inquiry was whether the
16 agreement contained at least one obligation for both parties
17 that would constitute a material breach if not performed.

18 And the court concluded that it was not an executory
19 contract because it did not contain at least one ongoing
20 material obligation for each side. And, Your Honor, we submit
21 that that's exactly the situation here and based on the Third
22 Circuit's ruling in Exide there's no basis for the Court to
23 find that there is an executory contract.

24 This APA was entered into in 1995 since that time --
25 that's sixteen years ago, Your Honor. This company has been

1 transferred, it's operated, there have been no interactions
2 between the parties with respect to providing reports, any
3 payments back and forth, again, putting aside the Sfax
4 royalties -- and Your Honor, why do I put those aside? We're
5 not transferring the asset purchase agreement, we're not
6 transferred the obligation to collect those royalties. That
7 remains a part of the contract that is not being transferred.
8 We have no obligation to transfer a contract that we think
9 would be burdensome to the purchaser or for any reason. If the
10 purchaser doesn't want it, we have no obligation to transfer
11 that contract. And because it's not executory we have no
12 obligation to even consider whether we need to assume and
13 assign it or whether we need consent from Novell.

14 Your Honor, we also heard Mr. Broderick respond when
15 asked if when they entered into license agreements did any of
16 the parties also take an assignment of the 1995 asset purchase
17 agreement with Novell. Obviously the answer to that is no.

18 Your Honor, it's our view that we have to take a
19 pragmatic look at this. We don't know why Novell is objecting
20 to this sale. We can only speculate, is it objecting because
21 it wants to put a competing product out of business, because it
22 wants to try and compete in that market and it now will be the
23 exclusive holder of those copyrights and the right to use that
24 copyrighted material, we can only speculate. But, Your Honor,
25 it just doesn't make sense that a company whose business has

1 been transferred twice already cannot transfer its business
2 again.

3 It's a well accepted principle, I believe, of common
4 law that courts look favorably on anti-alienation provisions.
5 They're construed narrowly so that they don't interfere
6 improperly with commerce or free enterprise. Parties should be
7 able to transfer their assets. We understand that in the IP
8 world there are restrictions but we don't have a license here,
9 Your Honor, we have a course of conduct. We have an implied
10 right to use. And so, Your Honor, we can only look to what
11 those rights should be and it only makes sense and it would
12 only be consistent with that common law theory that an entity
13 that has been using this business and all of the bundle of
14 assets that go with it including the right to license this to
15 third parties should be permitted to go forward.

16 So, Your Honor, we think that really as a matter of
17 law that SCO can sell these assets. Novell does not have a
18 license. At best there's an implied license.

19 MS. FATELL: There's nothing in that implied license
20 based on the course of conduct of the parties that this Court
21 would -- that would result in this Court finding that consent
22 is required. We think that the trustee has complied with all
23 of the requirements to satisfy 363 and 365 in transferring
24 these assets and assuming assigning those contracts that are
25 executory, and it intends to assume and assign. And therefore,

1 Your Honor, we think that the objection should be overruled and
2 we ask that the sale be approved.

3 THE COURT: All right. Thank you Ms. Fatell. Thank
4 you.

5 Mr. Lewis?

6 MR. LEWIS: Thank you, your Honor.

7 THE COURT: You bet.

8 MR. LEWIS: First, let's be real clear on what's teed
9 up today. What's teed up is a 363/365 sale. And our objection
10 goes to the applicability of 365 and what its implications are
11 for this transaction.

12 So whatever may or may not be the standards for
13 approval of a sale under 363, we know what they are under 365.
14 And we know that one of them is not the public good. If it's
15 really true, and I suspect that it's not, that all of commerce
16 is going to come to a halt if SCO can't continue to operate its
17 business, or can't find some other way to help people
18 transition, which I suspect they can, and I would bet you a lot
19 of them are already doing that, because they've known for three
20 years that SCO is in trouble. And if they haven't been
21 preparing for a transition, they've not been paying any
22 attention at all.

23 But even if that were not true, the fact is, that's
24 not a relevant consideration here. So all the testimony about
25 McDonald's and CVS and financial institutions --

1 THE COURT: My computer -- and my computer.

2 MR. LEWIS: -- and your computer, Your Honor -- I
3 suspect will continue to operate notwithstanding that SCO may
4 not stay in business very much longer, one way or the other.

