IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP, INC. Plaintiff/Counterclaim-Defendant, vs. NOVELL, INC., Defendant/Counterclaim-Plaintiff.	Case No. 2:04-CV-139 DAK

BEFORE THE HONORABLE DALE A. KIMBALL

DATE: JANUARY 23, 2007

REPORTER'S TRANSCTIPT OF PROCEEDINGS

MOTION HEARING

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JANUARY 23, 2007 SALT LAKE CITY, UTAH

P R O C E E D I N G S

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THE COURT: We're here this afternoon in the matter of SCO Group vs. Novell, Inc., 2:04-CV-139. For plaintiff, Mr. Brent Hatch, Mr. Stuart Singer.

MR. HATCH: Good afternoon.

THE COURT: Good afternoon.

And Mr. Edward Normand.

MR. NORMAND: Good afternoon.

THE COURT: For defendant, Mr. Michael Jacobs.

MR. JACOBS: Good afternoon, Your Honor.

THE COURT: Mr. Thomas Karrenberg, and Ms. Heather Sneddon, correct?

MS. SNEDDON: Yes, Your Honor.

THE COURT: All right. We have Novell's motion for partial summary judgment on the sixth, seventh, eighth and ninth claims for relief or, in the alternative, a motion for preliminary injunction, and SCO's cross motion for partial summary judgment.

Who is arguing?

MR. JACOBS: I will for Novell, Your Honor.

THE COURT: Okay. Mr. Jacobs?

MR. JACOBS: That's correct.

THE COURT: You're going to argue everything

for defendant.

And, Mr. Singer?

MR. SINGER: I'll be arguing for SCO, Your Honor.

THE COURT: Well, since you're not splitting arguments, can you argue the motions together; in other words, you can argue -- while you're arguing, Mr. Jacobs, about your motions, you can tell me why I shouldn't grant the cross motion. And, Mr. Singer, while you're arguing against Novell's motions, you can tell me why I ought to grant this cross motion. All right. How much time do you need?

MR. JACOBS: Ten or 15 minutes, Your Honor, would be fine.

THE COURT: Mr. Singer?

MR. SINGER: Your Honor, I would ask for 30 minutes.

THE COURT: Okay. And then I'll give you each a few minutes on rebuttal.

Go ahead, Mr. Jacobs.

MR. JACOBS: Your Honor, I apologize. I seem to have gotten a little gravel in my throat, so if you have any trouble hearing me, please let me know. On this motion for --

THE COURT: It doesn't sound like it's going to

make it any harder to hear you. It might make it easier. Go ahead.

MR. JACOBS: I'm reminded of Demosthenes, Your Honor.

THE COURT: Take the rocks out of your mouth.

MR. JACOBS: On this motion for summary judgment and preliminary injunction, Your Honor, we have two powerful things going for us. The first is SCO's acknowledgement that they're a fiduciary for Novell when it comes to the administration, collection and remittance of SVRX royalties. I say "acknowledgement" advisedly. We made quite an issue out of this in our opening papers. They did not contest it in their opposition, and we brought the issue home in our reply brief.

It's really a very important aspect of the motion because it changes what might be seen as two contesting versions of the situation into --

THE COURT: But it would still leave open, wouldn't it, the question of what SCO might be a fiduciary of?

MR. JACOBS: Exactly. And the contract defines the scope of its fiduciary obligations. But because they are a fiduciary, they have certain duties not to play around the edges of those obligations, and they have a duty to act in the utmost good faith. We know these

doctrines well. Most importantly, they have a duty to put Novell's interests above their own when it comes to the SVRX license royalty fiduciary duty that they undertook through their predecessor in the Asset Purchase Agreement.

So then that does bring us to the question of: What is the scope of the duty? And that is defined by the contract. And that's the second thing we think powerfully argues in our direction. We were joking among ourselves preparing for this argument. This is an argument about the three alls. And the alls are: The all royalty fees and other amounts due in 4.16A; all SVRX licenses, also in 4.16A; and then in the annex that lists the SVRX releases, the all contracts relating to the SVRX licenses listed below.

THE COURT: So it's a-l-l-s, not a-w-l-s?

MR. JACOBS: That's right, Your Honor.

THE COURT: Think about this question, and you don't need to get to it now.

MR. JACOBS: Sure.

THE COURT: But if you have here -- part of the relief you seek here is equitable.

MR. JACOBS: Yes.

THE COURT: And yet you're relying on a contract. Does that make any difference? And, if so,

what difference does it make, if you have a breach of contract but you still seek this equitable relief based on breach of contract? Anyway. Have that rolling around in your mind.

MR. JACOBS: I think that's -- so, the Supreme Court I think has helped us out on this issue recently and, to some degree, trumped some of the case law that might have preexisted on this question. I think I'm not going argue that, on that breach of contract claim, where our remedy is at law, that we have a constructive trust remedy. I don't think I need to reach that point because we are defined in the agreement as the equitable owner of the SVRX royalties because they are a fiduciary collecting for our benefit.

That set of predicate relationships, if you will, sets up the claim for a constructive trust. It's our property that they are holding in trust for us, and it's defined that way in two ways: One. The strict letter of the agreement, which allocates to us this ownership interest; and, secondly, the fiduciary arrangement that arises out of the contract.

So I think maybe the harder question is: Can a contract establish a fiduciary relationship? Can a contract allocate ownership in the way it does and not convert the remedy that we would have, because it's in a

contract, to a legal remedy?

