

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re:)
)
SCO GROUP,)
)
) Plaintiff,)
)
vs.) Case No. 2:04-CV-00139
)
NOVELL INC.)
)
Defendant.)
)
-----)

BEFORE THE HONORABLE DALE A. KIMBALL

April 30, 2008

Motion for Summary Judgment

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1 Salt Lake City, Utah, April 30, 2008

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3 THE COURT: We're here this afternoon to argue
4 Novell's motion for summary judgment on its fourth claim for
5 relief and SCO's motion for judgment on the pleadings on
6 Novell's claim for money or claims for declaratory relief,
7 correct?

8 MR. NORMAND: Correct.

9 THE COURT: And we're here in SCO Group, Inc. versus
10 Novell, Inc., 2:04-CV-139 and I see all of the usual
11 suspects here and present. Which one should we do first?

12 MR. SINGER: We don't have a particular preference.

13 MR. JACOBS: Nor do we, Your Honor.

14 THE COURT: Well, on my list, Novell's motion on the
15 fourth claim for relief is first.

16 How long do you need for this one, do you think?

17 MR. JACOBS: Five minutes, Your Honor.

18 THE COURT: Five minutes?

19 MR. JACOBS: Yes.

20 THE COURT: And how long do you need, Mr. Singer?

21 MR. SINGER: I was going to say 10, but I'll see if I
22 can keep it down.

23 THE COURT: I'm so heartened by that, I'm afraid to
24 ask how much time you need on the second motion?

25 MR. JACOBS: Five minutes, Your Honor.

1 THE COURT: Okay. Go ahead.

2 MR. JACOBS: Thank you, Your Honor. Of course, this

3 in some sense, this motion has been overtaken by events

4 we're trying many of the underlying issues before Your

5 Honor, and we're also sort of in a fashion, unusual perhaps

6 to a legal dispute in which lawyers are principal witnesses

7 or arguing the motion through the witnesses to some degree.

8 Nonetheless, it is worth stating our view that the question

9 of whether SCO had the authority under these agreements is a

10 question of law that there are no genuine disputed, no

11 genuinely disputed facts, no material disputed facts. I

12 think that is probably easiest to show with respect to the

13 Sun agreement. The agreement on its face purports to amend

14 the 1994 agreement. There is a question of law about the

15 meaning of amendment number two. The language is clear. It

16 is any agreement concerning a buy out. It doesn't say any

17 agreement representing a buy out or some narrower language.

18 I suspect as a matter of the history that language came from

19 Santa Cruz at the time which wanted broad language but the

20 language is what the language is. And the Sun agreement,

21 the 2003 agreement, purports to amend an SVRX agreement.

22 There is no dispute that the 1994 agreement is an SVRX

23 agreement particularly in the wake of Your Honor's summary

24 judgment ruling.

25 So that really is the -- on the Sun agreement we do

1 think that is a question of law. And the Microsoft
2 agreement, as a matter of law, we think that the agreement
3 on its fashion purports to grant substantial brand new SVRX
4 rights. Those are -- it is therefore an SVRX license. They
5 had no authority to enter into that SVRX license. We're
6 hearing a lot of testimony around the significance of SVRX
7 rights. As a matter of undisputed fact, SCO is out in the
8 marketplace saying legacy UNIX code has substantial value.
9 And it was in the wake of that activity that that agreement
10 was entered into.

11 So, again, as a matter of law, we think that agreement
12 that they had no authority to enter into that agreement.
13 Thank you very much.

14 THE COURT: Thank you, Mr. Jacobs. Mr. Singer, I
15 assume you have a different view?

16 MR. SINGER: Well, we do, Your Honor. And as we have
17 customarily done, we have put together a few argument
18 slides, although fewer than usual if I might approach.

19 THE COURT: Yes, thank you sure.

20 MR. SINGER: I think as an opening proposition we
21 agree with what Mr. Jacobs said about events overtaking the
22 motion. I think it is hard to see a rationale for summary
23 judgment being a vehicle to decide this issue now that we're
24 in the middle of trial and the same issues are going to be
25 fully tried by the time, what within the next 48 hours we

1 hope.

2 We look at the first slide here. Four issues which we
3 think leads to why the motion should be summarily denied.
4 The first is a genuine fact dispute over whether the Sun and
5 Microsoft agreement, SVRX component, is incidental to the
6 licensing of UNIX ware. If it is incidental, then we have
7 the authority to enter into it. The issue of whether it is
8 incidental we don't think can be resolved as an issue of
9 law. You don't just count up the number of releases of a
10 prior product and say well that must mean it is substantial.