5 What is relevant here is how Section 365 works,
6 particularly in the context of licenses of intellectual
7 property, such as we are talking about here.

8 THE COURT: Yes.

9 MR. LEWIS: And let's start kind of at the back end
10 and work our way up the chain.

11 The debtor accuses us of pussyfooting with our
12 language about licenses. But it's the debtor that's
13 pussyfooting, because the debtors own agreement talks about a
14 sublicense. Well, a sublicense has to be a sublicense of a
15 license. Not of some kind of inchoate -- whatever it is,
16 floating around just below the surface of the agreement. And
17 indeed, as counsel was arguing, she couldn't help but use the
18 word license. It kept leaping into her vocabulary. And Mr.
19 Broderick, when I asked him "what is this a sublicense of?" He
20 says licenses of copyrights that they got from Novell. And Mr.
21 Comer said the same thing, from a less expert point of view I
22 suppose, but that was his understanding too, and he was in on
23 those conversations.

24 So that's what we have here. And whether they're
25 implied licenses or expressed licenses isn't the point.

1 Because the backdrop to intellectual property law in this field
2 is that if you don't have an express consent provision, you
3 have to get consent. And we have no evidence that there's an
4 express consent provision. We do have an argument that that
5 somehow -- we all knew that was there in the implied license,
6 because that was the course of conduct of the parties. But I
7 bring you back to why we're talking about 365 in the first
8 place.

9 When Santa Cruz sold to Caldera there was no dispute
10 between the parties. There was no litigation between the
11 parties. And least of all was there a bankruptcy. So the fact
12 that Novell went along with a prior transfer of the whole
13 business doesn't mean that that was the course of dealing
14 between the parties. Or indeed, when it went from Santa Cruz
15 to Caldera SCO. Completely different situation. Hardly makes
16 for a course of dealing.

17 Now, dance as he might around the issue, Mr. Broderick
18 himself, I think, all but confirmed -- and I think common sense
19 tells you this, that you can't separate out this little
20 sublicense as an ordinary course license, just like all the
21 other licenses that they've done over the years, and there are
22 two reasons for that. Once again, we're in bankruptcy again.
23 Different rules apply. And secondly, in that instance, you
24 can't really separate that sublicense from the sale to UnXis.
25 Do you think UnXis would be buying this without the whole

1 transaction? Without the intellectual property? This is a
2 transfer of the business. And one ongoing executory obligation
3 of the APA is that SCO is required to develop "the business."

4 It isn't going to be doing that anymore, as we heard
5 this morning. And as we thought was pretty obvious before we
6 heard it. Right? That's an important obligation. That's
7 really at the heart of the APA. And that isn't going to be
8 happening anymore. There are others that we've cited to that
9 are ongoing executory obligations. So while this one may be a
10 long-term relationship, nothing in the cases says that long-
11 term relationships mean ipso facto, presto change-o, we have no
12 more -- an executory agreement. We do. And we've never
13 insisted that the APA be transferred. We were content in those
14 prior transactions to let the transactions go through. The
15 circumstances were different than they are today. Today we
16 have SCO, which purporting to transfer this business in a way
17 that puts itself out of business, in a dispute with Novell,
18 where we think it owes us at least three million dollars, where
19 it's appeal means, basically, that it's continuing to disparage
20 our ownership rights. That's another default. And, of course,
21 it's in bankruptcy. So it's not the same circumstance. It's
22 not ordinary course, and it's not the course of conduct of the
23 parties. This is a very different circumstance.

24 The -- at the other end, we have UnXis, where what we
25 know for sure about UnXis is, we know who it's people are, one

1 of whom the Court had some questions about last time around.
2 We know it came up with the munificent sum of 600,000 dollars
3 plus 50 to close this transaction. But we don't know a darn
4 thing about its finances, other than that Mr. Bolandz is
5 confident they'll be able to raise the money.

6 What does that mean? What that means -- and he has
7 some kind of business plan, but not out to the fourth decibel.
8 What that means is, to me -- and he admits, there are no
9 binding commitments for financing this company once it acquires
10 the assets. Not a single one. As he testified, his white
11 knight could walk, even after the acquisition. And we hear
12 that it's probably six months before we're really talking about
13 new funding -- while they figure out, as he put it, how to run
14 the business. And you know what, if they don't like how the
15 business runs, and they don't like how it operates, and they
16 don't like what its prospects are, maybe that financing won't
17 show up.