And I think the answer to that clearly, under California law, is that the contract doesn't change the essence of the claim. The fact that the relationship or the ownership interests arise out of the contract doesn't change this from a legal to an equitable -- doesn't change this from an equitable to a legal claim, and, therefore, we have a claim to a constructive trust, and we have a claim to a preliminary injunction establishing a constructive trust.

I think, concededly, we have a much harder row to hoe if we are making strictly a claim at law as a breach of contract action. That's why that first doctrine, that fact that this is a fiduciary relationship, is so important to the ultimate relief we seek, as well as the way it, if you will, biases the analysis of the provisions of the contract.

So, on the scope of the fiduciary relationship, it's worth pausing on the specific language for a minute. I don't know if you have the Asset Purchase Agreement handy.

THE COURT: I do.

MR. JACOBS: So if you would turn to page 24.

THE COURT: Twenty-four. I'm there.

MR. JACOBS: And 4.16A.

THE COURT: Okay.

MR. JACOBS: So the language, "All royalties fees and other amounts due," is dispositive here of one of the issues in SCO's opposition. Is it really just royalties due under the binary aspects of the SVRX relationships? Well, it doesn't say "royalties only." It says, "royalties, fees and other amounts due." So, any category of revenue under an SVRX license, regardless of what it is attributed to and regardless of how it's labeled, again, all royalties, fees and other amounts due.

Now let me pause here because there is something very interesting going on in the debate between the parties. Their cross motion and their opposition rests heavily on these declarations from business people who have had some varying degree of association with the actual transaction. And I think there is a basic misapprehension about the role of contracts and the role of lawyers that divides the parties on this motion.

Business people form -- I'm not telling you anything new, but I thought it's worth articulating what's going on here. Business people come up with an idea for a deal. They model the deal. They model the transaction based on aspects of the transaction that they understand. One of the aspects of this transaction that

they apparently modeled was the continuation of the existing SVRX revenues because they could understand that.

Lawyers then sat down and drafted an agreement. And lawyers, they are not computer engineers, but they are transactions engineers, and they try to draft language that anticipates not only what the business people might have specifically contemplated by way of the business purpose of the transaction, lawyers try and draft language that covers all contingencies.

That doesn't make that any less of the intent of the parties simply because it's the result of the lawyers doing drafting of an agreement. The lawyers are the party at that stage of a relationship and then, of course, the parties ratify what the lawyers do when they sign the agreement. So there's -- what's basically going on here is SCO would have us ignore what the lawyers did.

Now, there are ways to do that. They could ask for the contract to be reformed if, in some way, the contract didn't reflect the underlying intent of the parties. But they haven't asked for reformation. They could make an argument for mutual mistake, but they haven't made an argument for mutual mistake. They haven't said the lawyers were incompetent, although there is a theme running through their papers that somehow

their lawyers didn't capture their intent or, to be more precise, the predecessor's intent in the agreement.

It may be that, as the Asset Purchase Agreement was being drafted, people were working quickly. It may be that Novell had all sorts of leverage over old SCO during the time of drafting the Asset Purchase Agreement. That doesn't change the outcome. We look at what the contract says, not what the business people might have thought was the essence of the deal.

Now, here, we have one additional important fact, if you will, that reinforces this basic point I'm driving at. There were three months between the signing of the Asset Purchase Agreement and the signing of Amendment Number 1. This provision was heavily focused on. 4.16 is a major focus of Amendment Number 1. There was a lot of opportunity to tweak the language if tweaking would have better conformed the agreement to some different notion of what the transaction was all about.

But, in particular, the language, "all royalties, fees and other amounts due, under all SVRX licenses" didn't change. SVRX royalties in Amendment Number 1 was used as a category. There are various carve outs from the category, but those carve outs confirm that the set SVRX royalty is a very large set because certain

things were exempted from the set explicitly. They weren't said -- it wasn't not said that these things are not SVRX royalties. It was said that these things which are not SVRX royalties are not part of the payment remittance obligation that SCO incurs.

So, these elements of the set help define the set, and that was done three months after the Asset Purchase Agreement was signed. So that's the first "all," all royalties fees and other amounts due.

Then the second "all," all SVRX licenses as listed in detail under Item 6 of Schedule 1.1A hereof and referred to herein as SVRX royalties.

Now, this part has provoked all sorts of consternation and argumentation on the other side. What is an SVRX license, they ask. The list of programs that is identified under Section 1.1A makes this a non-issue as far as this motion is concerned because what we demonstrated in our papers is that if you take the SUN and Microsoft agreements and lay them against the list of programs in Schedule 1.1A, it's almost a -- it's a lay down. It's a perfect match up. It's almost as if they took Schedule 1.1A, added and subtracted a little bit from it, but used the exact formulations for the names of the programs in the SUN and Microsoft agreements.

So, we don't need to know the ultimate scope of

SVRX licenses. We don't need to know how far it could possibly reach in order to decide this motion. What we know is: If you take that list of programs and you lay it down against the exhibits in SUN and Microsoft, particularly NXB of the Microsoft agreement, the second payment provoking annex of the Microsoft agreement, it's a nearly perfect match up.

THE COURT: What does "nearly perfect" mean?

