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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP, INC., a Delaware corporation, Plaintiff and Counterclaim-Defendant, v. NOVELL, INC., a Delaware corporation, Defendant and Counterclaim-Plaintiff.	**NOVELL'S AMENDED TRIAL BRIEF** *[REDACTED pursuant to the August 2, 2006 Stipulated Protective Order]* Case No. 2:04CV00139 Judge Dale A. Kimball

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INTRODUCTION

This Court has held that any contract "relating to" the SVRX releases listed in the APA is an SVRX License, that the Sun and Microsoft SCOsource licenses are SVRX Licenses, and that SCO breached its fiduciary duties by failing to disclose those licenses and by failing to remit appropriate revenue from those licenses. The principal questions that remain for trial are:

- What portion of the revenue from the Sun and Microsoft SCOsource licenses has SCO wrongly retained?
- Are SCO's other SCOsource licenses SVRX Licenses, and, if so, what portion of the revenue from those SCOsource licenses has SCO wrongly retained?
- Did SCO have the authority to enter into the SCOsource licenses, including those with Sun and Microsoft?[1]

As the Court may have surmised from the motion *in limine* briefing, neither Novell nor SCO intends to come into court and argue, e.g., "The evidence definitively establishes Novell is entitled to precisely 98% of this license's revenue, 88% from this license, etc." Instead, SCO intends to argue that it is entitled to most, if not all, of the SCOsource licensing revenue, and Novell intends to argue the opposite. Novell believes the evidence presented at trial will paint Novell's position as *considerably* more credible.

The evidence will show that:

- SCO approached Novell before beginning the SCOsource licensing campaign and asked Novell to join that effort;
- Novell refused to join the SCOsource campaign, but SCO went ahead anyway;
- The SCOsource campaign was based entirely on claims that Linux infringed SVRX copyrights;

[1] This Trial Brief replaces the brief Novell filed before SCO's bankruptcy, at Docket No. 470.

- SCO has never claimed that any party infringed SCO's UnixWare rights;
- The focus of the specific SCOsource licenses that SCO executed is SVRX rights, not UnixWare rights; and
- SCO never remitted to Novell any portion of the SCOsource revenue — on the contrary, in violation of its fiduciary duties, SCO consistently refused to disclose the SCOsource contracts.

The law is clear that as Novell's fiduciary and as the party at fault for introducing any apportionment uncertainty into the SCOsource licenses, SCO must bear the burden of apportionment, and any doubts as to entitlement to particular licensing revenue must be decided against SCO.

In the face of such evidence, SCO persists in arguing that SVRX played only an incidental role in SCOsource and that SCO was therefore authorized to enter into the SCOsource licenses, notwithstanding the APA's general prohibition against SCO entering into new SVRX Licenses. Because the evidence will demonstrate that SVRX was at the heart of SCOsource, it cannot be that SVRX played only an "incidental" role in SCOsource licenses. Novell is therefore entitled to a declaration that SCO was without authority to enter into the SCOsource licenses.

CLAIMS AT ISSUE

A. Fourth Claim: Declaratory Relief

Novell has a motion for summary judgment pending on this claim. As described in the accompanying briefing, Novell believes this claim can be decided as a matter of law. (*See* Memo. in Support of Novell's Motion for Summary Judgment on Its Fourth Claim for Relief, filed December 21, 2007, PACER No. 482.) Pursuant to the Court's January 15, 2008 Order (PACER No. 485), Novell's motion is set for hearing on April 30. Novell is therefore also prepared to try this claim before the Court.

At trial, Novell will seek a declaration that SCO had no authority to enter into the Sun, Microsoft, and other SCOsource licenses. The Court has already held that the Sun and Microsoft SCOsource licenses are SVRX Licenses. At trial, Novell will prove that the other SCOsource licenses are also SVRX Licenses. Novell will then prove that none of the exceptions to the APA's prohibition against SCO entering into or modifying SVRX Licenses apply — i.e., that Novell did not consent, that these licenses were not merely "incidental" to SCO's right to enter into UnixWare licenses, and that the licenses are not "additional CPU" licenses.

