Extrinsic evidence of business negotiators prior to the finalization of the agreement is not probative of the issue regarding copyrights because it is obvious that the deal changed over time. The extrinsic evidence demonstrates that Santa Cruz did not have the cash necessary to complete the deal. Therefore, the parties constructed a fairly complex mechanism to ensure Novell a future revenue stream. Novell has presented evidence that the transaction evolved as it became necessary for Novell to protect its future stream of revenue. Novell deliberately excluded the UNIX and UnixWare copyrights to protect its retained right to receive 95% of future SVRX revenues. Braham testified that the exclusion of UNIX and UnixWare copyrights ensured that copyrights would not be part of the bankruptcy estate if Santa Cruz went into bankruptcy and the retention of the UNIX and UnixWare copyrights strengthened Novell's legal basis for receiving royalties and negotiating buy-outs of SVRX licenses. SCO, however, provides no extrinsic evidence regarding the final negotiations of the deal that would contradict Novell's evidence.

In its attempt to argue that extrinsic evidence is necessary, SCO repeatedly overstates its case. SCO contends that the exclusion of the UNIX and UnixWare copyrights would render the APA meaningless because it would prevent Santa Cruz from pursuing its UNIX business. Braham testified that Novell's sale of UNIX and UnixWare products to Santa Cruz under the APA necessarily conferred a license on Santa Cruz to use the copyrights as needed to implement the APA. Contrary to SCO's assertions, there is evidence that SCO did not need to own the UNIX and UnixWare copyrights to pursue its UNIX business.

It is well established that a contract involving copyrighted works confers an implied license to use the copyrights as needed to implement the transaction. In *Food Consulting Group, Inc. v. Musil Govan Azalino*, 270 F.3d 821 (9th Cir. 2001), the defendant's predecessor paid

$175,000 to plaintiff to prepare a preliminary plot plan and final engineering drawings for a proposal to build a shopping center. *Id.* at 824. When defendant hired a different firm to complete the project using a modified version of plaintiff's plan, plaintiff claimed that the defendant had no right to use or modify plaintiff's copyrighted drawings. *Id.* at 824-25. The Ninth Circuit rejected this claim, holding that the contractor granted "an implied license to use the revised plot plan to build the project." *Id.* at 828. The Ninth Circuit emphasized that "[t]he central purpose of the contract" was the production of engineering documents for the shopping center and given this purpose and the amount of money paid, "it would have been surprising if the parties had intended for [defendant] to seek [plaintiff's] permission before using the plans to build the project." *Id.*

In this case, while copyrights were excluded from the transferred assets, Santa Cruz did acquire ownership of other rights in multiple versions of UNIX and UnixWare. Moreover, a central purpose of the APA was to enable Santa Cruz to develop and distribute an improved version of UNIX that combined Novell's "UnixWare" product with Santa Cruz's "OpenServer." Implementing this purpose required Santa Cruz to copy, modify, distribute, and sublicense code in Novell's UnixWare products. Thus, Novell's sale of its UNIX and UnixWare products necessarily conferred a license on Santa Cruz to use the related copyrights as needed to carry out the business activities contemplated by the APA.

The conclusion that Santa Cruz had a license to the UNIX copyrights is reinforced by the fact that Santa Cruz indisputably did not acquire ownership of Novell's UNIX-related patents. Santa Cruz needed to use these patents to be able to distribute and modify UNIX products. Therefore, Novell's sale of its UNIX products to Santa Cruz necessarily conveyed a license to

use the patents as needed to implement the APA.

Burt Levine, a former paid consultant to SCO and in-house attorney for AT&T, USL, Novell, and Santa Cruz, acknowledged that the APA "convey[ed] enough of a patent license under Novell's patents that would be necessary for SCO to conduct its business." Similarly, he agreed that if Novell had retained the copyrights, SCO would have had an inherent license to use those copyrights as necessary in the business.

Furthermore, there is extrinsic evidence that during the period of time between the signing of the APA on September 19, 1995, and its closing on December 6, 1995, the parties spent considerable time going through the documents and determining what amendments should be made. While there may be some claims that the original signing of the APA was rushed, there were months of further negotiations regarding certain provisions before the Closing. This resulted in the changes made in Amendment No. 1. Although changes to Schedule 1.1(a) and 1.1(b) were made in Amendment No. 1, there were no changes made to the intellectual property provisions.

SCO also argues that there is no evidence that Novell publicly asserted ownership of the UNIX copyrights between the APA's Closing and May 28, 2003. While the court fails to appreciate why SCO believes that Novell would have had a reason for publicly announcing its ownership of copyrights before that date, there is substantial evidence that Novell privately asserted its right to the copyrights during that time period. When SCO contacted Novell to enter into Amendment No. 2, Novell asserted its ownership of the copyrights and it refused to transfer them. There is evidence that when Santa Cruz sold its business to Caldera, Santa Cruz was unable to obtain a chain of title to the copyrights. In addition, there is evidence that in response

to several telephone calls from Darl McBride to various individuals at Novell, Novell refused to transfer copyrights to SCO. A failure to publicly announce its ownership is not particularly probative of whether the copyrights transferred.

In addition, the evidence with respect to joint copyrights being used on products does not demonstrate that copyrights transferred under the APA. Novell's explanation for the joint reference of both Novell's and Santa Cruz's copyrights is consistent with the fact that the copyrights in the original UNIX and UnixWare products remained with Novell, and SCO retained the copyright in the newly produced derivative products.

Therefore, even relying on the extrinsic evidence from the time the APA was signed and closed, the court is convinced that the UNIX and UnixWare copyrights did not transfer under the APA or the agreements executed in connection with the APA's Closing.

B. Did Copyrights Transfer Under Amendment No. 2 to the APA?

SCO contends that Amendment No. 2 clarified that the UNIX and UnixWare copyrights were not Excluded Assets. Amendment No. 2 amended the Excluded Asset schedule to read: "All copyrights and trademarks, except for *the copyrights and trademarks owned by Novell as of the date of the Agreement required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies.*" APA Amend. No. 2 (Emphasis added to demonstrate amendment.) SCO asserts that it is plain that the UNIX and UnixWare copyrights were so required because of the substantial rights to the Business Santa Cruz received in the transaction. Obviously, this contention is rebutted by the evidence above demonstrating that SCO could conduct its business with a license to the copyrights.

Novell argues that Amendment No. 2 did not transfer UNIX and UnixWare copyrights

because (1) it does not constitute an instrument of conveyance under the Copyright Act, (2) it did not include any provisions transferring ownership of copyrights nor did it purport to retroactively amend the Bill of Sale to transfer copyrights, (3) it did not specifically identify which copyrights, if any, should be transferred, and (4) Santa Cruz did not "require" ownership of the UNIX and UnixWare copyrights for its business because it already had a license to use these copyrights as needed to implement the APA.

The Copyright Act requires a signed written instrument to transfer ownership of copyrights. Section 204(a) states: "A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent. 17 U.S.C. § 204(a). This requirement is meant to "enhance[] predictability and certainty of copyright ownership." *Effects Assoc. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990).

Section 204 is a prerequisite to a valid transfer of copyright ownership, and not merely an evidentiary rule. A transfer of copyright is simply "not valid" without the required written instrument. *Konisberg Int'l, Inc v. Rice.* 16 F.3d 355, 357 (9th Cir. 1994). Further, unlike a statute of frauds, Section 204 is not subject to equitable defenses, such as estoppel, because such defenses would "undermine the goal of uniformity and predictability in the field of copyright ownership and transfer." *Pamfiloff v. Giant Records, Inc.*, 794 F. Supp. 933, 937 (N.D. Cal. 1992).

"As with all matters of contract law, the essence of the inquiry here is to effectuate the intent of the parties. Accordingly, even though a written instrument may lack the terms 'transfer' and copyright,' it still may suffice to evidence their mutual intent to transfer the copyright

interest." *Nimmer on Copyrights* § 10.03[2]. SCO contends that, under the applicable authority, the language identifying the Assets by reference in Section 1.1(a) of the APA, as amended by Amendment No. 2, meets the statutory requirements.

Amendment No. 2 does not include any provision that purports to transfer ownership of copyrights. It merely revised the definition of the intellectual property category of the Excluded Assets schedule. Unlike the APA, Amendment No. 2 was not accompanied by a separate "Bill of Sale" transferring any assets. Nor did Amendment No. 2 purport to retroactively change the scope of the assets transferred by the Bill of Sale that was executed in connection with the APA in December 1995. Amendment No. 2 states that it "amended" the APA "[a]s of the 16th day of October, 1996." Thus, Amendment No. 2 did not retroactively cause the Bill of Sale to transfer copyrights that were expressly excluded from transfer by the APA and Amendment No. 1.

Furthermore, Amendment No. 2 also did not amend Schedule 1.1(a). It is undisputed that the Bill of Sale transferred the Assets contained on Schedule 1.1(a). Even after the execution of Amendment No. 2, however, Schedule 1.1(a) did not include any language regarding copyrights.