MR. JACOBS: Well, there are a few additions. I didn't notice any important subtractions. There are a few additions to the list. In annex B, it's two additions at the top, I think, and everything else lines up perfectly. So are these -- is there -- there are two questions to ask, I suppose. Are the SUN and Microsoft agreements SVRX licenses, or do they represent at least, in part, SVRX licenses? We think the answer to both is yes. The second. They are at least in part an SVRX license. We think they are also SVRX licenses.

And this is where I think the fiduciary obligation starts to kick in. One of the obligations of a fiduciary is to make it possible for the principal to know whether you have collected on behalf of the principal or on behalf of yourself. And you have a duty to prevent the kind of commingling here that's gone on; not commingling only in the sense of the pot of money but

commingling in the agreements. So this is where I think the fiduciary duty aspect of this should tilt the -- any concerns that one might have about this lineup of programs against SCO.

They had a duty to do this in a way that would not provoke this kind of self-serving, "no, no we are not your fiduciary for this" sort of declaration that they have introduced.

Now, if you look, then, at Amendment 1, just to underline the point about the scope of the obligation, I think it's worth walking through that briefly. So the first thing to note is that on page 9 of Amendment 1, which is Exhibit 2 to my declaration.

THE COURT: Uh-huh.

MR. JACOBS: It's in item four. The first line is amended in its entirety to read as follows: All contracts relating to the SVRX licenses and auxillary product licenses collectively SVRX licenses listed below. So what's going on here three months after the asset purchase agreement is signed, are the parties cutting back on the definition of SVRX license? No. They are actually making sure that it's sufficiently inclusive and so, with three months -- with the benefit of three months, if it was rushed at the initial negotiation, it's being cleaned up but, in this respect, not in a way that

helps SCO.

And in the other provisions, the elements of the set that I was referring to here, are really quite telling here because I think they answer all of SCO'S arguments. So really this is a question about the importantance of the language of the contract as against the declarations of the business people that SCO submitted.

If you look at page 3, revenues to be retained by buyer, it says: Buyer shall be entitled to retain 100 percent of the following categories of SVRX royalties collected by buyer.

So what this amendment is doing is making clear that the following categories are SVRX royalties. They would, therefore, fall under the scope of the fiduciary obligation of the payment and remittance obligations of 4.16A, but we are going to exempt them explicitly. We are not going to define them away. We are not going to define SVRX more narrowly. We are going to take a few elements of the set and pull it out. And one of them is source code right-to-use fees under existing SVRX licenses from the licensing of additional CPU's, proving, we submit, that source code right-to-use fees in all other circumstances are SVRX royalties and are not exempted by the language of the agreement.

They are not exempted by this Section E of Amendment Number 1 from SVRX royalties. A specific category of SVRX royalties is taken out of the pool of money that has to be remitted to Novell.

And then, similarly, in the next little bullet. Source code right-to-use fees attributable to new SVRX licenses approved by seller prusuant to Section 4.16B. So, had SCO obtained approval for source code right-to-use fees under these SUN and Microsoft agreements from Novell, then SCO could have retained those fees.

Now plainly, had they -- what the agreement contemplates, then, is some kind of a discussion and negotiation between SCO and Novell under those circumstances. Novell has no obligation to approve a proposed agreement that SCO might enter into. But here, of course, there was no such opportunity to negotiate, and Novell might very well have -- if asked, might very well have declined to approve it, in which case SCO would have been entering into the agreements at its own peril under this provision.

So I think that Section E and little Section E on page 3 make it very clear that SVRX royalties is not limited temporally. It's not limited to existing, as against future, and it's not limited as to source code or

that source code or binary dimension that SCO proposes as a limitation.

Now, it is worth pausing for a minute on the actual agreements themselves, and I want to observe that the agreements are under -- I'm talking about the SUN and Microsoft agreements are under seal. It's not our confidential information, so if you want to stop me at some point and propose to Judge Kimball -- however you wish to proceed with this, Your Honor.

THE COURT: Do we need to clear the courtroom before you proceed?

MR. JACOBS: I think what I will try to do is keep away from something that might be sensitive.

THE COURT: That would be better, if you can.

MR. JACOBS: Okay. So, first of all, with respect to the SUN agreement -- part of SCO's argument is that we should have filed this three years ago, this motion three years ago before we saw the agreement, but it isn't until you see the agreement, for example, that you see that in the whereas clauses, SUN and SCO are specifically referring to a 1994 agreement that is being amended and restated, and that is an SVRX agreement. So, if there is any question about whether the SUN agreement is an SVRX agreement, as opposed to something else, that statement, that this is part of a desire to amend and

restate the original agreement dating back to 1994, pretty much answers what the intent of these parties was.

And then, if you go to the exhibit on the SUN agreement, the list of technology, you will see a list of System V release after System V release. Is it alll System V technology? No. There are some other things that are included. But, are the bulk of the listed programs System V releases? Absolutely. Is it possible that one could allocate the value between the various components? Conceivably. Does a fiduciary get to make that kind of carve up under these circumstances? I submit not. Only with the heaviest of presumptions against them, if they can somehow demonstrate that there is something to be excepted, but demonstrate as a fiduciary has to demonstrate, then perhaps in the accounting that we see, some portion of the SUN money gets retained by SCO.

But looking at the purpose of the agreement, and looking at the list of materials that are licensed in the agreement, it’s quite plain, we submit, that this is an SVRX license within the meaning of the Asset Purchase Agreement or that, at the the very least, it is, in substantial part, an SVRX license.

