UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	
	)	Chapter 11
The SCO Group, Inc., et al.,	)	
	)	Case No. 07-11337 (KG)
Debtors.	)	(Jointly Administered)

Objection Deadline: July 22, 2009 at 4:00 p.m. (prevailing Eastern time)
Hearing: July 27, 2009 at 9:00 a.m. (prevailing Eastern time)

NOVELL'S RESPONSE TO THE DEBTORS' NOTICE OF CURE AMOUNTS

Novell[1] hereby responds to the Notice of Cure Amounts [etc.] (dated July 8, 2009 as amended on July 10. 2009 and as further amended by Exhibit A attached hereto) (the "Notice") of the Debtors. The Debtors served the Notice in connection with their Third Sale Motion.

By the Third Sale Motion, the Debtors seek authority to sell assets to a newly-formed entity called Unxis, Inc. ("Unxis"). In connection with that proposed transaction, the Debtors served the Notice to advise the relevant parties that the Debtors wish to assume and assign their executory contracts with those parties to Unxis and to state what, if any, cure amounts the Debtors acknowledge must be paid pursuant to Code[2] section 365(b)(1). Per the Notice, the Debtors purport to assume and assign certain Novell agreements with them. The following descriptions of the agreements come directly from the Notice (the "Group" nomenclature is Novell's).

Group I

CUSTOMER NAME	CUST TYPE DESCR	ADDRESS1	ADDRESS2	ADDRESS3	CITY	STATE	ZIP	CURE AMOUNT
NORTHSIDE INDT SCHOOL DISTRICT	END USER	5900 EVORS ROAD	ACCOUNTS PAYABLE		SAN ANTONIO	TX	78238	None
NORTHWEST DIRECT MARKETING	END USER	24790 BIG FIR ROAD			EUGENE	OR	97408	None
NORTHWEST TIRE	END USER	3425-G WEST PIERSON ROAD			FLINT	MI	48504	None
NORWALK MATTRESS COMPANY	END USER	145 WEST CEDAR STREET			NORWALK	CT	06854	None
NOVA BUSINESS SYSTEMS	END USER	PO BOX 1003			LAKE OSWEGO	OR	97034	None
NOVA CHEMICALS	END USER	785 PETROLIA LINE			CONRUNNA	CONT	NON 1G0	None
NOVATEL LTD	END USER	11450 INTERSTATE 10 WEST	SUITE 110		SAN ANTONIO	TX	78230	None
NOVELL INC	EVEX REVENUE	1800 SOUTH NOVELL PLACE			PROVO	UT	84606	None
NOVELL INC	EVEX REVENUE	1800 SOUTH NOVELL PLACE			PROVO	UT	84606	None

[1] Capitalized terms not defined herein will have the meaning attributed to them in Novell's Opposition to the Debtors' Motion for Authority to Sell (filed July 20, 2009), which is related to this response.

[2] The "Code" is the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

Group II

COM /EDU		LICENSEE	CURE AMOUNTS DUE AS OF JUNE 30, 2009	AGREEMENTS GOVERNING ACCESS AND USE	SOFTWARE PRODUCTS LICENSED THROUGH A PRODUCT SUPPLEMENT OR THROUGH A NDA/EVALUATION TYPE AGREEMENT
C-R	2	NOVELL, INC.	NONE	SOFT-01460 Non-Disclosure (May 6, 1993) SOFT-01460 (Jan 13, 1989) SUB-01460A (Jan 28, 1993) Technology License Agreement (Dec 6, 1995)	 UNIX System V, Release 4.2 OEM Adapter Kit UNIX System V, Release 3.2 (Jan 13, 1989) UNIX System V/386, Release 4.0 (Feb 14, 1990) UNIX System V/386, Release 4.0, Version 2 (Oct 1, 1990) Limited Rights License to all UNIX and UnixWare
C	2	OA LABORATORY CO., LTD.	NONE	UP-SOFT-00492 (Aug 6, 1991) UP-SUB3-00492 (Aug 26, 1994)	UNIX System V/88000, Release 4.0 Int'l (Aug 8, 1991) UNIX System V/88000, Release 4.0, Version 3 Int'l (Mar 11, 1992)
E	2	OAKLAND UNIVERSITY	NONE	E-SOFT-00488 (Apr 15, 1988) E4-SOFT-00645 (Aug 10, 1990) E4-SUB-00645A (Aug 10, 1990)	UNIX System V, Release 3.0 (Apr 15, 1988) C++ Language System, Release 2.0 (Dec 21, 1989) S Software, June 1989 Version (Feb 13, 1990) UNIX System V, Release 3.2 (May 10, 1990) C++ Language System, Release 2.1 Aug 10, 1990)
C	2	OBJECT DESIGN, INC.	NONE	SOFT-01431 (Oct 6, 1988) SUB-01431A (Mar 20, 1990) Beta Test (Dec 18, 1990) Beta Test (Mar 14, 1991)	C++ Translator (Oct 6, 1988) C++ Language System, Release 2.0 (Mar 20, 1990) C++ Standard Library Extension, Release 2.0 C++ Language System, Release 3.0
C	2	OBJECTIVITY, INC.	NONE	SOFT-01553 (May 8, 1989) SUB-01553A (Jul 16, 1990)	C++ Translator (May 8, 1989) C++ Language System, Release 2.0 (Oct 2, 1989) C++ Language System, Release 2.1 (Sep 14, 1990) C++ Standard Components Release 2 (Nov 5, 1991) C++ Language System, Release 3.0 (Nov 18, 1991)
C	2	OCE-NEDERLAND B.V.	NONE	SOFT-NL-0002 (Aug 5, 1985)	UNIX System V, Release 2.0 VAX# 11/780 Version 2 Int'l