11 For example, we have evidence in this case showing a
12 prior pattern and practice of licensing those earlier
13 versions incidental to the current version. That itself is
14 grounds to deny summary judgment as well as the question of
15 what is the value of those earlier products. If you have
16 new equipment, you need newer products to run on, there
17 certainly has been no showing on summary judgment or really
18 no showing in the plaintiffs case that there has been any
19 commercial value to those older products.

20 Now with respect to intellectual property rights, when
21 we're talking about giving someone a license, it is the
22 license that gives them those rights. And the UNIX ware
23 license gave them all the rights they needed because they
24 included rights to everything that was in that UNIX ware
25 product. So on the first point, we think there is a genuine

1 factual issue.

2 The second point only relates to the Sun agreement.

3 Because obviously there is no issue about the Microsoft
4 agreement being a buy out. There is nothing to buy.

5 Mr. Jacobs says that you only have to concern a buy out and
6 this clearly concerned a buy out and so it triggered that
7 provision of the APA that required Sun's approval. And
8 while Mr. Jacobs accurately states the language in the APA,
9 I think there are two reasons why it doesn't lead to the
10 conclusion he suggests.

11 The first is that concerning a buy out means more, we
12 submit, than simply that in the whereas clauses in the 2003
13 agreement it says it amends and restates that 1994 agreement
14 which was a buy out. We think it is important that nothing
15 here changed that buy out. They got paid 82 and a half
16 million dollars for buying out all of these binary royalties
17 in 1994. Nothing in 2003 amended that. So nothing
18 concerned it. We don't think that the plain language of
19 that agreement means that when you already have a buy out
20 years before, and you come up with a new agreement that
21 doesn't change the terms of that, that that is something
22 that we had to go back to Novell. But there is a second
23 reason why their argument is, we believe, doesn't lead to
24 the conclusion they suggest and that if we could, turn to --
25 it is slide number seven.

1 THE COURT: Seven?

2 MR. SINGER: Seven.

3 THE COURT: Okay.

4 MR. SINGER: And which is also on the screen. And
5 that is the language of amendment two which is the amendment
6 that deals with the buy out issue. It says specifically in
7 paragraph B(5) that Novell may not prevent SCO from
8 exercising its rights with respect to SVRX source code in
9 accordance with this agreement. So even if that amendment
10 number two was triggered by it being an agreement that
11 concerns a buy out, all the elements of our amendment
12 involving source code are not things that Novell had a right
13 to prevent us from doing by the very language of amendment
14 number two.

15 So we think even if amendment number two applied,
16 overwhelming the Sun agreement deals with source code rights
17 and therefore all aspects -- all those aspects of the
18 agreement are authorized. So to the extent they have an
19 argument here, it only applies to non source code issues in
20 the Sun 2003 agreement and I don't even think they have
21 identified any of those.

22 Now if we go back then to the four issues that are
23 implicated in this -- that deals with the first two. The
24 third involves SCO's source licenses. Turn to tab eight in
25 the --

1 THE COURT: Tab eight?

2 MR. SINGER: Tab eight. And I'll be very brief on
3 this. There is no -- first of all, summary judgment
4 determination by this court in your prior order regarding
5 SCO source licenses being SVRX licenses at all, that was
6 never raised, never dealt with in the August 2007 order.
7 There is ample evidence in this record, and also in the
8 summary judgment record, that SCO was concerned with
9 technology that was in open server at UNIX ware being
10 improperly used at Linyx. It is not just a concern with the
11 historical Unix System V code although that was certainly
12 part of the concern but as well as things that in the more
13 recent UNIX library and open server. But I think the most
14 important fact here is the third point. That SCO had the
15 right to release its own claims. Because these SCO source
16 licenses are essentially releases and licenses of SCO's
17 intellectual property rights. If Novell's argument is right
18 here, that because of their ownership of certain copyrights
19 we didn't have much to release to these third parties who
20 bought these licenses as we thought, it just meant that
21 those third parties didn't get as much. But it doesn't
22 change the SCO source license into a license of Novell's
23 intellectual property. There is nothing on the face of the
24 agreement that does it. And unless it did that, there is no
25 issue here about it being an SVRX license within the meaning

1 of that agreement or something that required Novell's
2 approval.

3 These aren't people who are being given source code
4 licenses or going off and doing things with this. This was
5 a release from litigation claims, essentially. If it is a
6 smaller release than we thought, that may be an issue
7 between SCO and that licensee about what they paid for. It
8 is not an issue that relates to Novell.