Now, the only other thing that SCO tries to argue, really, on this point is that it’s incidental and

this falls under the incidental language of 4.16. But I don't think this is something on which there can be a fact dispute when you look at the list of technology and System V release after System V release is listed there. To say that it's incidental, I think turns incidental into something that it is not.

Incidental means by happenstance or by chance or it might, in some minor way be related to, in my dictionary. And I don't see how they can concoct an incidental argument out of this agreement.

Now, that brings us to the Microsoft agreement, and it had an interesting aspect to it which we think also answers the question: Is it, in substantial part, an SVRX license? And that is the structure of the agreement and the fact that, pursuant to an option, there were -- there was a purchase of rights to additional code. And if you compare the two lists -- I won't go into it in detail because of the confidentiality, but if you look at Exhibit A, it starts out with SCO UnixWear and then lists a lot of technologies under it, including the System V kernel in the first bullet.

Are you looking -- I'm on page 8 of the Microsoft agreement.

THE COURT: All right.

MR. JACOBS: So if that was what this agreement

was all about, you might say: Well, gee, this is just incidental because Exhibit A looks like a license to UnixWear with a Unix component included. But then, if you look at Exhibit C. -- I think I misspoke before. Exhibit C, well, it, too, starts out with references to UnixWear. Pretty soon we're in that body of the additional assets that are listed there that lines up letter perfect with releases on the Asset Purchase Agreement's definition of an SVRX license, so in no way, with Exhibit C, can this aspect of the Microsoft agreement be thought to be an incidental licensing of SVRX associated with UnixWear. The contrast between C and A, we believe, makes that very, very plain.

To say it again, Exhibit A is how you would document it if you were going to make an argument from incidentalness, and Exhibit C is an SVRX license with some additional licensing of UnixWear.

So we think that basically is the beginning and the end of it. Now, we don't need to get into the extrinsic evidence, but what we thought the extrinsic evidence gave us an opportunity to do was to show Your Honor how, in fact, in the wake of the agreement, the parties' conduct was consistent with the interpretation we offer.

And to the extent that gives the Court some

additional comfort, that we are not twisting the language ten years later, the way it wasn't contemplated, we thought actually their cross motion gave us an opportunity to not get into the facts on the lead motion which rests -- which really, as a matter of law, under the contract, we win.

But if you look at the factual material we submitted in opposition to their motion, to their cross motion, you will see that, in fact, in the wake of the Asset Purchase Agreement, the word "source code" was used repeatedly to describe the rights that Novell retained. There was no source binary distinction, in particular. When there were various buyouts, such as the IBM buyout, source code was -- revenues were paid 95 percent to Novell, as well as binary code revenues.

So that's only five months after Amendment Number 1 is signed. The Asset Purchase Agreement actually closes. So that's very close in time. I think I'll stop there and see what important points SCO advances in their motion.

THE COURT: Thank you, Mr. Jacobs.

MR. JACOBS: Thank you.

THE COURT: Mr. Singer.

MR. SINGER: Thank you, Your Honor. Your Honor, if I may approach, we have some argument

exhibits.

THE COURT: Sure. Have you given Mr. Jacobs a copy?

MR. SINGER: I have, Your Honor.

THE COURT: Thank you.

MR. SINGER: Your Honor, I would submit that it is an extraordinary motion for summary judgment when a party asks the Court to interpret a contract in direct opposition to what all of the witnesses who were directly involved in the negotiation of the agreement, in setting the business deal, in directing the lawyers, testify was the intent and the effect of that agreement. Yet that is the situation we have here. We have submitted nine declarations. Not just from individuals on the Santa Cruz side, but numerous individuals who, at the time, worked at Novell; from the senior executive, such as Doug Thompson to Ed Chatlos, the chief Novell negotiator, to Mr. Maciaszek, who worked throughout this period on these products, and on and on, as well as witnesses on the Santa Cruz side.

And they tell a very consistent story, that the intent of this agreement was for Novell to retain 95 percent of the royalties on existing SVRX licenses. And by SVRX licenses, they meant binary licenses that went to end users.

Now, Mr. Jacobs suggests that, well, the business people must not have understood what the lawyers were drafting. First of all, I would submit that position turns on its head the practice of contractual interpretation followed by Courts throughout the country that look at evidence reflecting the intent of the business people, of the parties, and don't assume that somehow the lawyers took it upon themselves to run amuck and recut a different deal.

THE COURT: Hypothetically, could a contract provide A, B and C, hypothetically, in the clearest terms, and you could have a situation, then, hypothetically, where most of or many of the people involved say: Well, what we meant was X, Y and Z.

What is a Judge to do, then, hypothetically? I'm not saying that's this case. Hypothetically, what is the Judge supposed to do then?

MR. SINGER: Hypothetically -- and it's not this case -- if the language is not at all open to the interpretation that the witnesses say, then absent issues of reformation and mistake and issues like that, which one would need to go into, you look at the language. If, for example, this was a case of a contract which said the 2003 Microsoft agreement and 2003 SUN agreement and the fees related to those agreements should go to Novell,

that would be a clear statement, and one, then, doesn't have to worry as much about these types of statements.

Or, if you had a statement which said that all existing and future licenses for source code and binary or object code are ones on which Novell keeps the royalties, then you might get closer to your hypothetical situation. That is, of course, not the case here.