Column 1 Note: C = commercial licensees including governmental agencies
C-R = commercial licensees including governmental agencies with royalty tracking
E = educational licensees

Column 2 Note: 1 = Licensees with Source Licensing rights
2 = Licensees with Source Licensing and Sublicensing rights

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Group III

NetWare	Novell			Yes	UnixWare 2.0 & 2.1	Yes	NONE

Note that Group I above includes excerpts that preserve the Debtors' column titles, and the Novell agreements are the last two on the list. The Group II chart is an excerpt from 491 pages of licenses. The vast majority of these thousands of licenses are "SVRX Licenses," defined and discussed below. Group II, as reflected above, also includes two UNIX licenses between Novell, AT&T, and USL; an unidentified non-disclosure agreement; and a license agreement between Novell and Santa Cruz. Group III is part of a chart titled "Assume Contracts – Third Party Software".

Novell has a number of objections. First, as to Groups I and III, Novell cannot tell what agreements are disclosed, the descriptions being wholly inadequate. Second, the purported

assignments of the SVRX Licenses in Group II are impermissible for several reasons. Third, the Debtors have not produced as yet (if ever they can) *any* evidence of adequate assurance of future performance by the proposed assignee. Finally, there are serious questions about whether the entire transaction was motivated by sound business reasons.

I. APPLICABLE LAW

As far as the Third Sale Motion goes, it correctly states the general law regarding assumption and assignment of executory contracts. (*See* Third Sale Motion 9-12.) The Debtors must have a good business reason for assuming and assigning under Code section 365, must cure any defaults and provide adequate assurance of future performance by the assignee, Unxis.

However, additional principles apply here. The Debtor takes each contract as it finds it, with *all* of its burdens along with its benefits. It thus may only assume a contract in whole; it cannot pick and choose which provisions or benefits or burdens it wishes to assume and assign and which it wishes to shed. *In re Fleming Cos.*, 499 F.3d 300, 308 (3d Cir. 2007). The assumption and assignment of a contract is "'intended to change only *who* performs and obligation, not the obligation to be performed itself.'" *Id.* (citation omitted) (emphasis added). In that regard, a debtor must assume or assign all of a series of integrated and related contracts even if they appear in separate documents. *In re Exide Techs.*, 340 B.R. 222, 229 (Bankr. D. Del. 2006). In *Exide Technologies*, the Court found that the following agreements were part of an integrated transaction and that the debtor had to assume or reject them as a batch rather than individually:

> In 1991, [debtor] Exide entered into a series of agreements with EnerSys for the sale of substantially all of Exide's industrial battery division. The parties executed over twenty-three agreements as part of the transaction. The following four agreements are at the heart of this dispute: (1) the Trademark and Trade Name License Agreement, dated June 10, 1991 ("Trademark License"), (2) the Asset Purchase Agreement, dated June 10, 1991, (3) the Administrative Services Agreement, dated June 10, 1991, and (4) a letter agreement, dated December 27, 1994 (collectively, all four are referred to herein as the "Agreement") . . . .

> As part of the transaction, EnerSys paid in excess of $ 135 million at closing. In exchange for such payment, EnerSys received various assets, including manufacturing plants, equipment and certain intellectual property rights. Certain Exide employees in the industrial battery division became EnerSys employees.

Ibid, 340 B.R. at 227-28.

Finally, based upon this Third Circuit's adoption of the so-called "hypothetical" test regarding governing the interplay between Code sections 365(c) and 365(f), *see In re West Elecs., Inc.*, 852 F.3d 79, 83 (3d Cir. 1988), the Debtor may not assume, let alone assign, licenses of copyrights from the copyright holder without the former's consent. *RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257, 265-70.