In addition, Novell will demonstrate it is entitled to a declaration that SCO had no authority to enter into the Sun SCOsource license because that agreement "concerned" a buy-out and SCO did not seek Novell's approval before entering into the Sun SCOsource license.

B. Sixth, Seventh, and Eighth Claims: Unjust Enrichment, Breach of Fiduciary Duty, Conversion

The Court has resolved any question as to SCO's liability for unjust enrichment, breach of fiduciary duty, and conversion as to the Sun and Microsoft SCOsource licenses. (Memorandum Decision and Order ("Order"), PACER No. 377, at 97 ("SCO's conduct also amounts to a breach of fiduciary duty, conversion, unjust enrichment, and breach of express contract").) As to the Sixth, Seventh, and Eighth Claims, the only issue left for trial on the Sun and Microsoft SCOsource licenses is therefore the proper apportionment of the license revenue. The trial will also address whether SCO's remaining SCOsource agreements licensed SVRX and, if so, the amount of revenue that should be apportioned to Novell from those agreements. As discussed below, Novell need only prove up the total amount of revenue SCO received from the SCOsource licenses, and the burden then shifts to SCO to prove what amount is not Novell's. The evidence will show that the majority of the SCOsource revenue is in fact SVRX Royalties.

C. Claims Not Set for Trial

Pursuant to agreement or Court order, Novell's First, Second, Third, Fifth, and Ninth Claims are not set for trial. Novell will also not seek punitive damages.

ARGUMENT

I. SCOSOURCE IS A CAMPAIGN TO LICENSE SVRX.

SCOsource is a campaign to extract licensing revenue based on SCO's claim that UNIX System V code was in Linux. (Order at 29 ("SCOsource . . . was an effort to obtain license fees from Linux users based on claims to Unix System V intellectual property.").) SCO has recently suggested that, in describing the focus of SCOsource, SCO's use of the term "UNIX System V" is broad enough to encompass UnixWare, because, technically, UnixWare is derived from the UNIX System V code base. The origins of UnixWare are not important. Given that SCOsource is a licensing campaign based on claims of copyright infringement, to get at the heart of what is licensed one need only examine what code SCO alleged infringed. After years of litigation, thousands of hours of investigation, and millions of dollars in expert fees, SCO has only identified UNIX System V release 4 code as infringing — SCO has never identified a single line of post-APA code in Linux.[2]

II. NOVELL IS ENTITLED TO THE SCOSOURCE LICENSING REVENUE.

The evidence presented at trial will show that the bulk of the money SCO collected in its SCOsource campaign was in fact SVRX Royalties and that Novell is entitled to restitution of this money.

[2] *See, e.g.*, NOV-EX-427 (SCO opposition to IBM's motion for summary judgment on IBM's claim seeking declaration that it does not infringe any UNIX copyright, identifying only "SVr4" material as infringing, see esp. Appendix A at 92-93, ¶ 181, admitting that infringing material comes from SVr4 and previous releases), NOV-EX-428 (expert report submitted by SCO purporting to collect infringing code in Linux, identifying only SVr4 material as infringing), NOV-EX-429 (IBM submission noting "the only allegedly infringed copyrights are, under the Novell Decision, owned by Novell, not SCO"), NOV-EX-430 (SCO letter informing arbitration panel that proceeding with arbitration is "pointless" because all copyrights relevant to SUSE's purported infringement have been held owned by Novell); *see also* NOV-EX-192 (letter identifying "UNIX System V" infringing material as "distributed by AT&T" – i.e. well before UnixWare), NOV-EX-193 (same), NOV-EX-194 (same), NOV-EX-195 (same), NOV-EX-346 (letter identifying only pre-APA code as infringing, see esp. Ex. 1), *Id.* (same, see esp. Ex. 2).