18 So where's the adequate assurance of future
19 performance, Your Honor? There isn't any. There's a lot of
20 speculations and soothing noises and maybes, but nothing that
21 provides us with real adequate assurance of future performance.
22 There's no assurance of performance at all. There's not a
23 penny in the bank, other than the money to close. And not a
24 penny legally committed, once the transaction closes to fund
25 this company going down the road, and probably not much of a

1 business plan at that.

2 So what we're buying is a transferee of these assets
3 who may turn out to be worse than SCO, and certainly worse than
4 SCO looked when we originally sought to them, or to Santa Cruz
5 and then to SCO. And that's not adequate assurance of future
6 performance either.

7 I want to emphasize, the public interest issue here is
8 not relevant, and it's certainly not a reason to impose on
9 Novell yet another transaction, in case in which Novell and the
10 other creditors, through these endless efforts to sell these
11 assets over SCO's objections, is going to end up holding the
12 bag on a three million dollar claim. The other creditors
13 aren't going to get a penny either. The only beneficiaries of
14 this transaction are going to be the lender and the
15 administrative claimants and the buyer.

16 That isn't a good reason to ignore the law, Your
17 Honor. No reason is a good reason to ignore the law, but
18 that's an especially bad reason to ignore the law.

19 The trustee chose his course of action here. What he
20 wanted to try to accomplish -- whether he wanted to settle,
21 whether he could settle with Novell at a price people could
22 live with, that was not possible. The parties tried and they
23 didn't get there. But he chose that course of action. Why
24 should the consequences of that be imposed on Novell again,
25 after we suffered through all the missteps of SCO and its

1 management for a year and a half, and now we're almost two
2 years into the trustees regime, and we're facing the same kind
3 of problems -- except the price keeps going down, and the
4 insolvency keeps going up.

5 So what we have is a sublicense of a license -- and it
6 has to be a license. Everybody admits that. They can't get
7 away from saying it, even though they may try. A sublicense of
8 a license from Novell that's part of an integrated transaction
9 that is still executory.

10 It's as simple as that, Your Honor. And as a
11 consequence they cannot do this without our consent and without
12 sharing the existing default of at least three million dollars.
13 And I might say, Your Honor, to some extent for what it's
14 worth, if we're talking about motive, which I think are also
15 relevant, our position probably hurts us too. Because we
16 believe that 180- some odd thousand dollars of costs in the
17 litigation are going to end up being administrative expenses.
18 We're not going to get -- the money that's coming in isn't
19 going to go towards that, if it doesn't come in at all. So in
20 that sense, we're probably not going to get our share of that,
21 because as you know, that has to be distributed pro rata.

22 It's not a big amount. I'm sure our share of that
23 wouldn't be a big amount, given all the other unpaid
24 administrative claims, and paid administrative claims that
25 might have to be reallocated if this case is indeed

1 administratively insolvent as it seems -- everybody agrees it
2 is.

3 So as much as it would be nice to kind of have some
4 successful, in some sense, outcome to this case, the law just
5 doesn't permit it here. And no amount of talking around
6 whether these are licenses, and whether the APA's executory,
7 whatever has to be cured and whether our consent is necessary,
8 changes what the facts are. And the facts are, there is a --
9 there's going to be a sublicense of a license -- that
10 sublicense is not some little ordinary course sublicense
11 floating around there, just like all the others, and it's a
12 sublicense of a license where our consent is needed, and that's
13 a license that's part of an APA where our consent and cure is
14 needed, and those things are not on the table.

15 And so the Court, in my respectful opinion, cannot
16 approve this transaction, much as it might like to, and much as
17 it might benefit McDonalds. Or a small business. Or your
18 computer, Your Honor.

19 THE COURT: Or me.

20 MR. LEWIS: Thank you, Your Honor.

21 THE COURT: The appeal is already under consideration,
22 isn't that correct?

23 MR. LEWIS: The appeal has --

24 THE COURT: It's been argued?

25 MR. LEWIS: -- been argued, Your Honor.

1 THE COURT: It's been argued.

2 MR. LEWIS: They're just waiting for a decision --

3 THE COURT: Okay.

4 MR. LEWIS: The appeal was argued maybe three, four
5 weeks ago.

6 THE COURT: Okay.

7 MR. LEWIS: I don't know whether to expect a decision
8 quickly, as we got last time, or whether the circuit will take
9 longer this time because it doesn't seem as urgent as it might
10 have seemed last time. I just don't know.