II. THE GROUP I AND III AGREEMENTS ARE INADEQUATELY DESCRIBED

The agreements between the Debtors and Novell that are listed in Groups I and III above are not intelligibly described. There are no dates, no subject matters, no identifying information of any kind. This is not a unique problem in what, between the Third Sale Motion and the Notice, materials prepared by the Debtors in a great hurry even though the exhibits supposedly were final on June 15. (*See, e.g.,* Novell's Opposition to the Debtor's Motion for Authority to Sell (filed July 20, 2009) ("Novell's Sale Opposition") 5; Oracle USA, Inc.'s Limited Objection [etc.] (filed July 20, 2009) 1.)[3] Novell therefore cannot respond on the issue of whether these supposed agreements are assumable and whether there are defaults to be cured. It reserves its rights on that issue until the Debtors supply adequate clarification.

III. THE GROUP II AGREEMENTS CANNOT BE ASSUMED AND ASSIGNED

A. Background

Because it is at the heart of what is at issue here, Novell must remind the Court briefly of the contractual and related background. In 1995, Novell, Inc. (one of the Novell parties)

[3] As just one example, the Group III chart has two identical column headings , the fifth and seventh, that are both labeled "Royalties Due for SCO Distribution" but somehow nevertheless report different information in some rows.

transferred certain UNIX software-related assets to The Santa Cruz Operations, Inc. ("Santa Cruz") pursuant to an Asset Purchase Agreement (the "APA").[4] Eventually, Santa Cruz assigned the APA to The SCO Group, Inc. ("SCO"), one of the Debtors. (Hereafter, for convenience Novell will use "Novell" to refer either both Novell entities or to Novell, Inc., as the context and facts warrant. It will do the same for the "Debtors" and SCO or SCO Operations, Inc.)

In the APA, Novell reserved certain important rights to itself. For example, it retained all copyrights. More importantly for this matter, although the transferred assets included SVRX software licenses (the "SVRX Licenses"),[5] which generated a royalty stream for Novell (the "SVRX Royalties"), Novell similarly reserved and augmented important rights for itself regarding the SVRX Licenses and SVRX Royalties. Specifically, for purposes of this proceeding:

- SCO has *only "legal title and not an equitable interest in the SVRX Licenses [R]oyalties* within the meaning of Section 541(d) of the Bankruptcy Code." APA § 1.2(b).
- "All right, title and interest to the SVRx [sic] Royalties, less . . .[a] 5% fee for administering the collection thereof pursuant to Section 4.16 hereof" are *excluded* from the transfer. APA, Schedule 1.1(b)(VIII).
- "Within 45 days of the end of each fiscal quarter of [SCO], [SCO] shall deliver to [Novell] or [Novell's] assignee 100% of any SVRX Royalties collected in the immediately preceding quarter." APA § 4.16(a).
- SCO is required "*to [re]assign [to Novell at Novell's sole pleasure]* any rights to . . . any SVRX License to the extent so directed in any manner or respect by" Novell. APA § 4.16(b).
- SCO cannot "amend, modify or waive any right under or assign any SVRX License *without the prior written consent of [Novell].*" APA § 4.16(b).

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[4] A more extensive discussion of this background, with relevant evidence (including a copy of the APA and the relevant court decisions), can be found in Novell, Inc.'s Motion for Order Directing the Debtors to Remit Undisputed Further SVRX Royalties [etc.] (filed October 4, 2007, Dkt. No. 90), the supporting Affidavit of Greg Jones [etc.] (filed October 4, 2007, Dkt. No. 91) and Novell's Amended Proof of Claim filed March 27, 2009.

[5] The software industry refers to certain versions of UNIX as "SVRX," which stands for System V, Release X. "X" is the generic placeholder for the release number: System V, Release 1; System V, Release 2; and so on.

- SCO must provide Novell detailed monthly reports and submit to audits. APA §§ 1.2(b)

(Emphasis added.)

As the Court knows from prior proceedings in these cases, SCO and Novell have been litigating their respective rights under the APA, first before the United States District Court for the District of Utah (the "District Court Action") and now in the Tenth Circuit Court of Appeals, for almost six years. On August 10, 2007, the District Court confirmed the basic terms outlined above and found that the Debtors had breached the APA by failing to remit royalties from post-APA SVRX Licenses to the extent that they included used at least some SVRX rights. After stay relief for Novell and trial in mid-2008, the District Court entered a final judgment for Novell that included over $3.5 million for the unpaid SVRX Royalties.