But, not only does one not assume that the lawyers run amuck in interpreting and writing the agreement that is counter to what the business purpose is, one would assume, then, that that would only be counter to what the Santa Cruz witnesses said was the business purpose and that, without negotiating with Santa Cruz, they effectuated the intent of their client on the Novell side.

But here we find that the declarations indicate, from Novell as well as Santa Cruz, that they very well understood the intent, that the intent was the same and that the intent was a limited right with respect to existing licenses, with respect to binary and not source code and, as we'll see later, by operation of the amendments, did not apply when you had a distribution or license of SVRX that was incidental to, that accompanied the sale of UnixWear, which was a new product being sold.

Now, not only is there this uncontroverted

testimony from the witnesses most directly involved in the transaction, but it is reflected, as well, in formal public statements by SCO -- by Novell to the public, to the Securities & Exchange Commission.

If Your Honor would turn to tab 1 of the book of exhibits, one finds an excerpt, and that excerpt is taken from, at the time, the '95 annual report, the '96 annual report, the '96 quarterly reports that Novell filed. And they describe the transaction because the purpose of this transaction was the sale of the business, the Unix business, and it was compensation which Novell received, which was 17 percent of the SCO common stock. It was a future revenue stream based on UnixWear that Novell doesn't discuss that I'll get to later, but, most importantly, they described the issue here by specifically saying that Novell will continue to receive revenue from existing licenses for older versions of Unix System source code, which, again, is consistent with what all the witnesses on both sides say.

Now, Your Honor, we would submit that the plain language of the agreement is consistent with and effectuates this intent when one looks at Amendment 1, as well as when one looks exactly at what was put into those agreements. But there is no controversy over the fact that the purpose there was to transfer the entire

business to SCO and to provide this as a mechanism of paying for that business. And, in fact, the evidence in the record shows that Novell has received from SCO over $200 million in royalties relating to the binary product sales.

And the evidence shows that SCO has consistently taken that interpretation in terms of what was paid and also contrary to what Mr. Jacobs says, that Novell, until 2003, never even asked about source code focused on binary license revenue when they audited the revenue stream that these licenses were generating.

Now, I'm going to only very briefly talk about the legal standard that California law applies here. We insert two cases at tabs 4 and 5. California law says one uses extrinsic evidence to expose ambiguities and to see if a contract is reasonably susceptible to the parties' interpretation. And here we think whether this was under California law or otherwise, the language goes beyond reasonably susceptible but, in three critical respects, fully supports the arguments SCO is making: One, on the argument of existing-versus-future contracts; two, on the issue of source code in light of Amendment 1; and, third, on the issue of incidental licensing of SVRX in the context of a new UnixWear license.

And I'd like to spend some time talking about

each of those points. First of all, the fact that we were talking about licenses existing at the time. And if one looks at 1.2B, one immediately sees how the language supports that position because what is being defined here is the transfer of SVRX licenses, is only legal title and not an equitable interest. Those are licenses that have to be existing at that time. How else could they appear on the schedule of assets, which is schedule 1, which is being sold? How else can you say that buyer has legal title, if these contracts have not yet come into existence? At the same time, when the drafters of this contract wanted to deal with future sales, they knew how to do so expressly.

Later, in the same provision of 1.2B, it talks about future sales. That's the UnixWear. And it says that on account of buyer's future sale of UnixWear products, there will be a payment to the seller. That provision is totally ignored by everything Novell has said in its papers. If they had earned a royalty on UnixWear, they would have received it. That was a limited royalty. It had to meet certain threshold amounts of sales based on a Novell business plan that did not occur, and it expired in December of 2002 before the contracts at issue here were entered into.

But what it reflects is that the drafting of

this agreement was talking about a transfer of licenses -- and we submit you can't transfer something that doesn't exist at that time -- and specifically dealt with future sales with express language. You do not see, Your Honor, any language in this agreement which says future SVRX licenses entered by SCO or the buyer, the revenue from those flow to Novell. That is not found anywhere in the document. If one follows 1.2 to the reference in 4.16 where the issue is: What does SVRX licenses mean? that refers, in turn, to a schedule.

Item 6 of Schedule 1.1A. It says these are listed in detail. Of course the licenses aren't listed in detail. If one turns to that provision, one sees just a product listing. One finds, in other provisions of this list of assets being sold -- because that's what this was. This was a schedule of the assets being sold -- references to UnixWear generally, references to software and sublicensing agreement, including source code and sublicensing agreements that the seller has, and those agreements are under a different section here.

There is no specific listing of licenses here in detail. There is no reason to believe that this listing was intended to be more than the product supplements which are the actual licenses by which a royalty is generated.

Now, there is an additional reason, looking at 4.16B why the parties didn't contemplate any need to deal with future SVRX licenses, and that's found in Subsection B because the expectation here was that the future sale would be of the UnixWare, the new product. And it said: Buyer shall not, and shall have no right to enter into future licenses or amendments of the SVRX licenses except as may be incidentally involved through its rights to sell and license the assets for the merged product or future versions.

And later, after the amendment, that was also expanded to where there was an approval from Novell. But the contemplation of the parties was that you weren't going to have future SVRX licenses, which is perfectly consistent with this being understood as meaning the licenses in place which, in turn, is consistent with what every person who has touched this transaction, nine separate declarations, reflect was the intent.