Also, significantly, Amendment No. 2 did not identify which copyrights, if any, were "required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies." The written instrument required by Section 204 should contain sufficient information "to serve as a guidepost for the parties to resolve their disputes." *Konisberg Int'l*, 16 F.3d at 357. Amendment No. 2 does not meet these standards. SCO now claims that Santa Cruz required ownership of all of Novell's UNIX and UnixWare copyrights to exercise its rights regarding the UNIX assets it acquired under the APA. Novell, in contrast, contends that Santa Cruz did not need to own these copyrights because Santa Cruz already had a license to the

copyrights.

Where the plain language does not resolve the issue, among the relevant extrinsic evidence courts review to determine such "mutual intention" is "the surrounding circumstances under which the parties negotiated or entered into the contract" and "the object, nature and subject matter of the contract." *Morey v. Vannucci*, 64 Cal. App. 4th 904, 912 (1998). The contract may be explained by reference to the circumstances under which it was made. Cal. Civ. Code § 1647.

In this case, the extrinsic evidence surrounding Amendment No. 2 strongly favors Novell's position that Amendment No. 2 was merely affirming Santa Cruz's implied license to use the UNIX and UnixWare copyrights. Santa Cruz's in-house counsel, Steve Sabbath, approached Novell's in-house counsel, Allison Amadia, about obtaining the UNIX and UnixWare copyrights. Amadia testifies that she then reviewed the APA and spoke with Braham to learn about the history of the agreement and the intent of the parties.

Santa Cruz's first proposed draft of Amendment No. 2 referred to copyrights "owned by Novell as of the date of this Amendment, which pertain to the UNIX and UnixWare technologies and which SCO has acquired hereunder." This proposed language clearly intended to transfer the UNIX and UnixWare copyrights through the amendment. However, Novell rejected Santa Cruz's proposed language. Amadia testifies that she told Sabbath that while Novell was willing to affirm that Santa Cruz had a license under the original APA to use the UNIX and UnixWare copyrights in its business, it was not willing to transfer ownership of the copyrights. As a result, the final version of Amendment No. 2 does not refer to any specific copyrights and does not refer to Santa Cruz's "acquisition" of any copyrights.

This extrinsic evidence is consistent with the language of the Amendment, which reads like an implied license. It is also consistent with the fact that the parties did not amend Schedule 1.1(a) when they executed Amendment No. 2. No specific copyrights were, therefore, included as Assets to be transferred on Schedule 1.1(a). As in interpreting the original APA, "the whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Cal. Civ. Code § 1641. Construing the language of Amendment No. 2 to be an affirmation of an implied license to the copyrights does not put the amended Excluded Assets Schedule at odds with the transferred Asset Schedule 1.1(a).

There is also significant evidence that Santa Crux did not "require" the UNIX and UnixWare copyrights. Santa Cruz had been able to pursue its UNIX business from December 6, 1995 until October 16, 1996, without any problems due to its lack of ownership of the copyrights. Santa Cruz indisputably did not own the copyrights during those ten months. While SCO has submitted testimony from witnesses stating generally that the copyrights were necessary to running a software business, none of those witnesses give specific examples of how a lack of copyright ownership impeded Santa Cruz's ability to exercise its rights under the APA. The APA conferred an implied license on Santa Cruz to use Novell's copyrights as needed to implement the purposes of the APA. That implied license allowed SCO to license the copyrights to others. Because Santa Cruz already had that license, it did not require ownership of the copyrights. Therefore, even if Amendment No. 2 had a means of conveyance or conveyance language, Amendment No. 2 would not have transferred the UNIX and UnixWare copyrights as there is no evidence that any of the copyrights were "required."

For these reasons, the court concludes that Amendment No. 2 did not transfer the UNIX

and UnixWare copyrights to SCO. Even if the Amendment met the requirements of Section 204, the extrinsic evidence demonstrates that the parties intended only to affirm the implied license granted under the original APA. Furthermore, SCO has not provided evidence that it required ownership of the copyrights to exercise its rights under the APA. Accordingly, the court concludes that Novell is the owner of the UNIX and UnixWare copyrights.

This court's conclusion that Novell owns the UNIX and UnixWare copyrights impacts several of the claims asserted by both parties and several pending motions. Novell's motion on the copyright issue is brought with respect to SCO's First Claim for Relief for slander of title and Third Claim for Relief for specific performance. Novell is entitled to summary judgment on SCO's First Claim for Relief for slander of title because SCO cannot demonstrate that Novell's assertions of copyright ownership were false. *First Sec. Bank of Utah v. Banberry Crossing*, 780 P.2d 1253, 1256-57 (Utah 1989). In addition, Novell is entitled to summary judgment in its favor on SCO's Third Claim for Relief seeking an order directing Novell to specifically perform its alleged obligations under the APA by executing all documents needed to transfer ownership of the UNIX and UnixWare copyrights to SCO. Neither the original APA nor Amendment No. 2 entitle SCO to obtain ownership of the UNIX and UnixWare copyrights.

SCO's motion for summary judgment on copyright ownership is brought with respect to its First Claim for Relief for slander of title, its Second Claim For Relief for breach contract, its Fifth Claim for Relief for unfair competition, and Novell's First Claim for Relief for slander of title. SCO's motion for partial summary judgment on its own claims is denied. SCO's motion with respect to Novell's slander of title claim focuses only on the title/ownership issue. A slander of title claim involves a false statement disparaging title, that is made with malice and

that causes actual or special damages. *First Sec. Bank of Utah*, 780 P.2d at 1256-57. Because SCO has not moved on the elements of malice or special damages, the court has no present basis for dismissing Novell's claim. Accordingly, the court denies SCO's motion for summary judgment on the Novell's slander of title claim.

II. Novell's Summary Judgment Motions on Special Damages and the Copyright Ownership Portions of SCO's Unfair Competition Claim and Breach of Implied Covenant

Novell's motion for summary judgment on SCO's slander of title claim for failure to establish special damages is now moot because the claim has been dismissed on other grounds. Novell is also entitled to summary judgment on the copyright ownership portion of SCO's unfair competition and implied covenant of good faith claims because SCO cannot establish that Novell's assertion that it owns the UNIX and UnixWare copyrights was false.

Even if the court had found that SCO owned the copyrights, Novell would still be entitled to summary judgment on the copyright ownership portions of SCO's claims of unfair competition and breach of the implied covenant of good faith and fair dealing. Novell's assertions that SCO does not own the UNIX and UnixWare copyrights do not state a claim for unfair competition under Utah common law or statutory law, and do not state a claim for breach of the implied covenant of good faith under California law.

Utah common law does not recognize an unfair competition claim based on allegedly defamatory statements. *See Proctor & Gamble Co. v. Haugen*, 947 F. Supp. 1551 (D. Utah 1996), *aff'd in part, rev'd in part*, 222 F.3d 1262 (10th Cir. 2000). Recognizing that "no Utah court has extended unfair competition . . . to include defamation in the marketplace," the court declined to "create a new cause of action under the umbrella of unfair competition which would essentially be identical to an already well-established cause of action and would offer no further

protection of commercial values." *Id.* at 1554. Similarly, in this case, SCO's unfair competition claim is duplicative of its slander of title claim and there is no need to expand Utah law to create a new cause of action.

Even though SCO argues that Novell did not publicly claim ownership in the copyrights until it was presented with an opportunity to garner financial and strategic benefit in the market, there is no evidence that Novell's public statements were based on anything but its good faith interpretation of the contracts. The evidence in this case demonstrates that on several occasions, between the time the APA was signed and Novell made its public statements, Novell privately refused to transfer the copyrights to Santa Cruz and SCO. Santa Cruz attempted to gain the copyrights under Amendment No. 2 to the APA, Santa Cruz attempted to get a chain of title from Novell when it sold its assets to Caldera, and McBride repeatedly attempted to get Novell to transfer the copyrights when SCO began its SCOsource initiative. Whether or not SCO acquired those copyrights under the APA, it was aware that the parties disagreed about the ownership of the copyrights. Therefore, there is no basis in the evidence before this court for finding that Novell's public claims of ownership were a misappropriation or seizure of SCO's property.

Furthermore, Novell's allegedly false statements do not meet the statutory definition of "unfair competition." Unfair competition is defined as "an intentional business act or practice " that falls within the categories of "(A) cyber-terrorism; (B) infringement of a patent, trademark, or trade name; (C) a software license violation; or (D) predatory hiring practices." Utah Code Ann. § 13-5a-102(4)(ii) (2006). Novell's alleged statements claiming ownership of copyrights based on its interpretation of the parties' contracts do not fall within any of these categories. Novell's statements are not a breach of Section 3 of the TLA, which states that SCO owns the

Licensed Technology. Section 3 does not prohibit the parties from making statements about whether or not copyrights were a part of the Licensed Technology that was transferred.

SCO's breach of contract claim alleges that Novell "breached the covenant of good faith and fair dealing under the APA and TLA" by "numerous acts of bad faith," including "making false and misleading statements denying SCO's ownership of the copyrights in UNIX and UnixWare." Sec. Am. Compl. ¶ 99. SCO has cited to no California case holding that the implied duty of good faith and fair dealing prohibits a party to a contract from making statements related to its understanding of the rights that are conferred or not conferred by the contract.