9 The final point, the fourth issue, also relates to the
10 SCO source licenses and that is our estoppel argument. And
11 we think that is inherently factual. And you're hearing
12 some of those facts in this trial. That Novell was aware
13 from late 2002 and early 2003 that SCO intended to launch a
14 licensing program for the intellectual property of UNIX that
15 was in Linyx. And they said they wouldn't help us. They
16 never said don't do it, they never said we don't have the
17 rights to do it, they never said if you do it you're going
18 to owe us the money. And so there is at least a factual
19 issue on that estoppel defense that precludes summary
20 judgment. Thank you, Your Honor.

21 THE COURT: Thank you, Mr. Singer. Any reply,
22 Mr. Jacobs?

23 MR. JACOBS: Briefly, Your Honor. The only thing
24 worth focusing on, because I don't think the briefing really
25 paid a lot of attention to this, is the B(5) provision in

1 amendment number two. The language is under the category of
2 heading B which is relating to buy outs. In addition,
3 Novell may not prevent SCO from exercising its rights with
4 respect to SVRX source code in accordance with the
5 agreement. The only way to read that is as a reminder that
6 SCO has some rights in accordance with the agreement and SCO
7 can't and Novell can't prevent SCO from using those rights.
8 It doesn't expand anything. It doesn't contract anything.
9 It is language that is sort of inherently circular and adds
10 nothing or detracts nothing from the overall asset purchase
11 agreement or from amendment number two. Thank you, Your
12 Honor.

13 THE COURT: Thank you. Thank you both. We'll now
14 move to SCO's motion for judgment on the pleadings on
15 Novell's claim for money or their claim for declaratory
16 relief.

17 Mr. Normand, how much time do you need on this matter?

18 MR. NORMAND: I don't want to be a drag on the ticket,
19 but I probably need 20 minutes, Your Honor.

20 THE COURT: All right.

21 MR. NORMAND: May I approach, Your Honor?

22 THE COURT: Yes.

23 MR. NORMAND: Your Honor, we think there are five
24 questions before the court on this motion. Now, this is a
25 motion for judgment on the pleadings, of course, so this

1 pertains to Novell's own allegations, Novell's own version
2 of the facts. Arguments out of Novell's mouth. Your Honor
3 will appreciate, given that we're in the middle of trial,
4 there are aspects of these allegations that we disagree
5 with. But the question here is under Novell's own version
6 of the facts, did they have a claim? We don't think they
7 do.

8 The first question was SCO Novell's agent? Second
9 question was SCO authorized to execute the agreements at
10 issue? Third question, if SCO was not authorized to execute
11 the agreements, as SCO's principal has Novell ratified them?
12 Here we get in to the principal agent law in terms of our
13 ratification. Four, if SCO was not authorized to execute
14 the agreements, and Novell has not ratified them, do the
15 counter parties to the agreement get back the money they
16 paid under principals of restitution? And the fifth
17 question, where SCO was not authorized to execute the
18 agreements, Novell has not ratified them, and the counter
19 parties do get back the money they paid, does Novell have
20 any claim to hold the money in the interim?

21 Question one, Your Honor, was SCO Novell's agent?
22 Under Novell's version of the facts, we were. Novell makes
23 the specific allegation and we acknowledge that the court
24 concluded in its August 2007 order that SCO was and is
25 Novell's quote agent for SVRX licenses. I don't think this

1 is a controversial point.

2 Question two, was SCO authorized to execute the
3 agreements? Again, under Novell's version of the facts,
4 clearly not. Novell alleges in its pleadings that SCO
5 lacked the authority to execute the agreements. Novell has
6 moved for summary judgment on the grounds that SCO lacked
7 the authority to execute the agreements. And Novell is
8 arguing at trial, of course, that SCO lacked the authority
9 to execute the agreements.

10 So far so good. Question three, if SCO was not
11 authorized to execute the agreements as SCO's principal, has
12 Novell ratified? No. Novell does not allege in its
13 pleadings that it has ratified the agreements. In support
14 of its pending motion for summary judgment, Novell
15 emphasizes that it has rejected the agreements at every
16 step. And when we explained a few months ago in opposition
17 to that motion that we were confused as to that position,
18 they explained that our view that they had implicitly
19 approved the agreement that was wrong. They said that
20 nothing could be further from the truth.

21 Now, Novell also wrote letters to Sun and Microsoft in
22 September 2007, those came in today as exhibits, those were
23 produced yesterday morning. I don't know why they were
24 produced six months after they were sent. I don't know why
25 they were produced two months after we brought our motion.