A. Any Doubt or Ambiguity as to Entitlement to SCOsource Revenue Must Be Resolved in Novell's Favor.

As the plaintiff, Novell bears the burden to make out its *prima facie* case — to show that SCO entered into SVRX Licenses, that SCO received SVRX Royalties, and that SCO did not remit those SVRX Royalties. The evidence presented at trial will establish such a case. The law is clear, however, that where a fiduciary commingles its own funds with those of its agent, it is the fiduciary's obligation to untangle the funds. Novell need only prove up the *total* amount of revenue SCO received, and the burden then shifts to SCO to show what amount is *not* Novell's.

Any other result would be manifestly unfair. Novell is not the author of the SCOsource licenses — indeed, SCO did its best to keep the terms of those licenses secret from Novell. If it is difficult to separate out what is SCO's from what is Novell's in those licenses, that is SCO's fault *alone*. To place the burden of doubts on Novell would reward SCO for its breach of fiduciary duty and encourage fiduciaries to convert agents' funds in ways that make apportionment difficult. One of the primary benefits of the APA's requirement for Novell's prior approval of SVRX Licenses is that it allows the parties to work out a fair apportionment of licensing revenue ahead of time and structure licenses to make clear each party's rights.

Faced with similar questions in the context of a copyright infringement accounting, Judge Learned Hand held:

> [T]he defendants must be content to accept much of the embarrassment resulting from mingling the plaintiff's property with their own. We will not accept the expert's testimony at its face value; we must make an award which by no possibility shall be too small. It is not our best guess that must prevail, but a figure which will favor the plaintiffs in every reasonable chance of error.

Sheldon v. Metro-Goldwyn Pictures Corp., 106 F.2d 45, 51 (2d Cir. 1939). Similarly, *Rosenfeld, Meyer & Susman v. Cohen*, 191 Cal. App. 3d 1035 (1987), involved the dissolution of a law firm. The court held that, in breach of their fiduciary duties, one set of partners (the "RMS" partners) withheld partnership revenue from a second set (the "C&R" partners). Separation of the monies involved was complicated by the fact that some revenue stemmed from post-dissolution work (to which, like SCO, only the RMS partners were entitled) and pre-dissolution work (to which, like Novell, the C&R partners were entitled). Given the fiduciary relationships involved, the trial court placed the burden of apportionment on the RMS partners, with doubts decided against them. The appellate court affirmed:

> The position of RMS was not unlike that of other trustees who fail to keep proper records of the dates and amounts of receipts and expenses; such fiduciaries have the burden of establishing that data and, upon their failure to do so, a computation may be made on the basis of gross receipts, even though that approach is unfavorable to them.
>
> . . .
>
> Surely, where a fiduciary has a legal duty to allocate receipts between those in which its beneficiary has some interest and those in which the beneficiary has none, and is fully and singularly capable of making that allocation but fails to do so, a court is justified in calling upon the fiduciary to bear the burden of differentiation at trial . . . .
>
> Except for a few accounts, for which RMS did prove that percentage fee receipts were the product of post dissolution work, RMS failed to bear its burden at trial. As a result, the trial court correctly used the balance of the percentage fee income as the base for allocating the partners' shares.

Id. at 1051-52. This shift of the ordinary burden of proof allocation reflects a bedrock principle of the law of fiduciary relationships:

> The rules of law that were applicable in the taking of the accounting may be briefly stated:
>
> When the defendant is an accounting party, and stands as one occupying a fiduciary relation toward the plaintiff, because of money or property intrusted to him, the burden is upon him to show that he has performed his trust and the manner of its performance. He owes this duty because of the confidential relation he bears to his principal, and because he is presumed to know how he has performed his duty. He must therefore prove any allowances or credits that he may claim to have made on behalf of his principal. . . .
>
> It follows as a corollary to these principles that the duty to account is not fulfilled by a mere general statement that the money was expended for the principal's benefit or business, or by a general

> denial that any of the principal's money was taken for the personal use of the trustee. Such statements are but the conclusions of the witness, and afford no reasonable opportunity to the principal to test the fact or the propriety of the expenditures, and give the court no basis for determining from the facts of each transaction whether the trustee has faithfully performed his duty.