B. Analysis: The Debtors Cannot Assume or Assign the SVRX Licenses Without Novell's Consent

It is beyond contest that the APA and the transfer of interests in the SVRX Licenses to Santa Cruz (and then SCO) are essential elements of an integrated transaction. The APA effected the sale of line of business from Novell to Santa Cruz. It carefully and in detail restricts and governs what Novell transferred, what it kept, and what Santa Cruz's duties were with respect to the SVRX Licenses and SVRX Royalties as part of the asset sale represented by the APA. Indeed, if the Debtors were to be able to assume and assign the thousands of SVRX Licenses without assuming and assigning the APA, it would make utter nonsense out of who is to collect and remit SVRX Royalties from those thousands of licenses. The situation is, in relevant respects, identical to that in *Exide*. It follows that SCO must try to assume and assign the APA if it is to assume and assign the SVRX Licenses. But it is not attempting to do that. It purports to ignore the APA while assuming and assigning the SVRX Licenses. This it cannot do. The Third Sale Motion should be denied as to the proposed assumption and assignment of the SVRX Licenses.

Moreover, in assuming the APA, SCO must assume *all* its terms. *Fleming Cos.* This would include the term that prohibits SCO from assigning SVRX Licenses without Novell's

consent. It does not have that consent from Novell. A similar point is that Novell's right to direct SCO to assign the SVRX Licenses back to Novell makes the proposed assumption and assignment of the SVRX Licenses, a right that also must be assumed by the Debtors, an exercise in futility unless SCO (and Unxis) have Novell's assurance that it will not exercise that election. Novell gives no such assurance. By the same token, given Novell's right to direct re-assignment of the SVRX Licenses to itself, Novell can be seen as the equitable owner/licensor of those licenses, which are licenses of copyrights Novell still owns. Hence, even if SCO *were* trying to (and could) assume the APA, as well, it cannot assign the SVRX Licenses without Novell's consent since they are copyright licenses. *Sunterra Corp.* Novell does not give that consent.

Finally, SCO cannot assume the APA without also curing all defaults under it. Those defaults clearly include SCO's failure to pay the millions of dollars of SVRX Royalties embedded in the District Court's judgment. It has neither done so nor offered to do so.

IV. THE DEBTORS' HAVE NOT PROVIDED ADEQUATE ASSURANCE

The Debtors recognize that they must provide adequate assurance of future performance for whatever agreements they wish to assume and assign, however much they try in the same breath to convince the Court in the Third Sale Motion that this requirement is merely *pro forma.* Whatever the particulars of the standard, it raises questions such as: Who and what is Unxis? What is its track record of operations and business? What is its business plan? What are its financial resources? What kind of expertise does it have in software administration and licensing? Yet, there is nothing in either the Third Sale Motion or the Notice about Unxis.

What evidence there is so far weighs against the Debtors and Unxis. As IBM has discovered (*see* Objection of IBM in Response to Debtors' Motion for Authority to Sell Property Outside the Ordinary Course of Business [etc.] (filed July 20, 2009) (the "IBM Sale Objection") 9), Unxis lacks proven financial resources[6] and appears to be controlled by people whose *bona*

[6] This lack of real financing has been a problem in prior deals the Debtors have brought to the Court, including the one Unxis's signing President, Stephen Norris, backed. (*See, e.g.*, Novell's Objection to the Debtors' Proposed Disclosure Statement (filed March 26, 2008) 4.)

fides and good faith are questionable (indeed, Unxis may have been enticed into the proposed deal by undisclosed from the Debtors' CEO and one of its foreign subsidiaries). Accordingly, the Court should deny the Third Sale Motion as to Groups I, II and III.

V. THE DEBTORS HAVE NOT DEMONSTRATED A SOUND BUSINESS REASON FOR ASSUMING AND ASSIGNING THE AGREEMENTS

As the Debtors also admit, they must show a business reason for assuming and assigning the contracts. The total evidence on this issue is not in, but as observed in both the IBM Sale Opposition and the Novell Sale Opposition, there is substantial evidence already to indicate that the Debtors are pursuing the Third Sale Motion (and the assumptions and assignments the Notice presents) for reasons that have nothing to do with sound business judgment. Unless the Debtors can overcome this and whatever other evidence is available by the July 27 hearing with affirmative evidence of their own, the Debtors will not be able to assume or assign any of the Novell agreements.

VI. CONCLUSION

The Third Sale Motion and Notice wholly fail to address the information and issues that assumption and assignment of the Novell agreements requires. In the case of the Group I and Group III agreements, it simply is unclear what agreements they are. As to the vast majority of the Group II contracts (the SVRX Licenses), the law and undisputed facts make the Debtors' attempt to assume and assign them unsustainable for specific reasons. And the available evidence indicates that the Debtors will fail to meet the requisite standards on other issues for all the contracts in all three groups.

Dated: July 22, 2009
Wilmington, Delaware

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