1 And I don't know why they were produced the morning of
2 trial. Um, but they don't help Novell. One quote, we'll go
3 through some more in both letters, we believe that the 2003
4 agreement is unenforceable, void or invalid. And, of
5 course, you heard Mr. Jones from Novell say today repeatedly
6 if he had known about the Sun and Microsoft and SCO source
7 agreements, if Novell had known about them, they would not
8 have approved them. Clearly, under its own version of the
9 facts, Novell has not ratified these agreements.

10 Question four, SCO was not authorized to execute the
11 agreements and Novell has not ratified them, do the counter
12 parties get back the money they paid under the agreements?
13 Again, this is Novell's version of the facts. Under the
14 law, they do. They get restitution. As to any void or
15 invalid contract, taking a step back from principal agent
16 law, for a second, as to any void or invalid contract, the
17 counter party who made payments under the contract is
18 entitled to restitution of them. As to a principal in
19 particular, if the principal disclaims the agents acts as
20 unauthorized, he has no grounds to retain the fruits
21 thereof. That is from the Tenth Circuit. That is the
22 Maryland Casualty case. And we put in another quote because
23 we like it so much, one court says it is repugnant in every
24 sense of justice and fair dealing that a principal shall
25 avail himself of the benefits of the agent's act and at the

1 same time repudiate his authority. And in these letters
2 that were produced yesterday, Novell acknowledges the
3 likelihood of restitution telling Microsoft and Sun if we
4 recover money from SCO on account of the 2003 agreement, we
5 intend to hold it for remittance to Microsoft or Sun or a
6 determination that no such remittance is necessary.

7 So I think it is clear that the answer to question
8 four is yes, these counter parties have restitution rights.
9 So we come to question five where SCO was not authorized to
10 execute the agreements, Novell has not ratified them, and
11 the counter parties get back the money, does Novell somehow
12 have a claim to hold the money in the interim. Hold being
13 the word that Novell actually used in the Sun Microsoft
14 letters. The answer to that question under the law is no.

15 The most recent authority, from the restated third and
16 reflects as well the restated second agency, makes clear
17 that quote, "as between the principal and the agent," that
18 is a phrase Novell itself used in opposing our motion, "as
19 between the principal and agent, if the principal declines
20 to ratify the agent is not even under a duty to account to
21 the principal."

22 Can you pull up section 402 and blow up that
23 highlighted part. This is from the restatement third of
24 agency. This is from 2006. Ratification has an immediate
25 effect on legal relations between the principal and agent.

1 Ratification recasts those legal relations as they would
2 have been had the agent acted with actual authority. Legal
3 consequences thus relate back to the time the agent acted.
4 Once the principal has ratified the agent's act, the agent
5 is subject to a fiduciary duty to account to the principal
6 as if the agent had acted with actual authority. And then
7 the next paragraph, legal relations as between agent and
8 principal, are affected by whether the agent has acted with
9 actual authority. So ratification clearly bears on this
10 relationship.

11 If we pull up Section 401, this is also from the
12 restatement third of agency. "When a person ratifies
13 another's act, the legal consequence is that the person's
14 legal relations are affected as they would have been had the
15 actor been an agent acting with actual authority at the time
16 of the act." Again, ratification is keen.

17 One more here on Section 408. If you would pull that
18 up. We show, Your Honor, this language as a sort of a
19 *fortiori* argument. Novell's argument has been somehow the
20 court should assess as between Novell and SCO who has a
21 better claim, who would it be more just to allow it to hold
22 onto the money. That is not what the law says. The law
23 actually says if you're not even an agent, let alone whether
24 you lack the authority, if you were just purporting to be an
25 agent, it is still the case that the principal can't get the

1 money if he doesn't ratify. If he was not an agent when he
2 acted, the subsequent ratification by the principal subjects
3 him to the liability of a fiduciary with respect to the
4 transaction. Thus, if he made a profit or received
5 property, the ratification subjects him to a duty to the
6 principal as to what he has received.

7 Why don't we go back to the slides, slide six. The
8 well-established authority, Your Honor, also makes clear
9 that the third-party, the counter party, is entitled to
10 restitution from either the principal or agent. There is no
11 suggestion in the law that the third-party has to wait until
12 the money goes to the principal and then seek restitution on
13 the principal.

14 Let's pull up Section 47, and blow that up, just the
15 highlighted part. I won't belabor these, Your Honor. And
16 sometimes A's, B's and C's are hard to follow but I think
17 these are pretty straightforward. These are illustrations
18 from the restatement of restitution. A shows B a telegram
19 from C. A is a principal and the owner of Black Acre by an
20 erroneous interpretation of the legal effect of the
21 telegram, both parties believe that it authorizes A to sell
22 Black Acre. B pays A for Black Acre. B is entitled to
23 restitution from A unless C ratifies or A before learning of
24 the mistake pays C the money. And number two, the same
25 facts as illustrated in one, except that B now sends the

1 money to C. B is entitled restitution from C unless C
2 ratifies.