Wootton Land & Fuel Co. v. Ownbey, 265 F. 91, 99-100 (8th Cir. 1920) (internal citations to various treatises omitted).[3]

SCO has attempted to distinguish these cases by inventing a distinction between uncertainty caused by the mingling of revenue from multiple sources (e.g., the new and old business in *RMS*) and uncertainty caused by the mingling of revenue within one source (e.g., the Microsoft SCOsource license). (SCO's Reply Memo. in Further Support of SCO's Motion *In Limine* Regarding Apportionment of 2003 Microsoft and Sun Agreements, filed September 4, 2007, PACER No. 449, at 3.) Nothing in these cases supports such a distinction, however, and

[3] *See also Confederated Tribes of the Warm Springs Reservation of Or. v. United States*, 248 F.3d 1365, 1371 (Fed. Cir. 2001) ("The court was also wrong to refuse to award damages on the ground that any award would be speculative. It is a principle of long standing in trust law that once the beneficiary has shown a breach of the trustee's duty and a resulting loss, the risk of uncertainty as to the amount of the loss falls on the trustee."); *Kim v. Fujikawa*, 871 F.2d 1427, 1430-31 (9th Cir. 1989) ("In determining the amount that a breaching fiduciary must restore to the Funds as a result of a prohibited transaction, the court should resolve doubts in favor of the plaintiffs." (internal quotation and citation omitted)); *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985) ("The burden of proving that the funds would have earned less than that amount is on the fiduciaries found to be in breach of their duty. Any doubt or ambiguity should be resolved against them. This is nothing more than application of the principle that, once a breach of trust is established, uncertainties in fixing damages will be resolved against the wrongdoer."); *Leigh v. Engle*, 727 F.2d 113, 138-39 (7th Cir. 1984) ("[T]he burden is on the defendants who are found to have breached their fiduciary duties to show which profits are attributable to their own investments apart from their control of the Reliable Trust assets . . . . [W]hile the district court may be able to make only a rough approximation, it should resolve doubts in favor of the plaintiffs."); *In re Unisys Corp. Retiree Med. Benefits Litig.*, MDL No. 969, 2000 U.S. Dist. LEXIS 22347, at *15 (E.D. Pa. Apr. 25, 2000) ("[O]nce a plaintiff has established breach and resulting harm, the breaching fiduciary has the burden of resolving any uncertainty pertaining to the extent of that harm.") (Ex. A hereto); *Kennard v. Glick*, 183 Cal. App. 2d 246, 250-51 (1960) ("An agent who fails to keep an account raises thereby a suspicion of infidelity or neglect, creates a presumption against himself, and brings upon himself the burden of accounting to the utmost for all that has come into his hands; and in such case every doubt will be resolved against the agent, and in favor of the principal . . . ."); *Roth v. Sawyer-Cleator Lumber Co.*, 61 F.3d 599, 602 (8th Cir. 1995) ("To the extent that there are ambiguities in determining loss, we resolve them against the trustee in breach.").

SCO has cited no cases of its own in support. It would be surprising if a fiduciary could force its principal to pay the price for the uncertainty caused by its own wrongdoing by simply commingling multiple revenue streams in one agreement.

B. Novell Is Entitled to the Microsoft SCOsource Revenue.

SCO has consistently described the license with Microsoft as part of its SCOsource campaign, and has never classified any portion of the revenue it collected from Microsoft as "UnixWare revenue" in its SEC filings. (NOV-EX-304.) Microsoft paid SCO [redacted] for its SCOsource license, as follows:

REDACTED

(NOV-EX-189.) Novell is entitled to the revenue from Sections 2 and 4. Though Novell believes a case can be made that it is also entitled to a portion of the Section 3 revenue, for purposes of this trial Novell will not seek such revenue.