11 THE COURT: I was just trying to think out loud a
12 little bit if perhaps putting a final piece between the parties
13 in place might somehow be worked into a -- you know, I don't
14 know the strength of the appeal, and how much weight --

15 MR. LEWIS: I'll volunteer my opinion, Your Honor.

16 THE COURT: I'm sure, Mr. Lewis. But you know, I was
17 just wondering if that was a mechanism to resolve --

18 MR. LEWIS: I don't know, Your Honor.

19 THE COURT: -- the parties' dispute.

20 MR. LEWIS: Obviously, if we win, that changes the
21 calculus some, although not as much as the jury trial changed
22 it from before.

23 THE COURT: Sure.

24 MR. LEWIS: And the Courts ruling on a motion to
25 vacate and the motion for injunctive relief.

1 THE COURT: Yes.

2 MR. LEWIS: But, yeah, I mean, it sort of puts it to
3 bed, unless the trustee's thinking about petitioning for cert,
4 which as well all know, is not a very easy road to follow. It
5 could take a long time.

6 THE COURT: And if you lose on appeal, where does this
7 whole thing go? Does it go --

8 MR. LEWIS: Well, it's hard to say, Your Honor, if for
9 no other reason than we don't know what the grounds might be.

10 THE COURT: Okay.

11 MR. LEWIS: For -- I mean, basically, and I venture
12 here maybe a little out of school, but basically I think the
13 grounds are that the jury's verdict was against the weight of
14 the evidence, and basically no rational jury could reach that
15 conclusion. And there were some objections and appeals on
16 district court's rulings on what evidence to admit.

17 THE COURT: Okay. Okay.

18 MR. LEWIS: I think those are the main points. But
19 nothing as dramatic as last time, I think.

20 THE COURT: Understood -- yes. Of course.

21 MR. LEWIS: So, you know, I just don't know what will
22 happen though. I know what we think, but there's no point, I
23 think, in reciting that.

24 THE COURT: All right. Thank you as always, Mr.
25 Lewis.

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

2 THE COURT: Thank you for an excellent argument as
3 always.

4 Ms. Fatell? The reply?

5 MS. FATELL: Yes, Your Honor.

6 Your Honor, I heard a couple of different things.
7 First I heard that 365 is important here, and that's the
8 controlling provision. And then I thought I heard Mr. Lewis
9 say at the end it doesn't really matter if this is an executory
10 contract. It doesn't really matter if cure amount can be paid
11 or not. This is a sublicense of a license and it can't be done
12 without our consent.

13 So let me go back for a minute. This is not an
14 executory contract. I didn't -- I listened very closely, and I
15 didn't hear counsel describe any material obligation of Novell
16 to SCO. And if you look at the Vern Countryman definition,
17 there have to be material obligations going back and forth
18 between both parties.

19 THE COURT: Well I think the one that Mr. Lewis
20 mentioned and then cited to his brief as to others, was the
21 requirement to conduct the business.

22 MS. FATELL: That's the requirement of SCO --

23 THE COURT: Yes.

24 MS. FATELL: -- to Novell.

25 THE COURT: Yes.

1 MS. FATELL: I didn't hear any obligation of Novell to
2 SCO.

3 THE COURT: Oh, I'm sorry.

4 MS. FATELL: So, to be executory, you need material
5 performance required on both sides.

6 THE COURT: Right.

7 MS. FATELL: I can't, for the life of me, figure out
8 how this is an executory contract. And again, I didn't see
9 anything in their pleadings nor did I hear anything in
10 argument, and we certainly didn't hear any testimony that
11 refuted the testimony of Mr. Broderick that nothing comes back
12 from Novell. There are no ongoing obligations of Novell.

13 So I think we have to start with that in the first
14 instance, Your Honor. This is not an executory contract. And
15 the burden should be on Novell to prove that it is, since
16 they're arguing that that's what drives this Court's decision
17 as to whether we can sell these assets. And I think they've
18 failed to meet that burden.