3 The point of these illustrations, Your Honor, to get a
4 chance to stick with them for a minute, is there is no
5 suggestion in here that the third-party has to wait for the
6 principal to get the money. That the third-party has to
7 wait for the principal to resolve its dispute with the agent
8 and then it has a right to restitution. There is no
9 suggestion of that. Whoever has the money, if the principal
10 was entitled to get it, the third-party gets restitution
11 from the agent. So Novell is wrong about that area of law,
12 I submit.

13 And finally, Your Honor, to go back to slide six. We
14 point out that the Tenth Circuit has long observed that
15 faced with the question of ratification, quote, the
16 principal is impelled on the horns of a dilemma. I think
17 Novell suggested in its opposition brief that we're trying
18 to put them in some uncomfortable or incongruent situation
19 that they're not. They are in the same situation as any
20 principal. You have to choose whether to ratify, and if you
21 have chosen not to, which Novell has chose not to, legal
22 consequences follow.

23 Two more slides, Your Honor, to try to bring this
24 home. We read the court's August 2007 order as leaving open
25 for determination in this trial as to whether we owe Novell

1 money. And, you know, our position is that any SVRX
2 component in these agreements at issue has de minimis value.
3 So our position is that liability on SCO's part to Novell
4 has not been established as such. We suspect Novell takes a
5 different view. If they do, we respectfully submit that
6 reconsideration of at least part of the August 2007 order is
7 appropriate. Now why would that be? I can understand Your
8 Honor's reluctance to hear motions for reconsideration so
9 many months later, but we think we have good grounds. We
10 would be happy to set them forth in more detail, but in
11 summary, first, the authority we have gone through reflects
12 it would be a manifest injustice in one of the standards for
13 reconsideration for Novell to recover any money while it
14 disclaims SCO's authority. Remember the quote that we like
15 so much, "repugnant in every sense of justice and fair
16 dealing."

17 And second, Novell's production yesterday of the
18 September 2007 letters is crucial new evidence. I think
19 that would have been very relevant for the court to know if
20 at the time of the summary judgment ruling it had been made
21 clear that Novell had rejected these agreements and at the
22 same time was acknowledging the possibility of remittance.
23 Or, as we go to the next slide, the -- actually let me
24 finish that thought, the possibility that Novell reserves
25 the right to keep the money. They have told Sun and

1 Microsoft there may be grounds for remittance, but if we get
2 money from SCO we may keep it. Well, they can't keep it
3 under any theory of law. We don't think they can get it
4 from us but they certainly can't keep it if at the same time
5 they are claiming authority. This would have been relevant
6 information to know if at the time of summary judgment they
7 were taking these positions and therefore we submit that
8 reconsideration might be appropriate.

9 Final point, Your Honor, and we have made this point
10 in our trial brief so I won't belabor it. Under the APA
11 amendment number one, SCO is entitled to retain 100 percent
12 of quote, "source code right to use fees attributable to
13 USVRX licenses as approved by the seller," that is Novell,
14 "pursuant to Section 4.16(b) hereof." If Novell now
15 reverses course and chooses to ratify the agreements, and
16 the court were to allow it, SCO keeps a substantial portion
17 of the alleged SVRX royalties that Novell seeks under these
18 agreements.

19 Now why would that be? We know Novell didn't give its
20 approval, we never sought it. Why would section 4.16(b) in
21 this language of amendment number one be satisfied? Two
22 reasons. One, the literal effect of ratification as we saw
23 in the earlier authority makes Novell's approval relate back
24 to the time of the execution of the agreement. It would be
25 as if they had approved the agreements. If they have

1 approved them, as Novell has argued up and down for the
2 first two days, the agreement's at issue involve significant
3 source code right to use fees. Monies paid for the rights
4 to use source code.

5 And second, Your Honor, we do detail this in our trial
6 brief, Novell might argue that it can't be that we get this
7 money under any theory because they didn't give approval at
8 the time. Well to preclude us from attaining these fees
9 because we failed to get their approval at the time would
10 create penalty provision. There has to be some relationship
11 between how much money we would be forfeiting, to use the
12 word Mr. Jones used today, how much money we would be
13 forfeiting, and whether at the time of the agreement,
14 whether at the time of amendment number one, Novell actually
15 thought it could be harmed in any where approaching that
16 amount, the amount that we would be forfeiting. There has
17 to be a relationship between those things.