1. Novell Is Entitled to the Entirety of the [redacted] Section 2 Revenue.

REDACTED

REDACTED

2. **Novell Does Not Seek the Section 3 Revenue.**

REDACTED

3. Novell Is Entitled to the [redacted] Section 4 Revenue.

REDACTED

C. Novell Is Entitled to the Sun SCOsource Revenue.

REDACTED

(NOV-EX-327.) Darl McBride, SCO's CEO, was asked about this aspect of Sun's SCOsource license, and confirmed that SCO believes the license conveyed the right to Sun to opensource Solaris. (NOV-EX-327, -341.) Sun's CEO, Scott McNealy, describes the license in the same way:

> "There were hundreds of encumbrances to open sourcing Solaris. Some of them we had to buy out, others we had to eliminate. We had to pay SCO more money so we could open the code — I couldn't say anything about that at the time, but now I can tell you that we paid them that license fee to expand our rights to the code," McNealy said, referring to the February 2003 expanded Unix SVR4 license rights purchase from the SCO Group.

REDACTED

D. Novell Is Entitled to the Other SCOsource Revenue.

SCO sent letters to thousands of Linux users threatening suit over the SVRX code supposedly in Linux. [redacted] such users took a SCOsource license, each under similar terms. These licenses grant, with certain limitations, the "rights and licenses to use . . . SCO IP." (NOV-EX-346.) The definition of "SCO IP" makes it clear that these licenses convey SVRX rights:

> **"SCO IP" means the SCO UNIX®-based Code** alleged by SCO to be included, embodied, or otherwise utilized in the Operating System.
>
> . . .

> "UNIX-based Code" means any Code or Method that: (i) in its literal or non-literal expression, structure, format, use, functionality or adaptation (ii) is based on, developed in, derived from or is similar to (iii) any Code contained in or Method devised or developed in (iv) **UNIX System V** or UnixWare®, or (v) any modification or derivative work based on or licensed under **UNIX System V** or UnixWare.

(NOV-EX-346 (emphasis added).)

In total, SCO entered into the following additional SCOsource licenses:

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(NOV-EX-365, -391, -411.)

As SCO itself admits, "The central feature of the other SCOsource agreements is the covenant not to sue and the waiver of claims by SCO for the companies' internal Linux usage." (SCO's Memo. in Opp. to Novell's Motion *In Limine* to Preclude SCO from Contesting Licenses Conveying SVRX Rights Are "SVRX Licenses," filed August 31, 2007, PACER No. 421, at 3.) Because SCO has never contended UnixWare is in Linux, that "covenant not to sue" and "waiver of claims" must concern only SVRX. Novell is therefore entitled to the entirety of this SCOsource revenue.

E. SCO Cannot Carry Its Burden to Show Entitlement to SCOsource Revenue.

Critically, SCO will *not* offer any testimony from an actual SCOsource licensee and will not offer any expert analysis of the value of UnixWare rights supposedly contained in SCOsource licenses. Instead, based on the briefing to date, it appears that SCO will, in large part, attempt to support its case through testimony purporting to show its licensees' "intent" in entering into a SCOsource license. This is classic hearsay, and inadmissible. Fed. R. Evid. 801, 802; *New England Mut. Life Ins. Co. v. Anderson*, 888 F.2d 646, 650 (10th Cir. 1989) (reporter's out-of-court statements properly excluded as hearsay where declarant "was unavailable for cross-examination, and the statements were offered to prove the truth of the matters asserted"). Moreover, the testimony of a SCO witness that, for example, a Sun representative said in SCOsource negotiations that Sun was seeking rights to UnixWare proves nothing about the license that eventually issued. *See United States of America v. Zelonky*, 209 F. Supp. 305, 307 (D.C. Wis. 1962) (defendant's testimony about how parties orally characterized contract at time of signing "cannot be given any credence in this action because it is not only hearsay but also is an attempt to vary by parol evidence the terms of a clear, unambiguous, and complete contract").