19 They talk about -- bear with me one moment, Your
20 Honor. They talk about this being a sublicense and it has to
21 be a sublicense of a license. We acknowledge there's an
22 implied license, Your Honor. Still, I haven't heard anybody
23 point to the four corners of a document that has a license that
24 says this is the license of the copyrights from Novell to SCO
25 and we can look at it to see whether it requires consent or it

1 doesn't require consent, or what kind of restrictions or no
2 restrictions there are.

3 And so, when you don't have a license, the Court needs
4 to look to what else, but the conduct of the parties, to
5 determine what the terms are of this implied license. And the
6 conduct of the parties here has been consistent over the years,
7 that these rights to use this copyrighted material have been
8 licensed by SCO and by Santa Cruz and by Caldera, for sixteen
9 years, Your Honor. And there's not been any requirement that
10 there be consent. In fact, there's been acquiescence.

11 And I believe Mr. Lewis said that they were content --
12 and I think that was the word he used, to permit the transfer
13 and the licensing up until now.

14 THE COURT: But that there's now been a change of
15 circumstances --

16 MS. FATELL: I'm not sure they have the ability to,
17 because there's been a change of circumstances and they don't
18 like SCO anymore, that they can suddenly say while we were
19 content, it wasn't really the same as consent. To me, change
20 one letter -- its consent. You know, they've acquiesced,
21 they've allowed to happen, they've even admitted, at least in
22 argument, that they were content to allow it to happen.

23 We have a course of conduct. We have an implied
24 license. And it is that implied license that we are
25 sublicensing. And we can look to the actions of the parties

1 over many, many, many, many years to determine that conduct.
2 And I don't hear Novell pointing to anything that says that
3 they're not -- in essence have stopped from changing the terms
4 of that implied license in midstream because they want to.
5 Parties have relied on that, parties have conducted business
6 based on that. There are many parties outside of this
7 courtroom who have relied and who have taken those licenses and
8 assignments of those licenses. So I'm struggling with how, now
9 suddenly, we can say we don't really consent anymore.

10 So, Your Honor, I go back to where we started, which
11 is, yes, this is a sale under 363. And yes, 365 is implicated
12 with respect to executory contracts. There is not an executory
13 contract with Novell. And I don't think based on the record
14 before this Court that one could conclude otherwise.

15 And, therefore, all of these arguments that are made
16 about their consent, and whether there's been adequate
17 assurance of future performance, doesn't really require this
18 Court's consideration, in our opinion. Is there adequate
19 assurance of future performance? We believe there is. All the
20 contract parties whose executory contracts are being assumed
21 and assigned have not come in and objected to that. They've
22 accepted what's been represented to this Court.

23 Your Honor, the testimony was that this company is
24 being supported by people who are intimately familiar with this
25 industry, who have years and years of experience in this

1 industry, who have the know-how, who are bringing in people
2 with the skills and have experience with this business, and
3 they are fully expecting that they will get the financing to go
4 forward with this business. Does that leave Novell feeling a
5 little insecure? It may. But that's not grounds to deny
6 approval. There's nothing in 363 that says that they're
7 entitled to adequate assurance of future performance as a party
8 to a contract that's not being assumed and assigned.

9 So, I don't believe that that's the issue before this
10 Court, in connection with approving a 363 sale, when you're
11 dealing with a non-executory contract that is not being assumed
12 and assigned.

13 THE COURT: All right.

14 MS. FATELL: Thank you, Your Honor.

15 THE COURT: Thank you, Ms. Fatell.

16 MR. LEWIS: May I, Your Honor, it'll be very short.

17 THE COURT: Mr. Lewis, of course, particularly on the
18 executory contract issue which I --

19 MR. LEWIS: Yes.

20 THE COURT: -- which is clearly critical.

21 MR. LEWIS: So, that's not an issue that's been raised
22 before today, but now that it's been raised, the question -- it
23 doesn't seem to be any question whether there are material
24 obligations of the debtor to SCO -- what I'm hearing is, what
25 are the material obligations to Novell? What are the material

1 obligations of Novell to SCO?

2 And I'd suggest, Your Honor, that if Novell were to go
3 out into the marketplace today, and say that SCO has no right
4 to sublicense, we'd be hearing some pretty loud complaining
5 that we had reached the APA, because we had undertaking not to
6 interfere with their licensing. That's how licenses work.
7 That's a pretty hefty, important executory obligation, going
8 downstream. That would be enough by itself, because, as
9 everybody agrees, this license is at the heart of the business.
10 So, there's just one that I can think of right off the top of
11 my head.