18 In Novell's view, SCO could forfeit millions of
19 dollars when Novell has not even alleged in its pleadings
20 that our failure to get approval has harmed Novell. They
21 are presenting no evidence at trial that they have been
22 harmed. They are not even pursuing a claim for breach of
23 contract. So in short there would be incongruity between
24 the size of SCO's forfeiture on the one hand and on the
25 other hand that prospect that Novell could have been harmed

1 by our failure to get their approval before the execution of
2 the agreements.

3 So for all these reasons, Your Honor, under Novell's
4 own version of the facts, we don't think they have a claim
5 to hold onto this money. Thank you.

6 THE COURT: Thank you, Mr. Normand. Mr. Jacobs?

7 MR. JACOBS: I have to confess, Your Honor, this is in
8 a case that has had lots of interesting issues, this is one
9 of the more -- more interesting ones because of this issue.
10 And we have had a lot of law school exam questions in this
11 case and this is another one of those. But I think here is
12 the problem with SCO's argument.

13 Number one, the third parties aren't here. In the
14 cases that SCO is advancing in the sections of restatement
15 that SCO is talking about, we're talking about three way
16 disputes. We should not be ourselves penalized for
17 proceeding step wise to determine -- to be absolutely sure
18 that SCO didn't have the authority to enter into these
19 agreements before we go off and create our own imbroglio in
20 the computer industry by filing lawsuits and creating
21 uncertainty about whether code is infringing or isn't
22 infringing.

23 So the fact that we have decided to proceed, if you
24 will, between SCO and Novell first, means that our situation
25 is different from the situations that SCO is citing in the

1 case law. In the case law it is true that the third-party
2 could proceed against SCO or could proceed against Novell
3 for the restitution. That isn't our case. We don't have
4 Sun and Microsoft or any of the other licensees here seeking
5 restitution from SCO and Novell.

6 In the third-party case, it is also true that if we
7 retain the benefits of the agreement, if we retain those
8 benefits, they may then claim if we have a subsequent follow
9 on dispute with them look Novell you retained the benefits
10 you can't now disclaim the agreement. But that again is a
11 third-party argument. That is an argument that Sun or
12 Microsoft or the SCO source licensees might make but again
13 only if we retain the benefit of that. The purpose of these
14 letters was to two parties who are not in this proceeding.
15 We don't think -- SCO doesn't stand in their shoes and argue
16 their case for them about why the agreement is or is not
17 void or is or is not ratified. Those are arguments for Sun,
18 Microsoft for the third-party licensee to make.

19 Here is an analogy that makes this point clear. I
20 have a business. I have an employee. The employee goes
21 off, signs an agreement, collects money and keeps the money.
22 And meanwhile, we're the employer, we look at that agreement
23 we go that is not an agreement that the employee could --
24 could permissibly have entered into. We think that it is
25 not valid. In the meantime, does the employee get to hold

1 the money? That can't be right. One reason it isn't right
2 one reason it is right is that the employer and the employer
3 employee situation there is no question about the agency
4 status of the employee. The employee is an agent. So we're
5 not disclaiming -- the employer in that case is not
6 disclaiming the agency as such and that is true here as
7 well. There is no question that SCO is Novell's agent.
8 We're not disclaiming the agency relationship. And there is
9 no question that SVRX, in its broadest sense, is the scope
10 of that agency.

11 We are claiming, we are alleging that they lacked the
12 authority as our agents to enter into those agreements. So
13 that is -- that is why these cases about disclaiming the
14 agency are irrelevant. And that is why the
15 employer/employee hypothetical, I think, is the right one to
16 think about when considering whether SCO gets to hold the
17 money.

18 There is another reason SCO doesn't get to hold the
19 money which makes this case different from the cases that
20 SCO cited. We have this complex agreement that defines the
21 nature of the relationship and defines SCO's duties to
22 Novell. Those duties include the duty to account. They
23 include the duty to remit. They include the duty to make
24 the -- to have, as the court has found, a fiduciary
25 relationship with Novell as to the SVRX revenues. The

1 manifest injustice would be if SCO gets to keep the money
2 under those circumstances. And again our case here is not
3 analogous to the cases that SCO has cited.

4 In fact, Your Honor, I don't -- I cannot claim to have
5 perused every one of the dozens of cases that SCO cited
6 throughout its brief. But if SCO had a case that answered
7 their question, the last question that they posed on all
8 fours with ours, I'm sure they would have cited it. That
9 question is what happens in the interim? In this case does
10 SCO get to hold the money having breached their fiduciary
11 duties, having failed to account, having converted, having
12 been unjustly enriched, as the court has found, or is the
13 right answer here for the principal to hold the money and
14 for the principal to work this out with the third parties,
15 Sun, Microsoft and the SCO source licensees.