A breach of the implied covenant requires "objectively unreasonable conduct, regardless of the actor's motive." *Carma Developers Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 374 (1992). A comment to Section 205 of the Restatement Second of Contracts states that the implied covenants are violated "by dishonest conduct such as conjuring up a pretended dispute, asserting an interpretation contrary to one's own understanding, or falsification of facts." *Id.* comment e.

Even if this court had ruled in SCO's favor on the copyright ownership issue, there is no evidence to demonstrate that Novell's position was contrary to its own understanding of the contractual language or objectively unreasonable given the history of the dispute between the parties.

III. Novell's Summary Judgment Motion on SCO's Non-Compete Claims

Novell seeks summary judgment on the non-compete claims in SCO's Second Claim for breach of contract and Fifth Claim for unfair competition. SCO's non-compete claims allege that Section II.A(2) of the TLA and Section 1.6 of the APA contained non-compete provisions

prohibiting Novell from using the Licensed Technology to compete with SCO's core server operating systems. Novell asserts that the provisions in the APA and TLA are limitations on the scope of Novell's license to the Licensed Technology rather than non-compete clauses. Novell also argues that it is entitled to summary judgment on the alternative ground that Santa Cruz's sale of substantially all of its assets to SCO's predecessor in 2001 constituted a "Change of Control" that terminated any non-compete obligations under the APA and TLA. Finally, Novell contends that any covenant not to distribute competing products would be void under California law.

A. The APA and TLA Provisions

Section 1.6 of the APA states that Santa Cruz must execute a license agreement concurrent with the Closing of the APA which grants Novell "a royalty-free, perpetual, worldwide license to (i) all of the technology included in the Assets and (ii) all derivatives of the technology included in the Assets." APA § 1.6. This licensed back technology is referred to collectively as "Licensed Technology." *Id.* Consistent with the court's conclusion above, however, this Licensed Technology does not include the UNIX and UnixWare copyrights. Therefore, to the extent that SCO's non-compete claims are based on its ownership in the UNIX and UnixWare copyrights, which this court has concluded were retained by Novell, SCO's non-compete claims are dismissed.

The parties, however, have not specifically addressed whether any of SCO's copyright infringement claims are based on copyrights SCO may have obtained in derivatives of the technology included in the Assets. In the copyright ownership discussion, Novell recognized that SCO would have the copyright to the new merged product. Novell also recognized that joint

copyright notices are used that demonstrate a copyright ownership by SCO as of 1996. SCO's non-compete and copyright infringement claims also relate to SUSE Linux. The SUSE Linux claims have been stayed pending arbitration. Although those claims are stayed, Novell asserts in its motion that it should not be precluded from raising a motion relating to the meaning and interpretation of the TLA. Assuming that SCO has a basis for asserting a copyright infringement action other than based on ownership in the UNIX and UnixWare copyrights, the court will address the merits of Novell's motion.

Under Section 1.6 of the APA, Novell has a license to "use the Licensed Technology without restriction for internal purposes and for resale in bundled or integrated products sold by [Novell] which are not directly competitive with the core products of [Santa Cruz] and in which the Licensed Technology does not constitute a primary portion of the value of the total bundled or integrated product." *Id.* Under the TLA, Novell retains a "non-exclusive, non-terminable, worldwide, fee-free license" in the Licensed Technology to "sublicense and distribute, and authorize its customers to sublicense and distribute, such Licensed Technology and modifications thereof, in source and binary form." This license as to external use was subject to the following restrictions:

> provided, however, that (1) such technology and modifications may be sublicensed and/or distributed by Novell solely as part of a bundled or integrated offering ("Composite Offering"); (ii) such Composite Offering shall not be directly competitive with core application server offerings of SCO, and (iii) the Licensed Technology shall not constitute a primary portion of the value of such Composite Offering.

TLA § II(A)(2).

Novell asserts that the clauses are limitations on the scope of the license, and if it has exceeded the scope of the license, then SCO can only assert a copyright infringement claim, and not a non-compete breach of covenant claim. SCO argues that Novell presents a false choice between license limitations and covenants not to compete because it can bring state law claims for breach of contract and unfair competition based on the same conduct as its copyright infringement claim.

"Generally, a 'copyright owner who grants a nonexclusive license to use his copyrighted material waives his right to sue the licensee for copyright infringement' and can sue only for breach of contract.'" *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1121 (9th Cir. 1999) (citation omitted). "If, however, a license is limited in scope and the licensee acts outside the scope, the licensor can bring an action for copyright infringement." *Id.* The *Sun* court stated that "[w]hether this is a copyright or a contract case turns on whether the compatability provisions help define the scope of the license." *Id.*

The language and the structure of the APA and the TLA suggest that the restrictions are a limitation on the scope of the license. The restriction immediately follows the description of the license in both agreements. The restriction necessarily limits how Novell was entitled to use the Licensed Technology and appears to define the scope of Novell's rights to use the Licensed Technology. License limitations, such as the restrictions here, set the boundaries of the agreement.

SCO, however, claims that the restrictions are covenants, and it cites to cases recognizing that "[c]ourts have held a breach of an independent covenant of a copyright license, such as a promise to pay royalties, is not a copyright infringement action, but a breach of contract

action." *Kabehie v. Zoland*, 102 Cal. App. 4th 513, 527-28 (2002) (holding state law claims not preempted by Copyright Act when based on something qualitatively different from copyright). In *Fantastick Fakes Inc. v. Pickwick Int'l, Inc.*, 661 F.2d 479, 483-84 (5th Cir. Unit B 1981), the court found that the "mere breach of a covenant may support a claim of damages for breach of contract but will not disturb the remaining rights and obligations under the license including the authority to use the copyrighted material."

SCO argues that the restrictions are a contractual covenant because they constitute an agreement between the parties that is separate from the scope of the license grant. Regardless of the scope of the license, if Novell had not agreed to the restrictions, SCO would not have consented to Novell's retention of any license in the Licensed Technology. Furthermore, "conduct that may give rise to a federal suit for copyright infringement may also give rise to a state law claim in tort for unfair competition, tortious interference, or breach of contract." *La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1199 n.2 (10th Cir. 2005).

The Copyright Act, however, preempts such claims if the "work is within the scope of the 'subject matter of copyright'" and the "rights granted under state law are equivalent to any exclusive rights within the scope of federal copyright." *Id.* (citations omitted). Nonetheless, the court also recognized that a state law claim is "qualitatively different from, and not subsumed within, a copyright infringement claim if the "state cause of action requires an extra element, beyond mere copying, preparation of derivative works, performance, distribution or display." *Id.*

Novell contends that it has not made an argument that the Copyright Act preempts SCO's state law causes of action and the preemption issue has no relevance to whether the language at issue is a license limitation or a covenant. Although SCO cites to several Ninth Circuit cases for

the proposition that a failure to comply with the terms of a license to use copyrighted material can give rise to both copyright and breach of contract claims, Novell claims that the cases do not support SCO's position. *Germaine Music v. Universal Songs of Polygram*, 130 Fed. Appx. 153, 155 n.1 (9th Cir. 2005) (stating in dicta that "If [defendant] was using songs without paying royalties, it was likely both a breach of contract and a violation of the copyright."); *Grosso v. Miramax Film Corp.*, 383 F.3d 965, 967-68 (reversing district court's holding that plaintiff could not bring a breach of contract claim when copyright infringement claim was dismissed); *Guthy-Renker Corp. v. Bernstein*, 39 Fed. Appx. 584, 587 (9th Cir. 2002) (upholding district court's damage award for breach of contract and copyright infringement); *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 586 (9th Cir. 1993) (stating claims available to plaintiff where claim was preempted).

The court finds the analysis in *Nimmer's Information Law*, cited by SCO, helpful on the issue of whether SCO can have a claim under both copyright and contract law. "Breach of the license creates the potential of liability for contract breach and also the possibility of liability under property rights law. Subject to considerations that preclude double recovery for the same act, both forms of action may exist in a given case. The two claims entail completely different remedy structures." Raymond T. Nimmer, 2 *Information Law* § 11:154.

"An infringement claim exists, in addition to the contract claim, however, if the licensee's actions involve conduct prohibited by applicable property law and are either outside the scope of the license or occur after the license was cancelled or terminated. In effect, the infringement claim requires that the conduct not be protected by the license." *Id.* "A conclusion that a particular act constitutes a copyright (or patent) infringement does not indicate that there can be

no contract law remedies with that same act. Both an infringement and a contract breach may occur in the same act and be subject to remedies brought under one or both bodies of law." *Id.*

Nimmer's discussion of *Kepner-Tregoe, Inc. v. Vroom*, 186 F.3d 283 (2d Cir. 1999) is also instructive:

> the court held that a party who transferred rights to use a copyrighted executive management system, retaining only the right to use it in his own classes, did not have the right to use the system in a software product. Thus, doing so exceeded the scope of the license and was copyright infringement. Nevertheless, the court awarded both copyright infringement damages and contract damages. The infringement statutory damages stemmed from the author's willful acts of copyright infringement, while the contractual damage award represented the company's consequential damages of having to enforce its copyright rights stemming from the author's breach of the licensing agreement.