12 Now, let's talk a little bit about this course of
13 conduct thing and consent. I would note, first of all, Your
14 Honor, that counsel did use the word "consent" that we did
15 consent. She didn't like the fact that I used the word for
16 content, and she said it was consent. Well, okay, consent.
17 That means it was needed. Now, I would add that my argument is
18 that the course of conduct is not relevant to interpreting what
19 the terms of the agreement are -- the implied agreement -- to
20 exclude from it the usual intellectual property consent rights
21 that are implicit in federal law, because what was done all of
22 those years that the debtor is using as course of conduct, was
23 not being done in the context that we have today.

24 So, it not only -- so, first of all, even if we
25 consented all those times, that doesn't mean that we have to

1 consent this time. Furthermore, that we may have consented all
2 those other times, or that we -- as they were doing these
3 things -- doesn't mean that this situation is just like all the
4 others and therefore that consent should be assumed here as
5 well. Just doesn't work that way.

6 This is a totally different situation. We have a
7 major dispute between the parties. We have the debtor owing us
8 3.6 -- three million dollars right now. We have the debtor
9 pursuing an appeal in which it challenges our rights, and we
10 have a bankruptcy which has an overlay to it that changes how
11 things work. And we are simply employing that law to vindicate
12 our rights under these circumstances.

13 So, what happened in the past is totally irrelevant to
14 what's going on today, Your Honor. And as I said, even the
15 debtor admits that we consented in the past. And my point is
16 simply that we consented in the past on totally different
17 circumstances, doesn't mean that consent should be implied
18 here. A very, very different situation; materially different
19 situation. Thank you, Your Honor. I'm done.

20 THE COURT: Thank you, thank you, Mr. --

21 MS. FATELL: Your Honor, if I may just have one
22 minute?

23 THE COURT: Yes.

24 MS. FATELL: Your Honor, I have to refer the Court to
25 the Exide Technology's Third Circuit opinion.

1 THE COURT: Yes.

2 MS. FATELL: And the court deals with material versus
3 nonmaterial obligations. And I'm going to just summarize it
4 briefly, but the obligation to observe the use restriction, was
5 not material. The obligation to observe the quality standards
6 provision was not material. The indemnity obligation and the
7 further assurances obligations -- these are defined terms in
8 this agreement -- do not outweigh the factors supporting
9 substantial performance.

10 Your Honor, there has been substantial performance
11 under this asset purchase agreement, and, of course, there may
12 be a lawsuit in the works, if Novell decided to go out and do
13 something that would harm SCO's ability to operate its
14 business, but that's not a material, ongoing, substantial
15 performance obligation under the APA. Certainly doesn't -- not
16 under the Third Circuit's analysis. Thank you, Your Honor.

17 THE COURT: Thank you. Yes, Mr. Lewis.

18 MR. LEWIS: Your Honor, material remaining obligations
19 to be performed --

20 THE COURT: Yes.

21 MR. LEWIS: -- don't mean you have to be doing them
22 every day. It just means that you have an obligation that you
23 have to adhere to, whether it's every day, or every week, or
24 just not interfering with someone's rights. That's a material
25 ongoing obligation, even if it's not something you do every

1 day, the first thing you get up in the morning, after you have
2 your coffee. So, I think counsel's analogy is misplaced.

3 THE COURT: All right. All right. Well, you know, I
4 actually thought I had a better handle on this case before
5 today's testimony and arguments, which were excellent, and both
6 of you have given me some pause and reason to go back and do a
7 little bit more reading and a little bit more thinking. Help
8 me out timing-wise, Ms. Fatell, because sales are always
9 critical, I know from a timing standpoint. Give me --

10 MS. FATELL: Your Honor, the asset purchase agreement
11 requires that it close by March 30th.

12 THE COURT: Okay. That's not an issue then.

13 MS. FATELL: Okay.

14 THE COURT: I was thinking, you know, in terms of a
15 handful of days, more than anything. And, it sounds like that
16 won't be a problem in either event.

17 MS. FATELL: Okay. I mean, the company is, as we've
18 heard, struggling financially.

19 THE COURT: I know.

20 MS. FATELL: So, everyday that we don't get to a
21 closing is another day that we are in trouble.

22 THE COURT: Absolutely. I'm very -- yes.

23 MS. FATELL: Thank you.

24 THE COURT: I'm very sensitive to that, of course.

25 Mr. Lewis.

1 MR. LEWIS: Two quick points, Your Honor.

2 THE COURT: Yes.

3 MR. LEWIS: First of all, if there's anything the
4 parties can do in terms of post-trial briefing to help you on
5 any of these issues, I'm happy to pitch in, and I'm sure Ms.
6 Fatell would be as well, but that's your call.