Such a bar is especially appropriate here, where the issue is the apportionment of funds wrongfully retained by a fiduciary. It is fundamentally unfair to allow a fiduciary in such circumstances to apportion revenue based on the supposed statements or intent of third parties not present in court. As discussed above in Section II.A, a fiduciary must meet a high standard of accountability and transparency as to how those funds were managed:

> [The duty to account] is not fulfilled . . . by a general denial that any of the principal's money was taken for the personal use of the trustee. Such statements are but the conclusions of the witness, and afford no reasonable opportunity to the principal to test the fact or the propriety of the expenditures, and give the court no basis for determining from the facts of each transaction whether the trustee has faithfully performed his duty.

Wootton Land, 265 F. at 99-100. SCO seeks to buttress a "general denial" that the SCOsource licenses primarily conveyed rights to SVRX with third parties' out-of-court statements, the reliability of which cannot be ascertained. This tactic cannot help SCO meet its burden of proof on accounting. If anything, it demonstrates how little proof SCO has.

F. SCO Is Not Entitled to Keep 5% of the SVRX License Revenue.

As the Court is aware, under the APA, SCO undertook a fiduciary duty to collect and remit 100% of the SVRX Royalties. "In consideration of" SCO's exercise of its fiduciary duties, SCO is ordinarily entitled to "an administrative fee equal to 5% of such SVRX Royalties." (NOV-EX-1.) Here, the Court has found that, as a matter of law, SCO breached its fiduciary duties and converted revenue meant for Novell. (Order at 97.) Given that breach, SCO is not entitled to any percentage of the SVRX Royalties, and the Court should therefore make no 5% deduction from any restitution granted Novell.[4]

III. SCO WAS WITHOUT AUTHORITY TO ENTER INTO THE SCOSOURCE LICENSES.

In addition to the return of SCOsource revenue wrongfully withheld, Novell seeks a declaration that SCO was without authority to enter into the SCOsource licenses. Novell's entitlement to such a remedy is straightforward. This Court has already held that the Microsoft

[4] Novell will address additional recovery, such as prejudgment interest and attorneys' fees, in post-judgment briefing.

and Sun SCOsource licenses are SVRX Licenses, and has barred SCO from contesting that ruling at trial. (Order at 95; September 9, 2007 Order ("MIL Order"), PACER No. 453, at 16-17.) The evidence will show that SCO's other SCOsource licenses also conveyed SVRX rights and that they are therefore SVRX Licenses.

SCO is generally barred from modifying existing SVRX Licenses and from entering into new SVRX Licenses. (Order at 92.) As amended, the APA permits only three exceptions:

SCO may enter into SVRX Licenses with Novell's written permission. Novell never consented to the SCOsource licenses, and SCO has not suggested otherwise. (Order at 41.)

SCO may enter into SVRX Licenses "incidentally involved through [SCO's] rights to sell and license" UnixWare. The evidence cited and discussed above amply demonstrates that SVRX played more than an "incidental" role in the SCOsource licenses — it was the very heart of SCOsource.

And SCO may enter into SVRX Licenses "to allow a licensee under a particular SVRX License to use the source code of the relevant SVRX product(s) on additional CPU's or to receive an additional distribution, from [SCO], of such source code." The SCOsource licenses are not such "additional CPU" licenses. In the case of Sun and Microsoft, the SCOsource

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The other SCOsource licenses permit the licensee to use SVRX in Linux and, again, contain no CPU limitations. With no applicable exception, the APA's general bar applies and SCO was therefore without authority to enter into the SCOsource licenses.