2 *Information Law* § 11:154.

In this case, SCO's breach of contract claims is based on Novell's alleged distribution of Licensed Technology as part of Linux, which is a directly competitive system. Sec. Am. Compl. ¶¶ 97-98. SCO's copyright infringement claim also alleges that Novell infringed SCO's copyrights by copying, reproducing, modifying, sublicensing, and/or distributing Linux products containing unauthorized contributions of SCO's copyrighted intellectual property. *Id.* ¶ 116. SCO also claims copyright infringement based on Novell's alleged use of the Licensed Technology in an operating system that competes with SCO's core application server products or in a product wherein the intellectual property constitutes a primary portion of the value of the product. *Id.* ¶ 118. Therefore, SCO alleges that Novell exceeded the scope of its license and breached the non-compete restrictions.

Even though the restrictions are limitations on the scope of Novell's license, there appears to be no restriction under the case law precluding SCO, as a matter of law, from pursuing a claim for an alleged breach of those restrictions and copyright infringement. Outside the context of determining whether the irreparable harm presumption in a copyright infringement action applies for purposes of analyzing a preliminary injunction, as was the case in *Sun,* the distinction appears to be meaningless because a party can obtain separate damages based on the same alleged conduct.

Novell did not bring its motion based on the factual merits of SCO's copyright and contract claims. Rather, its only position was that, as a matter of law, SCO could not state a separate contract claim on the same provisions and conduct as its copyright infringement claim. The court concludes that it is possible to have both claims. Therefore, the court denies Novell's motion for summary judgment on this basis.

B. Change of Control

Novell's next basis for dismissing SCO's claims based on the TLA and APA non-compete restrictions is that the license restrictions ceased to exist as a result of Santa Cruz's sale of its UNIX assets to Caldera in 2001, which constituted a "Change of Control" as defined in the APA. SCO does not dispute the fact that Santa Cruz sold substantially all of its assets to Caldera in 2001. SCO asserts, however, that Santa Cruz's sale of assets to Caldera did not constitute a Change of Control, as that term is defined in the APA, that would terminate the non-compete covenants at issue.

The TLA states that the restrictions on Novell's license "shall cease to exist" in the event of a "Change of Control" of Santa Cruz. *Id.* § II(B). The TLA states that "Change of Control"

shall have the meaning attributed to it in the APA. *Id.* Under Section 1.6 of the APA, which provides for the license back of assets and provides the basis for entering the TLA, it states that "the license agreement shall also provide [Novell] with an unlimited royalty-free, perpetual, worldwide license to the Licensed Technology upon the occurrence of a Change of Control of [Santa Cruz] described in Section 6.3(c) hereof." APA § 1.6. Section 6.3(c) of the APA is entitled "Expansion of Seller's Rights Relating to the Licensed Technology upon a Change of Control" and provides that

> Until two (2) years from the Closing Date, in the event [Santa Cruz] has merged with, sold shares representing 50% or more of the voting power of [Santa Cruz] to, sold all or substantially all of [Santa Cruz's] assets to, or engaged voluntarily in any other change of control transaction with, any party identified by [Novell] on Schedule 6.3(a) hereof, or in the event any party identified by [Novell] on Schedule 6.3(a) hereof, shall acquire shares representing 50% or more of the voting power of [Santa Cruz], [Novell] shall automatically have unlimited, royalty-free, perpetual rights to the Licensed Technology.

Id. § 6.3(c).

Novell argues that based on the provisions of the TLA, Section 6.6 of the APA should apply because it is the only provision that defines a "Change of Control." Novell claims that because the TLA was entered after the APA, its provisions should control. Section 6.6(c) of the APA is entitled "Change of Control" and provides that

> For purposes of this Agreement, a "Change of Control" with respect to one party shall be deemed to have occurred whenever (i) there shall be consummated (1) any consolidation or merger of such party in which such party is not the continuing or surviving corporation, or pursuant to which shares of such party's common stock would be converted in whole or in part into cash, other securities or other property, other than a merger of such person in which the holders of such party's common stock immediately prior to the merger have substantially the same proportionate ownership

> of common stock of the surviving corporation immediately after the merger, or (2) any sale, lease, exchange or transfer (in one transaction or a series of related transactions) of all or substantially all the assets of such party, or . . . (v) any other event shall occur with respect to such party that would be required to be reported in response to Item 6(e) (or any successor provision) of Schedule 14A of Regulation 14A promulgated under the Exchange Act."

Id. § 6.6(c)

Section 1.6 of the APA, however, states that Section 6.6 is the provision for determining a change of control of Novell: "In the event of a Change of Control of [Novell] (as described in Section 6.6 hereof), the license granted pursuant to the license agreement shall be limited to [Novell's] products either developed or substantially developed as of the time of the Change of Control." *Id.* § 1.6.

The court disagrees with Novell's position that the TLA conflicts with the APA. The TLA states that it and the APA "constitute the entire understanding between the parties with respect to its subject matter." TLA § VIII. "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." Cal. Civ. Code § 1642. The TLA does not identify which Change of Control in the APA applies. Section 1.6 of the APA, however, clearly directs that Section 6.3 applies to a change of control of Santa Cruz, and Section 6.6 applies to a change of control for Novell. The TLA merely codified the license agreed to in the APA, and the court finds no conflict between it and the APA. While the language of Section 6.6 broadly states "For purposes of this Agreement" and uses language that makes it appear that the provision would apply to both parties, the court concludes that Section 6.3 is the applicable provision for determining whether a Change of Control of Santa Cruz occurred for purposes of eliminating the license restrictions in Section 1.6

of the APA and the TLA. The court, therefore, concludes that the license restrictions did not cease to exist when Santa Cruz sold its assets to Caldera in 2001. Accordingly, Novell's motion for summary judgment on these grounds is denied.

C. California Business and Professions Code § 16600

Novell further argues that the non-compete restrictions in the APA and the TLA are void under California law. California Business and Professions Code Section 16600 declares that "[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void." California courts have strictly construed Section 16600 as requiring non-compete clauses to be stricken unless they meet one of the narrow exceptions provided for in the statute. *See Hill Med. Corp. v. Wycoff*, 86 Cal. App. 4th 895, 899 & n.4 (2001). The only exceptions set forth in the statute relate to the sale of the goodwill of a business, § 16601, and dissolution of a partnership or limited liability company, §§ 16602, 16602.5.

SCO asserts that the covenants not to compete in the license are valid under California law. SCO contends that California Business and Professions Code Section 16600 does not apply to limitations on grants of rights that Novell would not otherwise have to SCO's property. In *King v. Gerold*, 109 Cal. App. 2d 316, 318 (1952), the court held that Section 16600 did not apply to a non-compete clause where the licensee is not "prohibited from carrying on his lawful business" but is limited only in particular aspects of how he runs his business.

Other courts have also recognized that non-compete clauses used in the employment, supplier-distributor, and franchisor-franchisee context during the term of the relationship, are not void under Section 16600. *Shaklee U.S., Inc. v. Giddens*, 934 F.2d 324 (9th Cir. 1991) (allowing

restrictions to scope of distributor's activities); *Great Frame Up Sys. Inc. v. Jazayeri Enterprises*, 789 F. Supp. 253, 255-56 (N.D. Ill. 1992).

The license in the APA and the TLA does not preclude Novell from pursing its business. Rather, the license merely restricts Novell's ability to use SCO's property and is part of an ongoing relationship between the parties. Therefore, the court finds that there is no restraint on trade and the restrictions are not void under Section 16600. The court, therefore, denies Novell's motion for summary judgment on SCO's non-compete claims on the grounds asserted by Novell. To the extent that SCO's non-compete claims are based on ownership of the UNIX and UnixWare copyrights, SCO's claims are dismissed as a result of this court's conclusion that Novell owns the copyrights.

IV. Cross Motions on Novell's Fourth Counterclaim re: SVRX Licenses

The cross motions on Novell's Fourth Counterclaim seek a declaration from the court on (1) whether Section 4.16(b) of the APA authorizes Novell to direct SCO to waive its purported claims for breaches of SVRX license agreements with IBM and Sequent, (2) whether Section 4.16(b) of the APA authorizes Novell to take action on SCO's behalf when SCO refuses to waive the claims, and (3) whether the IBM and Sequent Sublicensing Agreements are "SVRX Licenses" under the APA.