16 There is nothing inconsistent with the position we
17 have taken in the case or in our letter to Sun and Microsoft
18 with that proposition. It is the right thing to happen
19 here. Novell is ultimately going to have to work out with
20 Sun and with Microsoft and the SCO source licensees exactly
21 what happened here and exactly what should follow as a
22 consequence.

23 There are a couple of other minor points. I'm
24 exceeding five minutes, I apologize. They anticipated our
25 arguments. It cannot be that what happens as a result of

1 the follow-on negotiation dispute, whatever, with Sun,
2 Microsoft and the SCO source licensees necessarily amounts
3 to a ratification that necessarily relates back and
4 constitutes approval dating back to 2003 of what SCO did
5 here. There is far too much water under the bridge for that
6 to be the legal effect of the outcome when Novell and the
7 third parties sit down and figure out what to do about that.

8 There are all sorts of intermediate scenarios between
9 Novell saying at the end of all of this oh yeah those
10 agreements are fine, no problem. And by the way, whatever
11 we said about SCO breaching, whatever we said about their
12 breach of our fiduciary duties, whatever the court's
13 findings that they breached, oh, this is all retroactive, a
14 ratification back to 2003. SCO has no -- cites no case that
15 is on all fours with that scenario and the idea that this is
16 an unenforceable penalty, this is not a contract case, this
17 is an unjust enrichment case. This is a conversion case.
18 SCO has no cases in which a defendant who has been found
19 liable for unjust enrichment and now we're figuring out
20 exactly how much should be awarded, gets to say well that is
21 a penalty that is an unlawful penalty. There are no penalty
22 cases that deal with the situation we're dealing with here.

23 So I started out by saying that this is an interesting
24 issue, but our case is unusual and our case doesn't fit with
25 SCO's cases. The most -- the basic failure of SCO's legal

1 argument is they have no case that deals with the situation
2 between a principal and an agent as between the two of them
3 when the third-parties are not present and the court is not
4 actually called upon to declare, with the third-party
5 present, whether the agreements are void or not.

6 Last point. We believe, as we say in our letters,
7 that the agreements are void or invalid or not enforceable
8 or whatever. That is our belief. But we'll find that out.
9 But when an authoritative decision-maker like a court
10 decides that question. And until that question is finally
11 decided, this is the statement of our position and a
12 statement of our belief but it is not -- but the legal
13 effect of voiding of the agreement has not yet occurred.
14 Thank you very much.

15 THE COURT: Thank you, Mr. Jacobs. Mr. Normand?

16 MR. NORMAND: Thank you, Your Honor. Five quick
17 points, Your Honor, to mirror the five points I started
18 with.

19 First, Novell cites no cases that support its theory
20 that it gets to hold this money. If you look at Novell's
21 brief there are no cases that use counsel's phrase are on
22 all fours.

23 Second, the law has long made clear, including the
24 Tenth Circuit, that when a principal learns of what the
25 agent has done, the principal is on the horns of a dilemma.

1 Novell suggests that it gets to go to court, have a
2 resolution of the issues that will bear in this decision and
3 then make the decision. That is not the horns of a dilemma.

4 Three, the law says that in this sort of situation
5 principal has to quote promptly make a decision. If there
6 was any ambiguity as to whether a principal got to go to
7 court, that language clarifies it. We cited a lot of that
8 law in our brief. The principal has to make its decision
9 promptly.

10 Now, what happens when the principal makes its
11 decision? The question is whether the principal wants to
12 use a phrase, fall into the principal agent box or not.
13 That is the horns of the dilemma. Do I want to ratify this
14 transaction? Do I want to regard it as one that is within
15 my relationship with the agent? Do I want to go into the
16 principal agent box or not? It could be a hard decision,
17 but you have to make it. Novell has made the decision. It
18 did not ratify the agreements.

19 Fourth, the question on this motion is not whether SCO
20 gets to keep the money. The question is whether Novell is
21 entitled to the money. This is what I alluded to earlier in
22 my argument, Your Honor. It is not a court of equity where
23 we're assessing relative rights. We have got allegations of
24 principal agent relationship and the question on Novell's
25 claims and therefore on our motion is Novell affirmatively

1 entitled this money. The law says it is not.

2 Fifth, do we have any authority that is on all fours?

3 We do. Can we pull up Section 402. The key phrase that

4 Mr. Jacobs keeps using and suggesting that we don't have any

5 direct authority bearing on it is as between the principal

6 and agent. We all agree we're in a trial as between the

7 alleged principal and agent. We saw this law earlier.