SCO was without authority to enter into the Sun SCOsource license for an additional, independent reason. Before entering into "any potential transaction with an SVRX licensee which concerns a buy-out of any such licensee's royalty obligations," SCO must notify Novell in writing and obtain Novell's consent. (NOV-EX-40.) There is no dispute that Sun's 1994 agreement with Novell was a "buy-out," as that term is used in Amendment No. 2.

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The evidence will establish that SCO did not inform Novell in writing of SCO's intention to enter into the Sun SCOsource agreement and did not obtain Novell's consent to that agreement. For this additional reason, SCO was without authority to enter into the Sun SCOsource agreement.

IV. SCO'S AFFIRMATIVE DEFENSES HAVE NO MERIT.

During meet and confer on the pretrial order, SCO articulated two affirmative defenses it intends to raise at trial: estoppel and unclean hands. Neither has any application here.

As a preliminary matter, both defenses would appear to concern Novell's *entitlement* to equitable relief, not the precise amount of that relief. As that entitlement has already been determined as a matter of law, it is unclear what application these defenses could have now. Put otherwise, if SCO wanted to raise these defenses, it should have done so in the motion for summary judgment briefing.

A. Novell Is Not Estopped from Pursuing Its Fiduciary Duty Claims Against SCO.

SCO's draft pretrial order suggested that SCO will assert that Novell is estopped from seeking the SVRX Royalties withheld by SCO. SCO has, in the past, asserted that Novell's purported failure to ask for SVRX Royalties from licenses that also license UnixWare is evidence that Novell is not entitled to such revenue. SCO made that argument in an effort to graft "exist[ing] at the time of the APA" into the definition of "SVRX License," which the Court rejected as a matter of law. (Order at 90-93.) SCO bears an even greater burden to show that the same supposed facts make out a case for estoppel — a burden that SCO cannot hope to carry.

Estoppel arises out of the rule that "[w]henever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." Cal. Evid. Code § 623. To make out estoppel, "four elements must be present . . . : (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." *Lentz v. McMahon*, 49 Cal. 3d 393, 399 (1989). SCO would therefore have to show that Novell knew whether and to what extent SCO collected but did not remit SVRX Royalties, that Novell failed to seek such Royalties and intended for that failure to be taken by SCO as indication it could keep the money, and that SCO relied on Novell to SCO's injury.

It is obviously impossible for SCO to make out those elements as to the SCOsource revenue — as soon as Novell found out about the revenue, it sent repeated letters to SCO demanding Novell's proper share. (NOV-EX-220, -267, -280, -293, -297, -303, -317.) What SCO must intend to argue, instead, is that Novell's purported conduct concerning earlier licenses, not at issue in this trial, waived Novell's right to insist on apportionment of the SCOsource revenue. If that is not the very argument this Court has already rejected as a matter of law, it certainly bears a striking resemblance.

Assuming the law of the case does not bar estoppel here, though, SCO still cannot succeed. It cannot point to any affirmative conduct by Novell waiving its right to SVRX Royalties. SCO is therefore confined to arguing that Novell's *silence* when supposedly presented with evidence that SCO withheld SVRX Royalties estops Novell now. "Estoppel by silence" is especially difficult to show. Courts typically require a duty to speak before imparting preclusive effect to silence. *See, e.g.*, *Feduniak v. Cal. Coastal Comm'n*, 148 Cal. App. 4th

1346, 1362 (2007) ("It is settled that when the party to be estopped does not say or do anything, its silence and inaction may support estoppel only if it had a duty to speak or act under the particular circumstances."). That is especially true in fiduciary relationships, where the presumption is that the principal need *not* investigate the activities of its agent and can instead rely on the agent to fulfill its duties faithfully. *Hobbs v. Bateman Eichler, Hill Richards, Inc.*, 164 Cal. App. 3d 174, 201-02 (1985) ("Where there is a fiduciary relationship, the usual duty of diligence to discover facts does not exist."). As Novell has no "duty to speak" here, it cannot be estopped by its supposed silence.