7 THE COURT: I think the papers were splendid, really.

8 MR. LEWIS: Okay.

9 THE COURT: And helpful.

10 MR. LEWIS: Okay.

11 THE COURT: It's just that I heard a slightly
12 different slant to things here that has given me a little bit
13 of pause.

14 MR. LEWIS: So much for the adversary process, Your
15 Honor.

16 THE COURT: Well, it's the way it's supposed to work,
17 frankly, you know --

18 MR. LEWIS: I think that's right, Your Honor.

19 THE COURT: -- and, yes.

20 MR. LEWIS: The second thing I was going to say is the
21 proposed order that the debtor has submitted, we don't have any
22 objections to per se. We do, however, object to the provision
23 which would waive the rule against a ten-day stay, because if
24 the Court rules against us, we may want to appeal, and we may
25 seek a stay pending appeal --

1 THE COURT: I --

2 MR. LEWIS: -- and we'd like the opportunity to that
3 here.

4 THE COURT: Okay, I'll be sensitive to that.

5 MR. LEWIS: Okay.

6 THE COURT: And that will just make me move it a
7 little bit quicker.

8 MR. LEWIS: All right.

9 THE COURT: And you know, we try not to impose on our
10 friends across the street with having people run across with,
11 you know, emergency motions, so.

12 MR. LEWIS: Well, I think we would address that motion
13 to this Court in the first instance anyhow, so.

14 THE COURT: Of course. All right. I appreciate that.
15 Ms. Fatell?

16 MS. FATELL: Your Honor, we do have an agreed order it
17 appears except for that provision --

18 THE COURT: Yes.

19 MS. FATELL: -- which is different than the order that
20 was submitted. Does Your Honor want us to wait until the
21 ruling comes out before we submit that order?

22 THE COURT: No, I think it would be helpful for you to
23 do that for me.

24 MS. FATELL: Okay.

25 THE COURT: To submit it and I can --

1 MS. FATELL: Your Honor --

2 THE COURT: -- if need be, you know, be in a position
3 to enter an order.

4 MS. FATELL: Okay. Your Honor, I will hand up the
5 blackline and the clean --

6 THE COURT: Thank you.

7 MS. FATELL: -- and we understand that Your Honor will
8 address the issues.

9 THE COURT: And I will address these core issues that
10 you've raised promptly, particularly the issue of the executory
11 contract, which -- thank you -- which you both argued well,
12 which I just have to, sort of, decide who's right and who's
13 wrong, at least in my -- who's right or wrong in my view on
14 this.

15 MR. LEWIS: Your Honor, does the Court anticipate
16 issuing a short opinion as well?

17 THE COURT: Very -- yes.

18 MR. LEWIS: Okay.

19 THE COURT: I will do something very short.

20 MR. LEWIS: Give us some guidance.

21 THE COURT: But I'm hoping, you know -- and the reason
22 it'll be short is I do want to get something out, hopefully, by
23 the end of the week.

24 MR. LEWIS: Wonderful, thank you very much, Your
25 Honor.

1 THE COURT: That's my goal. That's my goal.

2 MS. FATELL: Thank you.

3 MR. LEWIS: Pleasure to be here as always.

4 THE COURT: Always good to have you, Mr. Lewis. It's
5 a pleasure, Ms. Fatell.

6 MS. FATELL: Thank you, Your Honor.

7 THE COURT: Always a pleasure to have all of you here,
8 and I wish you a good evening. And I'm off to try my hand at
9 mediating a little while. So, we'll stand in recess.

10 MS. FATELL: Well, good luck, Your Honor.

11 THE COURT: Good night to you. And thank you, and a
12 safe trip home, everyone.

13 IN UNISON: Thank you, Your Honor.

14 (Whereupon these proceedings were concluded at 4:49 PM)

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

I, Hana Copperman, certify that the foregoing transcript is a true and accurate record of the proceedings.

Hana Copperman
AAERT Certified Electronic Transcriber (CET**D-487)

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Date: March 4, 2011