8 Ratification retests those legal relations as they would

9 have been had the agent acted with actual authority. Legal

10 consequences thus relate back. Bottom Your Honor, legal

11 relations as between agent and principal are affected by

12 whether the agent has acted with actual authority. How are

13 they affected? They're affected because if you ratify,

14 you're in the principal agent box. It is at that point once

15 the principal has ratified the agent's act, once the

16 principal has ratified the agent's act, the agent is subject

17 to a fiduciary duty to account to the principal.

18 Finally, Your Honor, to use Mr. Jacobs example, and to

19 bring it home as to the claims at issue, if that employer

20 wanted to go to court and seek money, he would have to have

21 ratified. Novell has not done that. They have done the

22 opposite. And our motion for judgment on the pleadings even

23 bending over backwards to draw all inferences in favor of

24 Novell, the court cannot infer the opposite of what Novell

25 has alleged and we cited that law as well. Thank you, Your

1 Honor.

2 THE COURT: Thank you. I'll take the motions under
3 advisement. Let me just ask you a couple of questions
4 generally. There was a suggestion, and it might have been
5 in Novell's briefing, that you were defending on among other
6 things estoppel and unclean hands, but I didn't see any
7 unclean hands in the briefing, in your briefing.

8 MR. SINGER: We are not pursuing that aspect of the
9 defense.

10 THE COURT: Estoppel yes?

11 MR. SINGER: Estoppel with respect we are.

12 THE COURT: And then in Novell's briefing, there was
13 some reference toward the end of your trial brief about a
14 constructive trust. But that didn't come out -- that was
15 not released from the stay, that is part of the bankruptcy,
16 right?

17 MR. JACOBS: That is exactly right, Your Honor. What
18 we told the bankruptcy judge was that because that affects
19 the bankruptcy estate, we would seek a judgment here as to
20 the amount. We have a finding that we're entitled to a
21 constructive trust but because it is a preference, arguably
22 a preference related impact on the bankruptcy estate, that
23 quantification would occur in the bankruptcy court.

24 THE COURT: All right. Do you have anything you want
25 to say about that?

1 MR. SINGER: We agree with Your Honor that the issue
2 of constructive trust is not before this court because of
3 the ruling of the U.S. Bankruptcy Court.

4 THE COURT: And I assume that the time we have spent
5 here this afternoon does not count against the 20 hours; is
6 that correct?

7 MR. JACOBS: That is correct, Your Honor.

8 MR. SINGER: Although I think that we are making
9 pretty good progress.

10 THE COURT: Let me raise one potential problem and a
11 solution if it is a problem. I agreed several months ago to
12 help make a presentation to the Federal Bar Association
13 Criminal Law Seminar on Friday which I thought started at
14 3:00 when I made the agreement. They tell me now it starts
15 at 2:00.

16 Now, it is just up just a block away so that isn't a
17 problem. But if we need to, we can start at eight on Friday
18 and still get in our five hours if we need them on Friday
19 and be done at 1:30 instead of 2:00. Is that --

20 MR. JACOBS: Absolutely, Your Honor.

21 MR. SINGER: That is certainly fine with us. And we
22 may -- we'll probably know by the end of the day tomorrow.

23 THE COURT: By the end of the day tomorrow, you'll
24 know how much time you need Friday. But if you need the
25 whole five, we'll start at eight if that is okay.

1 MR. JACOBS: Great.

2 THE COURT: All right. Thank you. We'll be in
3 recess.

4 MR. JACOBS: Thank you, Your Honor.

5 MR. SINGER: Thank you.

6 (Whereupon, the hearing concluded at 3:59 p.m.)

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1 STATE OF UTAH)
2)ss
3 COUNTY OF SALT LAKE)
4

5 I, Laura W. Robinson, Certified Shorthand
6 Reporter, Registered Professional Reporter and Notary Public
7 within and for the County of Salt Lake, State of Utah, do
8 hereby certify:

9 That the foregoing proceedings were taken before
10 me at the time and place set forth herein and were taken
11 down by me in shorthand and thereafter transcribed into
12 typewriting under my direction and supervision;

13 That the foregoing pages contain a true and
14 correct transcription of my said shorthand notes so taken.

15 In witness whereof I have subscribed my name and
16 affixed my seal this 7th day of May, 2008.

17

18

19 Laura W. Robinson, CSR, RPR, CP
20 and Notary Public

21

22 MY COMMISSION EXPIRES:

23 December 1, 2008

24

25