Even if SCO surmounted all these obstacles, the facts simply do not show Novell silence in the face of knowledge that SCO retained SVRX Royalties from mixed licenses. SCO has presented no evidence that Novell was aware of even one such circumstance. The record instead shows that Novell's auditors reviewed royalty reports prepared by SCO, royalty reports from third-party licensees, and other payment and financial records, and not the terms of the actual SCO UnixWare licenses. (NOV-EX-84 ("[t]he audit included a review of royalty reports, third party royalty reports, summary reports, Novell cash deposit reports, cash reconciliations, accounts receivable reports, customer lists, other financial records and SCO's customer audits").) Novell is not aware of any evidence that it saw any of SCO's UnixWare licenses that conveyed SVRX rights. SCO's briefing is to the same effect.[5]

B. Novell Has Acted with "Clean Hands."

SCO's draft pretrial order also suggested that SCO intends to assert that the equitable remedies Novell seeks are barred under the doctrine of unclean hands. As partially codified in California Civil Code section 3517, this doctrine provides that "[n]o one can take advantage of

[5] (SCO's Memo. in Opp. to Novell's Motion for Partial Summary Judgment or Preliminary Injunction and in Support of SCO's Cross Motion for Summary Judgment or Partial Summary Judgment, filed December 12, 2006, PACER No. 183, at ¶ 60 (noting that Novell representatives received only reports of binary royalties from SVRX licenses).)

his own wrong." Aside from listing "unclean hands" in its Answer, SCO has never mentioned this defense and has therefore never articulated what conduct by Novell SCO claims bars the recovery of equitable remedies. If SCO had a meritorious unclean hands defense, it is surprising that SCO did not raise it in the motion for summary judgment briefing.

In any event, Novell has always acted in good faith toward SCO (*see, e.g.,* Order at 65), and the cases actually granting such a defense make it clear that no conduct by Novell rises to the level of unclean hands. *See, e.g., Rosenfeld v. Zimmer*, 116 Cal. App. 2d 719, 722 (1953) ("A court of equity will not assist a party to a fraudulent scheme to secure the objective of such plan."); *Reynolds v. Roll*, 122 Cal. App. 2d 826, 836 (1954) ("courts will not lend assistance to persons whose claim for relief rests on an illegal transaction" (internal quotation marks and citation omitted)). Even where such conduct is shown, it must be part of the same transaction at issue, and the nature of the plaintiff's conduct must be *worse* than that of the defendant. *See, e.g., Watson v. Poore*, 18 Cal. 2d 302, 313 (1941) ("[I]mproper conduct not necessarily connected with the transaction particularly involved . . . is not a reason for denying equitable relief on the ground of unclean hands."); *Belling v. Croter*, 57 Cal. App. 2d 296, 304 (1943) (unclean hands does not apply "[i]f it be shown that [the plaintiff] is the one 'least at fault,' and that the party against whom relief is sought was guilty of wrongdoing in respect to the same matters and is 'most in fault'").

It is therefore clear that no affirmative defenses protect SCO's conduct here.

CONCLUSION

For the reasons stated above, Novell is entitled to:

- Apportionment of the SCOsource revenue in an amount to be determined by the Court, without any 5% administrative fee deduction;
- Prejudgment interest at 7%; and

- A declaration that SCO exceeded its authority in entering into the SCOsource licenses.

Based on that recovery, Novell anticipates seeking additional relief in its post-trial briefing, such as a constructive trust. Consideration of such relief is not necessary at trial, which per the Court's direction will focus on the proper apportionment of the SCOsource revenue and on Novell's entitlement to declaratory relief.

DATED: April 23, 2008

ANDERSON & KARRENBERG

By: *__/s/ Heather M. Sneddon__*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of April, 2008, I caused a true and correct copy of **NOVELL'S AMENDED TRIAL BRIEF** *[REDACTED pursuant to the August 2, 2006 Stipulated Protective Order]* to be served to the following:

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