Novell argues that a declaration of rights is proper in this case because SCO's purported termination of IBM's and Sequent's licenses to SVRX technology creates an actual controversy as to the parties' rights, authority, and obligations with respect to SVRX Licenses under the APA. To determine the parties' rights and authority under Section 4.16(b), the court must begin by analyzing the language of that provision. Section 4.16(b) provides

> [SCO] shall not, and shall not have the authority to, amend modify or waive any right under or assign any SVRX License without prior written consent of [Novell]. In addition, at [Novell's] sole discretion and direction, [SCO] shall amend, supplement, modify or waive any rights under, or shall assign any rights to, any SVRX License to the extent so directed in any manner or respect by [Novell]. In the event that [SCO] shall fail to take any such action concerning the SVRX Licenses as required herein, [Novell] shall be authorized, and is hereby granted, the rights to take any action on [SCO's] own behalf. [Santa Cruz] shall not, and shall have no right to, enter into future licenses or amendments of the SVRX Licenses, except as may be incidently involved through its rights to sell and license the Assets or the Merged Product . . . or future versions thereof of the Merged Product.

APA § 4.16(b). Therefore, these rights state that they apply to "any" SVRX License. The scope of Novell's authority, therefore, turns on the meaning of SVRX License.

The APA appears to set out a clear roadmap for determining the meaning of SVRX License. Section 4.16(a) defines SVRX Licenses as those licenses "listed in detail under item VI of Schedule 1.1(a)" of the APA. Item VI of Schedule 1.1(a) states "All contracts relating to the SVRX Licenses listed below."[5] Item VI then provides a list of SVRX software releases, including UNIX System V Release Nos. 2.0, 2.1, 3.0, 3.1, 3.2, 4.0, 4.1, 4.2 and "[a]ll prior UNIX System releases and versions preceding UNIX System V Release No. 2.0." Item VI, however, does not provide a list of license agreements.

Novell argues that this wording plainly means that the term "SVRX Licenses" under the APA includes all contracts relating to the UNIX System V releases listed in Item VI. This would include contracts relating to UNIX System V Release Nos. 2.0, 2.1, 3.0, 3.1, 3.2, 4.0, 4.1, 4.2 and

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[5] This introductory language was amended by Amendment No. 1 to also include Auxiliary Product Licenses, which would be collectively referred to as "SVRX Licenses."

"[a]ll prior UNIX System releases and versions preceding UNIX System V Release No. 2.0." Novell, therefore, claims that its Section 4.16(b) authority extends to all licenses relating to each of the listed software products.

SCO contends that the term "SVRX Licenses" in the relevant APA provisions is ambiguous on its face. Section 4.16 directs one to Item VI in Schedule 1.1(a) for a detailed list of SVRX Licenses. Item VI has an introductory provision stating "all contracts relating to the SVRX Licenses listed below," but then it lists SVRX releases, not licenses. These listed SVRX releases are products to which a party would obtain a license.

The court agrees that there appears to be some ambiguity in the APA's attempt to define SVRX Licenses. But an ambiguity only exists if the language is reasonably susceptible to more than one meaning. *Dore v. Arnold Worldwide, Inc.*, 39 Cal. App. 4th 384, 391 (2006). Both parties assert definitions for the term SVRX License. Thus, the court must determine whether the contract language is reasonably susceptible to both interpretations. "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible." Cal Civ. Code § 1639.

A. Novell's Interpretation

Novell does not believe that Item VI in Schedule 1.1(a) creates an ambiguity because it contends that it is still clear that the intent of the language is that SVRX Licenses are all licenses relating to the software releases listed in Item VI. That meaning requires a minor inferential step, but it reconciles the ambiguity created by the listing of software releases instead of licenses. This proposed meaning is also consistent with the APA's explanation that Novell was engaged in developing a software product called UNIX System V, or SVRX, and selling binary and source

code licenses to the various versions of SVRX software. Novell contends, therefore, that the natural meaning of SVRX License includes any license to the listed SVRX releases. This interpretation is also consistent with the APA's repeated use of the broad language "any" and "all" SVRX Licenses.

SCO contends that Novell's interpretation that SVRX License means all licenses related to the listed SVRX products is not consistent with the text of the APA and is predicated on a fundamental misinterpretation of the limited rights Novell retained under Section 4.16 of the APA. As with the copyright issue, the court does not agree with SCO's characterization that Novell retained only limited rights under the APA. It is undisputed that the royalty stream Novell retained under the APA consisted of substantial future revenue and was a significant part of the consideration for the APA. Moreover, the language of Sections 1.2 and 4.16 of the APA does not suggest that Novell retained only limited rights. Section 1.2 states that while SCO acquired the SVRX Licenses and the legal title to SVRX Royalties, Novell retained *all rights* to SVRX Royalties. *Id.* § 1.2(b). SVRX Royalties are defined as "all royalties, fees and other amounts due under all SVRX Licenses." *Id.* § 4.16(a). Furthermore, the APA does not limit Novell's rights under Section 4.16(b) to "certain" SVRX Licenses, it unambiguously extends Novell's authority to direct SCO's actions as to "any SVRX License."

By interpreting SVRX License to mean all contracts related to the software releases listed in Item VI of Schedule 1.1(a), SCO contends that Novell would be able to negate the intent and purpose of transferring the entire UNIX and UnixWare business as set forth in the APA's other provisions. SCO interprets the APA's provisions regarding its acquisition of assets too broadly. Specifically, SCO fails to acknowledge that it acquired only "certain of the assets" comprising

Novell's UNIX and UnixWare business and that the transfer of assets was subject to specific exclusions on the Excluded Asset schedule. The transfer of assets under the APA was also subject to the rights and obligations of Sections 1.2 and 4.16. The court finds no conflict between the provisions describing the assets SCO acquired and Novell's retention of rights with respect to all contracts relating to SVRX software releases.

SCO further argues that Novell's proposed interpretation for the definition of SVRX License is at odds with the APA's license back provision and the TLA executed in connection with the APA's Closing. SCO claims that the TLA license relates to the SVRX products listed in Schedule 1.1(a)(VI) and would constitute an SVRX License under Novell's interpretation. If the TLA is an SVRX License, SCO contends that Novell could breach the license and require SCO to waive its breach. Section 1.6 and the TLA, however, grant Novell a license in the "Licensed Technology." As this court concluded above, the Licensed Technology does not include the UNIX and UnixWare copyrights–it includes only the technology included with the Assets listed on Schedule 1.1(a). The TLA also gave Novell a license to derivatives of the technology in the included Assets, which included the derivative works that Santa Cruz was to develop pursuant to the terms of the APA.

B. SCO's Interpretation

SCO argues for limiting the definition of SVRX License to product supplement agreements because it asserts that those agreements are the only agreements that generated the SVRX Royalties to which Novell was entitled. Section 4.16 describes SVRX Royalties as "all royalties, fees, and other amounts due under SVRX Licenses." Accordingly, SCO asserts that Novell's interests in protecting its royalty stream would be accomplished by retaining rights to

direct SCO's activities with respect to those product supplements. Novell, however, disputes that the royalty stream comes only from product supplements because no fees would be due and no license would be in place without the software and sublicensing agreements that make those product supplements operative.

SCO's contention that SVRX Licenses are limited to only agreements that collect royalties instead of SVRX software agreements, which specify the restrictions on a licensee's source code rights, appears to conflict with the language of the APA and the integrated nature of the licensing agreements entered into by AT&T and Novell. Given that AT&T, and then Novell, would typically enter into a set of agreements in connection with each license of SVRX technology–a software agreement, a sublicensing agreement, and product supplements– the APA would need to make a clear distinction between such agreements in its definition of SVRX License if it intended to exclude one or more of the agreements in the set. In Section 4.16 and Item VI of Schedule 1.1(a), the parties made no attempt to carve out a distinction between different types of agreements within the set.

Rather, Item VI states "all contracts" relating to the SVRX Licenses. The use of "all contracts" is consistent with Novell's interpretation that all of the agreements in the set comprise the SVRX License. The only ambiguity in Item VI is that it states that SVRX Licenses are listed below, but SVRX products, to which licenses are obtained, are listed instead. To incorporate a binary royalty distinction into the language of Section 4.16 and Item VI, however, would require a complete rewriting of those provisions.

The language of Section 4.16(b) also indicates that an SVRX License must be something that grants rights. Section 4.16 refers to "rights under" and "rights to" an SVRX License. SCO

admits that product supplements did not by themselves grant rights. The software and sublicensing agreements set forth the rights and obligations for the use and distribution of the technology. Because the software and sublicensing agreements set forth the general rights and obligations for the licensee's use of any software product, the product supplements identify only the product the licensee had a right to use, the CPUs on which it had that right, and the fees the licensor had a right to receive in exchange. The product supplement, therefore, serves only to give content to terms defined in the software and sublicensing agreements–"software product" and "designated CPU."

Moreover, the set of agreements refer to and incorporate each other. The software and sublicensing agreements state that the product supplement is a part of the agreement. The ability to assign, amend, modify, supplement, or waive any right under any product supplement, as is provided for in Section 4.16 for any SVRX License, would necessarily amend, modify, or supplement the other agreements. Therefore, SCO's attempt to distinguish product supplements from the other agreements used to license SVRX technology creates a distinction that is not supported by the license agreements or the terms of the APA.