Now, if the Court agrees on the issue of this reaching only existing licenses either as a result of the plain operation of the language or if it's reasonably suceptible to that language, that's the end of the issue because the 2003 agreements in question here did not exist back at the time of the APA in 1995, and the result of that should be denying the summary judgment motion

brought by Novell and granting the cross motion.

But there is a separate, second issue which also leads on to that result. And that is the question of whether source code license fees would ever go to Novell. Now, Mr. Jacobs suggests that Amendment 1, which was entered into later, in the end of 1995, supports his position. I submit it does not. One should look at what these provisions meant rather than just the terms that they use. Focus not on the fact that somewhere in here there's a reference to source code, but what do these provisions say?

They say, under Section 2, that the buyer, that's SCO, shall keep 100 percent of SVRX royalties that consist of source code right-to-use fees under existing licenses from the licensing of additional CPU's or from the distribution by the buyer of additional source code copies. And then, if you have totally new licenses that are approved by the seller, all of those fees also go to SCO, go to the buyer.

There is no way, we submit, that you can reconcile this amendment with the idea that some part of source code fees go to Novell. I mean, first of all, it doesn't say any of the source code fees goes to Novell. There is nothing in Amendment 1 which says that. We submit that they have covered the relevant universe in

these two provisions when one considers where source code fees can arise from. And if Your Honor turns to tab 11 in our binder, it indicates the four different categories one could conceivably have of these source code fees.

One category are the paid-up source code agreements. Sun's agreement in 1994 is one of them. Novell received $84 million with respect to those rights. They kept it all before the transaction. No need for the agreement to treat the paid-up source code agreements because they already have the revenue. If those agreements are being expanded in terms of additional units or distribution, that's the second clause here. That goes to the buyer. If there are new licenses that are approved by the seller, that also goes to SCO. If there was an intent that source code licenses generated revenue that went to Novell, that provision would say Novell has to approve them, but then the revenue goes to Novell. It makes no sense to suggest that there was an intent that the revenue go to Novell when it says that the revenue shall go to the buyer.

But then there's the question of: What happens if there is something that is a new source code license but it isn't approved by Novell? And we agree the Microsoft and SUN agreements were not approved by Novell. There is nothing in the APA or Amendment 1 that says that

those fees in that circumstance would go to the seller. We submit that those are properly treated under the incidental language because what was contemplated was that any licensing of source code of SVRX, along with UnixWear, fell within the separate provision of Amendment 1 that dealt with that, and that is Section E.

Section E said: Notwithstanding the foregoing, buyer shall have the right to enter into amendments of the SVRX licenses, as may be incidentally involved to its rights to sell and license UnixWare software or the merged product or future versions of the merged product.

And it also provides that a licensee, such as SUN, under a particular SVRX license, can be allowed to use the source code on additional CPU's or to receive an additional distribution from the buyer of such source code.

So, through these provisions, which do not require the approval of Novell, SCO was able to conduct its business, sell UnixWare and, as I believe five different witnesses have testified in their declarations, it was a customary and ordinary part of that business when you licensed a new product, when you licensed UnixWare, to provide a license to the Legacy product as well to go along with it. That is what is meant by incidental.

Now Mr. Jacobs suggests, without anything in the record to support him, that this Court should determine, as a matter of law, what's incidental by counting up the lines on a product license or the number of times that certain products on .6 appear on that list. There is no basis in law or in fact for that. One looks either at the agreement -- and this agreement does not define what incidental means -- or one looks to what the business people say was meant by incidental.

Here five witnesses, again both on the Novell and the SCO side, say this is what was meant when you license older Legacy products along with the UnixWare current product. And that was specifically authorized, and that is where the Microsoft and SUN agreements fall within their treatment of the agreement.

So those agreements mean, first of all, that because these are not existing SVRX licenses, they are not subject to Novell's royalty rights. Number 2, because they deal with source code, not binary rights, the revenue certainly does not flow to Novell. And, number 3, they fall squarely within this provision both on the language here and as interpreted by the extrinsic evidence of what was intended.

Now, Mr. Jacobs also says that his position on source code is supported by Amendment X, which was an

amendment that was entered into with IBM, and he suggests that's because 95 percent of the revenue in that Amendment X actually went to Novell. But, as we point out at tab 12, it made perfect sense for that revenue to go to Novell because that revenue related to expanded binary rights. And Amendment X expressly provided that when you are dealing with future source code rights, that would be dealt with differently.

Section 1 of Amendment X said that upon payment to SCO, they would have these rights. And then -- this is the third bullet point under tab 12 -- however if IBM requests deliveries of additional copies of source code, IBM will pay certain fees that were then listed under a separate topic. That would be in addition to the money that was paid when Amendment X was entered into. That money properly went -- at least 95 percent of it properly went to Novell completely consistent with the interpretation of the agreement that we, and the witnesses who were there and operated these agreements, testified to in their sworn declarations was the intent.

If one turns to tab 13, Your Honor, one sees references to the declarations of Ms. Acheson, Mrs. Broderick, Mr. Maciaszek, Mr. Chatlos, and Madsen, all of which support the view that these products commonly included -- or these licenses of UnixWare

commonly included licenses of SVRX. Incidentally, because the licensee wanted to have those rights and it was authorized, it's exactly what was intended by the language of Amendment 1.

Now, beyond the language of the agreements which we've been talking about and beyond the intent of the witnesses, the course of conduct on both Novell's side and SCO's side is completely consistent with our interpretation.