If the parties had intended to limit SVRX Royalties to only those revenues generated by product supplements and to limit SVRX Licenses to only product supplement, they obviously could have used far less sweeping terms than "all SVRX Royalties" and "all SVRX Licenses." In Section 1.2, the parties could have merely stated that SCO had acquired "all product supplements" but had only legal title in the royalties generated by such product supplements, whereas Novell retained rights to receive royalties under "all product supplements." And, if Section 4.16 was only intended to give Novell powers over the explicit subset of product

supplements, it clearly could have been written that way as well. It was not. SCO's interpretation runs contrary to the language of Section 4.16(b).

SCO's narrow interpretation of SVRX License produces a result that is contrary to SCO's own conclusion that Novell's Section 4.16(b) authority extends to binary agreements. SCO claims that SVRX source code licenses are not SVRX Licenses because "software agreements" governing SVRX source code are not mentioned in Item VI of Schedule 1.1(a) but are expressly referred to in Item III.L of that Schedule. SCO's interpretation, however, would exclude so-called binary licenses from the universe of SVRX Licenses as well because Item VI does not mention "sublicensing agreements" governing SVRX binary code either. Sublicensing agreements, like software agreements, are expressly referred to in Item III.L. Therefore, SCO's interpretation would mean that Section 4.16(b) does not apply to source or binary licenses–a result that is at odds with the whole purpose and structure of the parties' agreement.

Reviewing other provisions of the APA demonstrates that the parties knew how to specifically distinguish between matters relating to source and binary code, including source and binary agreements. In Schedule 1.1(a)(III)(M), the parties recognized binary licensing agreements and in Schedule 1.1(b) there are several items with "Binary only" included in a parenthetical after the item. Yet, in regard to SVRX Licenses under Section 4.16(b), the APA makes no distinction whatsoever. And Schedule 1.1(a) refers to "all contracts" when it easily could have stated binary only contracts.

SCO argues that Amendment No. 1 to the APA, which added Section 1.2(e), supports its conclusion that there is a distinction between source and binary licenses. The introductory language of Section 1.2(e) states that Santa Cruz is "entitled to retain 100% of the following

categories of SVRX Royalties." Amend. No. 1 ¶ E(e). Section 1.2(e)(iv) then provides that, notwithstanding its obligation to remit to Novell the SVRX Royalties due under SVRX Licenses, Santa Cruz could keep royalties formerly due under "its own licenses from [Novell] acquired before the Closing Date through Software Agreement . . . and Sublicensing Agreement . . . ." *Id.*

According to SCO, Section 1.2(e)(iv) thus expressly identifies the multiple "licenses" that Santa Cruz had acquired "through" its software and sublicensing agreements, and the only such licenses to which "royalties" could be "attributable" were the numerous SVRX supplements that Santa Cruz had executed with Novell. SCO's attempt to make a distinction based on the fact that it entered the software and sublicensing agreements with AT&T and its product supplements with Novell is meaningless because Novell acquired all rights to the software and sublicensing agreements when it acquired the UNIX business from AT&T. Moreover, Section 1.2(e)(iv) recognizes that royalties come from software agreements and sublicensing agreements, which does not help SCO's position.

Amendment No. 1 also added Section 1.2(f), which details the process and form of Santa Cruz's obligation to submit monthly reports regarding SVRX Royalties. Section 1.2(f) states that the "monthly reports shall be separately broken down by revenue type (i.e. source code right to use fees, gross and net binary per copy fees, and support fees), by product, by customer . . . ." Amend. No. 1 ¶ E(f). This language further demonstrates that SVRX Royalties include fees other than merely binary fees.

Section 1.2, as amended, actually helps demonstrate that the parties intended SVRX Royalties to apply to all of the agreements associated with licenses to SVRX technology. It also demonstrates that when the parties intended to make a distinction regarding binary and source

code fees, they specifically identified the distinction. This section expressly refers to certain "source code right to use fees" as a category of SVRX Royalties. If, as SCO suggests, SVRX License refers only to binary agreements, the APA's use of the modifiers "source" and "binary" in particular instances and its use of "all" and "any" in connection with SVRX Licenses payment obligations must be ignored. While the APA makes distinctions between source and binary code in other provisions, it makes no such distinction in relation to SVRX Licenses under Section 4.16.

SCO also relies heavily on the language of Amendment No. 2 to the APA regarding source code. In fact, SCO claims that the court can deny Novell's motion based on Amendment No. 2 alone. Paragraph B of Amendment No. 2 states that "notwithstanding the provisions of Article 4.16, Sections (b) and (c) of the [APA], any potential transaction with an SVRX licensee which concerns a buy-out of any such licensee's royalty obligations shall be managed as follows." Subparagraph 5 of Paragraph B then provides: "This Amendment does not give Novell the right to increase any SVRX licensee's rights to SVRX source code, nor does it give Novell the right to grant new SVRX source code licenses. In addition, Novell may not prevent SCO from exercising its rights with respect to SVRX source code in accordance with the [APA]."

Although SCO claims that the language of subparagraph 5 has a different tone than the subparagraphs that proceed it, all of the subparagraphs of paragraph B are limited to buy-out transactions. These additional provisions do not amend Novell's rights under Section 4.16(b) of the original APA. In fact, the amendment states that "notwithstanding the provisions of 4.16," the parties have agreed to the following procedures with respect to future potential buy-out transactions. Because the Amendment's language regarding Novell's rights with respect to

source code rights is limited by the plain language of Amendment No. 2 to buy-out transactions, it provides no insight into the source code rights SCO had or did not have under Section 4.16(b) of the original APA. The amendment only states that those source code rights will not be altered in the context of any future buy-out transaction.

Therefore, the court concludes that there is no support in the language and structure of the APA for SCO's interpretation of SVRX License to mean product supplements rather than the entire set of agreements relating to the licensing of SVRX code.

C. Role of Extrinsic Evidence

SCO seeks to introduce extrinsic evidence to help prove its interpretation that SVRX License should be limited to product supplements. "Where the contract is integrated, parol evidence still might be admissible if it is relevant to prove a meaning to which the language of the instrument is reasonably susceptible." *Haggard v. Kimberly Quality Care, Inc.*, 39 Cal. App. 4th 508, 519-20 (1995). However, because SCO's interpretation is a meaning to which the language of the APA is not reasonably susceptible, there is no amount of extrinsic evidence that would change the result. Therefore, the extrinsic evidence SCO seeks to introduce is immaterial.[6]

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[6] Even if this court were to consider SCO's extrinsic evidence, it does not uniformly support SCO's interpretation as SCO claims. If the contract language was susceptible to SCO's interpretation, SCO's evidence would, at most, create only a question of fact for the jury.

Prior to this litigation, SCO had publicly announced that its administrative duties under the APA extend to "customers who deploy SVRX technology." SCO did not report that its administrative duties are limited to a more narrow set of SVRX customers licensing binary SVRX products. In addition, in May 1996, Bill Broderick of Santa Cruz wrote a letter to Novell recognizing that the APA "requires prior written approval from Novell for all new agreements or changes to current agreements relating to UNIX System V."

SCO claims the circumstances surrounding the IBM buyout support its position because it demonstrates that Novell's rights under Section 4.16 were limited. The dispute focused on

D. Breach of Covenant of Good Faith and Fair Dealing

Finally, SCO argues that Novell's motion should fail because of Novell's breach of the covenant of good faith and fair dealing. SCO's Second Claim for Relief alleges that Novell breached the covenant by, among other things, purporting to waive and revoke SCO's rights and claims against IBM. SCO claims that Novell is not entitled to summary judgment on either declaration it seeks in this motion because there are material issues of fact indicating that Novell's waiver is in breach of the covenant of good faith and fair dealing.

California law precludes application of the covenant of good faith and fair dealing where a party is acting within an explicit grant of contractual authority. In *Carma Developers, Inc. v. Marathon Development Cal. Inc.*, 2 Cal. 4th 342, 374 (1992), the court stated that it was "aware of no reported case in which a court has held that the covenant of good faith may be read to prohibit a party from doing that which is expressly permitted by an agreement. On the contrary, as a general matter, implied terms should never be read to vary express terms."

Novell's unilateral right to grant the buyout of binary royalties. But SCO concedes that Amendment No. X to the IBM SVRX Licenses involved a grant of additional source code rights to IBM. Also, significantly, SCO does not dispute that it treated all of the SVRX revenue from Amendment No. X as subject to the 95/5 split that the APA applied exclusively to SVRX Licenses. In addition, Amendment No. X states that under the APA "Novell retained certain rights with respect to the Related Agreements." Amendment No. X defined the "Related Agreements" as certain software and sublicensing agreements. Thus, Santa Cruz agreed in Amendment No. X that Novell's APA-retained rights extended to all those agreements.

Even when SCO purported to terminate IBM's System V license agreements and SCO's CEO wrote to Novell refusing to waive its purported claims against IBM, he specifically called IBM's System V license agreements "IBM's SVRX License."

This evidence regarding the parties' conduct is close in time to the execution of the APA and, therefore, more persuasive as to the meaning of the agreement. However, even the witness testimony, which is less reliable given the passage of years and witnesses' mistaken beliefs, does not, as SCO claims, entirely support its interpretation. There is substantial testimony supporting Novell's position as well.

The actions Novell took were pursuant to an express contractual provision granting it authority to so act. Therefore, SCO's covenant of good faith and fair dealing argument is contrary to California law. Accordingly, SCO's claim for breach of the covenant of good faith and fair dealing does not preclude this court from granting Novell's motion with respect to its rights and authority under Section 4.16(b) of the APA.

The court concludes that Novell's reading of Section 4.16(b) is the only reading that is consistent with all of the APA's provisions, its Schedules, and its Amendments. SCO's attempt to narrowly interpret SVRX License to include only product supplements is not tenable under the language of the APA. A comparison of the SVRX License language in the APA with the IBM and Sequent Licenses leaves no doubt that the IBM and Sequent Licenses are SVRX Licenses as a matter of law. The IBM and Sequent Licenses are contracts that license the UNIX System V software that is listed in Item VI of Schedule 1.1(a) of the APA. Therefore, the court grants partial summary judgment to Novell on its Fourth Claim for Relief and declares that it was and is entitled, at its sole discretion, to direct SCO to waive its purported claims against IBM and Sequent, and SCO is obligated to recognize Novell's waiver of SCO's claims against IBM and Sequent.

Accordingly, Novell's Motion for Partial Summary Judgment on its Fourth Claim for Relief for declaratory judgment is granted and SCO's Cross-Motion for Summary Judgment on Novell's Fourth Claim for Relief is denied.

V. Cross Motions Regarding Sun and Microsoft Agreements

Novell argues that SCO received payments under SCO's 2003 license agreements with Sun and Microsoft which constitute SVRX Royalties that SCO was obligated to remit to Novell

pursuant to Sections 1.2(b) and 4.16 of the APA. Based on this conduct, Novell seeks partial summary judgment on its Sixth, Seventh, Eighth and Ninth Claims for Relief, which allege claims for breach of fiduciary duty, conversion, constructive trust, and accounting. SCO has filed a cross-motion for summary judgment on those same claims as well as on Novell's Third Claim for Relief for breach of contract.

The APA expressly created an agency relationship between the parties with respect to SVRX Royalties. Section 1.2(b) provides that Novell retained "all rights to the SVRX Royalties notwithstanding the transfer of the SVRX Licenses" to Santa Cruz, who has only "legal title and not an equitable interest in such royalties." APA § 1.2(b). Under Section 1.2, Santa Cruz agreed "to collect and pass through to [Novell] one hundred percent of the SVRX Royalties as defined and described in Section 4.16 hereof." *Id.* Section 4.16 further provides that SCO "shall administer the collection of all royalties, fees and other amounts due under all SVRX Licenses." Those revenues are defined as SVRX Royalties. *Id.* § 4.16(a).

A. Breach of Fiduciary Duty and Conversion

Novell seeks summary judgment on its Seventh and Eight Claims for Relief for breach of fiduciary duty and conversion, alleging that SCO wrongfully retained payments made by Sun and Microsoft that constitute SVRX Royalties under the APA. Because California law governs actions arising from the APA, and Novell's claim arises from the agency relationship created by the APA, California law governs. *Nedlloyd Lines B.V. v. Superior Ct.*, 3 Cal. 4th 459, 468, 470 (1992).

To establish a breach of fiduciary claim under California law, Novell must show "the existence of a fiduciary relationship, its breach, and damages proximately caused by that breach."

Roberts v. Lomanto, 112 Cal. App. 4th 1553, 1562 (2005). A conversion claim is based on "the wrongful exercise of dominion over another's personal property in denial of or inconsistent with his rights in the property." *Kasdan, Simonds, McIntyre, Epstein & Martin v. World Sav. & Loan Ass'n*, 317 F.3d 1064, 1069 (9th Cir. 2003). To establish conversion, therefore, Novell must establish: (1) its "ownership or right to possession of the property; " (2) SCO's "conversion by wrongful act inconsistent with the property rights of the plaintiff; and (3) damages." *Id.* at 1069.

Novell asserts that the undisputed facts establish that: (1) the APA creates an agency relationship between Novell and SCO; (2) as Novell's agent, SCO has a fiduciary duty to diligently collect, administer, and deliver to Novell any SVRX Royalties; (3) Novell is the equitable owner of the SVRX Royalties and holds all right, title, and interest to them; (4) SVRX Royalties are amounts due under all SVRX Licenses as defined in the APA; (5) the 2003 Sun and Microsoft Agreements are SVRX Licenses because they license the same UNIX System V technology listed in Item VI of Schedule 1.1(a) to the APA; and (6) SCO improperly retains the monies it collected from the 2003 Sun and Microsoft Agreements.

SCO does not dispute the agency relationship created by the APA, but it contends that the payments it retained under the 2003 Sun and Microsoft Agreements are not SVRX Royalties under the APA. SCO asserts that the 2003 Sun and Microsoft Agreements are not SVRX Licenses because "SVRX License" refers only to binary licenses in existence at the time of the APA. SCO also asserts that the 2003 Sun and Microsoft Agreements are primarily Unixware licenses with only incidental licensing of SVRX.

(1) Temporal Requirement on SVRX License

The court has already determined that there is not a binary limitation on the definition of SVRX License. However, SCO's arguments on this motion require the court to consider whether the term "SVRX License" refers only to licenses in existence at the time of the APA.

In the prior discussion, this court concluded that the only possible interpretation of the APA was that SVRX Licenses mean all contracts relating to the list of SVRX products provided in Item (VI) of Schedule 1.1(a). Item VI has no express temporal requirement on "all contracts." Therefore, there is no facial ambiguity. SCO seeks to introduce extrinsic evidence that the parties intended the royalties to be limited to SVRX licenses in existence at the time of the APA. SCO must, therefore, demonstrate that the language of the APA is reasonably susceptible to such an interpretation. *Dore v. Arnold Worldwide, Inc.*, 39 Cal. 4th 384, 391 (2006).

SCO first argues that nothing in the APA suggests that "all contracts relating to the SVRX Licenses" extends to any future agreement that Santa Cruz or its successors might execute. Section 1.2(b) refers to Novell "*retaining* all rights to the SVRX Royalties notwithstanding *the transfer of the SVRX Licenses* to Santa Cruz." APA § 1.2(b) (emphasis added). SCO contends that this language indicates that the licenses are those transferred at the time of the APA. But Novell's retention of rights places no temporal restriction on the exercise of that right. Furthermore, if Novell's argument that the licenses had to be "the" licenses in existence at that time of the APA focuses on the use of the term "the" before SVRX Licenses, SCO's assumptions are contradicted by the many instances in which the agreement refers to "any" and "all" SVRX Licenses. Specifically in connection with SCO's obligations to collect royalties, Section 4.16(a) refers to all royalties under "all SVRX Licenses."

Next, SCO points to Section 1.2(b), which requires SCO to pay royalties to Novell with

respect to SCO's "future sale of UnixWare products." *Id.* There is no similar language in Section 1.2(b) referring to future sales of SVRX Licenses. SCO posits that no reference is made to future SVRX Licenses because Section 4.16 states that SCO "shall not, and shall have no right to, enter into future licenses or amendments of the SVRX Licenses, except as may be incidently involved through its rights to sell and license the Assets or the Merged Product . . . or future versions thereof of the Merged Product." *Id.* 4.16(b).

Section 4.1(b) was amended, however, to include language stating that Santa Cruz "shall not, and shall have no right to, enter into new SVRX Licenses except in the situation specified in (i) of the preceding sentence or as otherwise approved in writing in advance by [Novell] on a case by case basis." Amend. No. 1 ¶ J. Contrary to SCO's interpretation, this language demonstrates that there are certain instances in which SCO was allowed to enter into new SVRX Licenses. There are no additional provisions that would exclude these new SVRX Licenses from the category of "all SVRX Licenses."

SCO further contends that Amendment No. 1 to the APA clarifies that Santa Cruz was obligated to remit to Novell only the royalties that were being paid and that would continue to be paid under the existing SVRX licenses. Amendment No. 1 added Section 1.2(e), which provided certain categories of SVRX Royalties that SCO was entitled to retain. *Id.* ¶ E(e). Subsection (ii) refers to "source code right to use fees under existing SVRX Licenses." Subsection (iii), however, refers to "source code right to use fees attributable to *new* SVRX licenses approved by" Novell. *Id.* (emphasis added). Therefore, Section 1.2(e) actually demonstrates that SVRX Royalties include payments under existing and new SVRX Licenses.

If, as SCO suggests, SVRX License refers only to those licenses in existence at the time

of the APA, the modifiers "new" and "existing" used in Sections 1.2(e) and 4.16(b) to modify that term are rendered meaningless. Under general rules of contract interpretation, this court is required to give effect to every part of the contract, if reasonably practicable. *See* Cal. Civ. Code § 1641 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.")

The court concludes, therefore, that there is no limitation in the APA to "then-existing" SVRX Licenses. Such an interpretation would be contrary to express terms in the agreement and render some express terms meaningless. Accordingly, the court rejects SCO's interpretation as a matter of law.