If Your Honor turns to tab 14, we indicate that, in 1998, Novell conducted an audit of SCO's royalty payments. That was in accordance with their rights. The representatives at that time did not ask for anything other than their reports of binary royalties from the SVRX licenses that existed at the time of the APA, and they never asked about the licensing of the source code. That is powerful evidence that supports the other evidence as to how the parties understood these agreements.

It is only in 2003, after litigation developed -- and this is now many years after the 1995 APA, eight years later -- that Novell starts asking about source code. We submit, the relevant course of conduct evidence is how, in the immediate aftermath of the agreement, they, by their actions, interpreted those

provisions.

How about on the Santa Cruz side? If one turns to tab 15, you see, based on this record, that Santa Cruz's conduct is also consistent with SCO's position. There's an April 23, 1996 letter which talks specifically about the APA providing for Novell to receive the residual royalties from the in-place SVRX license stream. There was the fact that that is what Santa Cruz paid and reported to Novell. They didn't pay anything else. So this is not some new interpretation that SCO has moved to in the last year or just with respect to the Microsoft and SUN agreement. This is consistent with how SCO and its predecessors have operated under these agreements going all the way back.

There was a particular instance involving Craig Computers where Santa Cruz reminded Novell it had no right to negotiate source code right and fees, and Novell agreed. And, of course, Santa Cruz and SCO has paid over $200 million in SVRX binary royalties based on this interpretation.

Now, if Your Honor turns to tab 16, we go a step beyond opposing Novell's motion for summary judgment and deal with our cross motion. And it's been an interesting evolution in the language with which Novell's attorneys in this case have used to describe the issue.

When they initially filed their motion for summary judgment, they said: Well, this is clear.

In opposing our summary judgment motion, they say: Well, we think the language is reasonably suceptible to their interpretation.

We don't think that's true for the reasons that I've outlined regarding the agreement, but even if that's true, they have not come forth with any competent evidence to counter the nine declarations of people who were there on both sides of the transaction with personal knowledge, explaining that only existing SVRX licenses were covered and that source code license fees were not covered. The only reference that they make is to a testimony from Mr. DeFazio who provided a declaration in the IBM case, and that declaration, while it talks about source code, does not in any way dispute the fact that the only licenses which Novell retained revenue on were the existing licenses. So even if one looked at Mr. DeFazio's declaration, that does not create a factual dispute there.

Simply put, Novell has no witness directly involved in the negotiations who supports their position, and both sides' witnesses support ours..

Now, what is the impact, then, on the SUN and the Microsoft agreements? If one looks at tab 17 as a

matter, then, of undisputed fact, the SUN agreement was not a license in existence at the time of the APA. It was, therefore, not transferred by Schedule 1. Secondly, it's a license for UnixWare as to which, based on this record, the SVRX licenses, five different witnesses support is incidental, and therefore it was authorized by the buyer to enter into it, and none of the revenue flows to Novell.

I don't even think we get to the third bullet point which is an issue of: If Novell did have rights, one would have to allocate how that fell within the agreement.

If one turns to the next tab, tab 18, the same is true with respect to the Microsoft agreement. The Microsoft agreement did not exist at the time of the APA. It was not subject to schedule 1. It was not subject to Section 1.1 B. Neither legal title or any other title transferred at that time. Number 2, any licensing of SVRX was incidental to the UnixWare license for the same reason. And, third, if you looked at an allocation of what was being treated there, contrary to Novell, the Microsoft agreement does not provide for $8 million going to the licenses that -- for SVRX.

Mr. Sontag, in his declaration, directly explains, at length, that that section of the agreement

provided Microsoft with broader distribution rights for UnixWare, and there is no counter to Mr. Sontag's testimony on that point.

The UnixWare license basically was expanded by this section of the Microsoft license that Novell suggests only brought these other products, these Legacy products, into play.

Now, I'm not going to take the Court's time with all the other issues that we have briefed that one only reaches in the event one were to find against us and be prepared to either conclude it as a summary judgment matter or as a likelihood-of-success matter on a preliminary injunction. We have briefed those. We have undisputed evidence that we have larger claims for copyright infringement against Novell than these claims.

We show that, as a matter of law, the risk of uncollectibility of a judgment is not a basis for an injunction and that, if they wanted to pursue something like that, they had to do it under Utah's Pre-judgment Attachment Statute; that a constructive trust requires proof that there is in existence today proceeds traceable to these funds received in 2003, which Novell has no evidence on; and that, in any balancing of the equities, one does not have the effect -- I mean, Novell likes to say that SCO is on the point of bankruptcy. It has no

proof of that. SCO obviously has been managing tight cash situations for some years, and it is planned to be in a position to continue through to conclusion of this litigation doing that.

The only thing that's clear is that if this injunction issued, it would greatly complicate and undermine SCO's ability to do so and that there is a public interest, particularly given the intellectual property rights here being involved in SCO being allowed to fully vindicate in litigation those rights.

So, for all of those reasons, even if one got through the merits issues that I have devoted most of my time discussing because I think that's the key here, one should not, under any circumstances, consider the relief which is being suggested here.

One last point. The issue is not fiduciary relationships. We have not contested a fiduciary relationship with respect to collecting money, but a fiduciary relationship doesn't extend beyond what the contract establishes here is the proper scope of that. It only kicks in once the Court were to conclude that an SVRX license is implicated by the Microsoft and the SUN agreements. Other than that, there is no case law or anything else that says that the Court interprets the contract any differently, just because, the way the

parties set this up, we would collect and hold the money for them and then transmit it to them.

This is an issue of contract interpretation, and it's an issue on which all of the evidence, the language, nine declarations, the course of conduct, everything, points in favor of SCO. Thank you.

THE COURT: Thank you, Mr. Singer.

Mr. Jacobs.

MR. JACOBS: I would like to lever off of SCO's reliance on a provision of the Asset Purchase Agreement that helps explain why there are no declarations that deal with this circumstance. As SCO knows, under Section 4.16, it wasn't supposed to enter into new SVRX licenses. It was barred from doing so. I offer -- for purposes of this motion, let's assume that no business person present at the negotiation of the Asset Purchase Agreement or on the periphery of those negotiations contemplated that, in 2003, old SCO would have sold its business to new SCO, that new SCO would have decided that there's not much profit in UnixWare and instead it's going to launch the SCO Source intellectual licensing campaign.

Let's assume that for a minute because I suspect it may well be true that no one, in 1995, contemplated what SCO has wrought over the last three or four years. But that doesn't answer the question: Did

the lawyers draft language covering that exigency? Studiously missing from SCO's argument is any explanation of how "all" doesn't mean "all." "All" does mean "all." "All" can only mean "all." "All" can't mean less than "all." The lawyers drafted language that covers the situation. What if SCO takes this set of rights in SVRX and in violation of the agreement, goes out and gets more SVRX revenue? Who gets that money? The fiduciary relationship established by Section 4.16 answers that question. I imagine it's a little bit like the situation where a client hires a lawyer and the lawyer sues, with the client's permission, A, B and C based on some fundamental right. And then the lawyer, without the client's permission, goes off and sues D. Does the client get the recovery? Of course the client gets the recovery.

And that's, in essence, what has happened here. SCO, without authority from Novell, went out and got more SVRX money, a lot of it. And the contract tells us that that money is within the scope of SCO's fiduciary obligation to Novell and that it must remit it and that failing to remit it, we are entitled to an accounting and a constructive trust.

That answers all these questions that SCO raises about course of conduct, about the declarants

because I offer to stipulate for purposes of this motion; in fact, I offer to stipulate it for purposes of society at large, no one really contemplated what SCO has done with SCO Source.

THE COURT: Stipulate it for society at large?

MR. JACOBS: That was a pretty broad stipulation.

THE COURT: It might exceed your authority.

MR. JACOBS: The authority of all of us is a little limited. I think, just to clarify, what I meant was: This change of business strategy by SCO, by new SCO, by Caldera renaming itself as SCO was, as we all know because of the attention this case has gotten, an extraordinary event in the life of the computer industry, and I dare say few, if anybody, contemplated that the 1995 asset purchase agreement would, by virtue of the chain that we have seen, lead to this campaign that SCO launched.

That doesn't -- the fact that that set of circumstances may not have been contemplated by the business people doesn't negate the legal effect of the language the lawyers drafted.

THE COURT: Thank you, Mr. Jacobs.

Mr. Singer.

MR. SINGER: Your Honor, I'll be very brief. I

don’t see how SCO Source has really anything to do with this. To the extent SCO entered into certain SCO Source licenses, those clearly are not covered by anything in the relevant agreements here from which Novell would receive any share of revenue. The focus on "all," by Novell, does not answer this case. "All" modifies SVRX licenses. The SVRX licenses have to be the SVRX licenses in existence at that time. Otherwise you can’t transfer the title. Otherwise, it doesn’t make any sense in the context of the agreement.

Similarly, "all" does not mean "all" after Amendment 1 because, at that point, indisputably, source code fees for both amended licenses and new licenses with approval go to SCO, not to Novell. So, clearly, that changed "all" in that respect.

And, thirdly, "all" does not mean "all" when you have language in the agreement, Section J of Amendment 1, that makes clear that incidental distributions and licenses of SVRX are okay as long as it’s in the context of the selling of the new or merged products. And that’s what we have here.

I would suggest to the Court, if it has any question about that, it could look in Exhibit 3 to the Microsoft agreement which specifies Open Unix products, distribution rights for UnixWare and things which go well

beyond the listing of SVRX licenses. You have only one side offering evidence in this record that what was done there was incidental to the licensing of UnixWare. And, therefore, the plain language of the agreement is carved out of those provisions, those SVRX royalties on existing licenses, which Novell enjoys and continues to enjoy revenue that currently has generated more than $200 million to Novell. They do not have a right to the revenue from the Microsoft and SUN agreements

Thank you, Your Honor.

THE COURT: Thank you. Thank you both. I'll take the matter under advisement and get a ruling out in due course. We'll be in recess.

(Whereupon the proceedings were concluded.)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, REBECCA JANKE, do hereby certify that I am a Certified Court Reporter for the State of Utah;

That as such Reporter I attended the hearing of the foregoing matter on January 23, 2007, and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting, and the foregoing pages numbered 1 through 45 constitute a full, true and correct record of the proceedings transcribed.

That I am not of kin to any of the parties and have no interets in the outcome of the matter;

And hereby set my hand and seal this 3rd day of May, 2007.

_____

REBECCA JANKE, CSR, RPR, RMR