(b) UnixWare Licenses

SCO further argues that the 2003 Sun and Microsoft Agreements are licenses for UnixWare which license SVRX only incidentally. The parties dispute whether the SVRX component of these licenses is only incidental. Nevertheless, it is undisputed that the 2003 Sun and Microsoft Agreements have some SVRX component.

The language and structure of the APA's Royalties provision in Section 1.2(b) makes a clear distinction between royalties from SVRX Licenses and UnixWare licenses. SVRX Royalties are governed by Sections 1.2 and 4.16, and UnixWare royalties are governed by Section 1.2 and Schedule 1.2(b). While SCO's obligation to pay royalties for the sale of UnixWare products expired on December 31, 2002, its obligation with respect to SVRX Royalties does not expire.

Particularly relevant to this motion are the provisions in Schedule 1.2(b) regarding the conversion of an SVRX customer to UnixWare and Section 4.16(b) regarding the incidental

licensing of SVRX technology with UnixWare. It is undisputed that Sun had previous UNIX-related agreements with AT&T and Novell because the 2003 Sun Agreement purports to amend and restate a 1994 agreement between Sun and Novell.

First, Schedule 1.2(b) addresses the conversion of existing SVRX customers to a UnixWare derived product. APA Sched. 1.2(f). The process to determine if a customer "is validly converted" is as follows:

> The conversion of an SVRx customer to UnixWare will validly occur and result in the UnixWare based revenue flowing to SCO, without giving rise to a continued obligation to make payment to Seller of royalties due under the SVRx licenses, only if the following are true (note: if the customer continues to sell their SVRx based product separately, then these SVRx revenues continue to flow to Novell):
> . . . .
> (ii) The product is derived from a source version of UnixWare . . . and (i) none of the original SVRx code provided by Novell to the customer, under the SVRx license, is included in the new product or (ii) [Santa Cruz] shall demonstrate to [Novell]'s reasonable satisfaction that an insignificant amount of original SVRx code is so included and the adoption of UnixWare is so substantial as to constitute a valid conversion.

Id. Therefore, even where a customer moves to a UnixWare product, SCO's SVRX Royalty obligations to Novell can continue unless there is no SVRX code or only an insignificant amount of SVRX code in the product. It is undisputed that some of the original SVRX code is included in the Sun and Microsoft Agreements. And, based on the arguments presented in this motion, it is also clear that SCO has not demonstrated to Novell's satisfaction that the amount of original SVRX code in these licenses is insignificant. Moreover, whether or not Novell's present satisfaction is reasonable, which could present a question of fact, the language suggests that SCO was obligated to present the information to Novell before the customer would be considered

validly converted. The facts here demonstrate that Novell was not made aware of the 2003 Sun and Microsoft Agreements. Therefore, SCO never attempted to validly convert Sun or Microsoft. Under Schedule 1.2(b), then, Sun and Microsoft would not be considered validly converted.

The court must then analyze SCO's obligations with respect to incidental licenses of SVRX under Section 4.16. Section 4.16(b) is amended in Amendment No. 1 to allow SCO "to enter into amendments of the SVRX Licenses (i) as may be incidentally involved through its rights to sell and license UnixWare Software or the Merged Product." Amend. No. 1 ¶ J. This amendment further allows SCO to enter into "new SVRX Licenses . . . in the situation specified in (i)." *Id.*

Although this amendment allows SCO to enter into new SVRX Licenses and amendments of SVRX Licenses incidental to its license of UnixWare, nothing in the language releases SCO from the obligation to remit "all royalties, fees, and other amounts due" under those SVRX Licenses. The use of the defined term SVRX License in this section demonstrates that even incidental licenses of SVRX are considered an SVRX License.

The APA only permits SCO to keep SVRX Royalties in the narrow circumstances outlined in Section 1.2(e). Although SCO references Section 1.2(e)(ii)'s exception as applicable to the Sun and Microsoft Agreements, Novell disputes that it applies. But, even if this exception applies, it does not relieve SCO of its obligation to account for those fees. SCO agreed to administer the collection of all amounts due under all SVRX Licenses. APA § 4.16(a). Section 1.2(f) specifically states that SCO's monthly reports are to be "separately broken down by revenue type (i.e. source code right to use fees, gross and net binary per copy fees, and support

fees) . . ." Amend. No. 1 ¶ E(f). And under Section 1.2(e), even those fees SCO retains are considered "categories of SVRX Royalties." *Id.* ¶ E(e). Those fees, therefore, as still SVRX Royalties. Section 1.2(e) merely provides that in those instances SCO may retain 100% of them instead of passing them through to Novell. SCO's right to retain all of those fees, which may account for a portion of the SVRX Royalties under the 2003 Sun and Microsoft Agreements, does not relieve SCO of its administrative duties to account for and report all SVRX Royalties according to the provisions of the APA.

The court concludes SCO was required to account for and pass through to Novell the appropriate SVRX Royalties according to the SVRX portions of the 2003 Sun and Microsoft Agreements. The parties dispute what portion of the payments SCO received from the 2003 Sun and Microsoft Agreements would relate to the products SVRX licensed. Although this type of allocation and accounting is a part of SCO's duties under the APA, such scrutiny of the Sun and Microsoft Agreements by the court presents a question of fact.

As a matter of law, the court concludes that SCO breached its fiduciary duties to Novell by failing to account for and remit the appropriate SVRX Royalty payments to Novell for the SVRX portions of the 2003 Sun and Microsoft Agreements. Accordingly, Novell is entitled to summary judgment on its Seventh Claim for Relief for breach of fiduciary duty, and SCO's cross-motion on this claim is denied. To the extent that SCO has failed to pass through the appropriate amount of SVRX Royalties under the 2003 Sun and Microsoft Agreements to which Novell was entitled, Novell is also entitled to summary judgment on its Eight Claim for Relief for conversion. Consequently, SCO's cross-motion for summary judgment on Novell's conversion claim is denied.

C. Constructive Trust and Accounting

Novell contends that a constructive trust is an appropriate remedy for a breach of fiduciary duty and conversion. Novell's Sixth and Ninth Claims for Relief for constructive trust and accounting seek remedies available at the court's discretion. *Callery v. United States Life Ins. Co.*, 392 F.3d 401, 408 (10th Cir. 2004). Under California law, the constructive trust cause of action arises from California Civil Code §§ 2223 and 2224. Section 2223 provides that "[o]ne who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner." And Section 2224 provides that "[o]ne who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

Courts interpret these statutes broadly and apply them to "practically any case where there is a wrongful acquisition of property to which another is entitled." *Ornbaun v. Main*, 198 Cal. App. 2d 92, 99 (1961). To prove a constructive trust cause of action, Novell must demonstrate the "existence of a res (some property or some interest in property), the plaintiff's right to that res, and the defendant's gain of the res by fraud, accident, mistake, undue influence or other wrongful conduct." *Pegg*, 782 F.2d at 1500.

In this case, the *res* is the SVRX Royalties, to which Novell retains "all right, title, and interest." This res is traceable to the monies received from the Sun and Microsoft Agreements. SCO's conduct also amounts to a breach of fiduciary duty, conversion, unjust enrichment, and breach of express contract, all of which are sufficient "wrongful conduct" to impose a constructive trust.

In *GHK Assoc. v. Mayer Group Inc.*, the trial court imposed a constructive trust based on breach of obligations flowing from a contract. 224 Cal. App. 3d 856, 878 (1990). The appellate court explicitly recognized the lower court's power to grant equitable relief in the form of a constructive trust and held that the imposition of the constructive trust was proper to ensure the owner received its damages. *Id.* Like the defendants in *GHK,* SCO breached its fiduciary obligations by failing to remit the SVRX Royalties it collected from the SVRX License portions of the 2003 Sun and Microsoft Agreements.

Although the court finds that Novell meets the requirements for the imposition of a constructive trust, the question of fact as to the SVRX portion of the 2003 Sun and Microsoft Agreements precludes the court from imposing a trust for the appropriate amount. Furthermore, despite Novell's fears regarding its ability to collect its royalties, the appropriate amount of SVRX Royalties can be determined at trial. Because of the question of fact, the court denies both Novell's and SCO's motions for summary judgment on Novell's Sixth Claim for Relief for constructive trust.

Novell also seeks the equitable remedy of accounting under its Ninth Claim for Relief. The APA obligates SCO to give detailed monthly reports and to comply with audits. APA §§ 1.2(b), (f). To the extent that SCO has failed to comply with these requirements with respect to the 2003 Sun and Microsoft Agreements, the court notes that it has a continuing duty to fulfill its contractual obligations. Novell also has continuing rights under the APA to conduct audits as to SVRX Royalties.

The court assumes that, through discovery in this action, Novell has actually obtained the information it needs to demonstrate its damages with respect to the SVRX Royalties it is due

under the 2003 Sun and Microsoft Agreements. The imposition of an accounting usually arises where "the facts are peculiarly within the knowledge of one of the parties." *Van de Kamp*, 204 Cal. App. 3d 819, 864 (1988). In this case, Novell acknowledges that it received copies of the 2003 Sun and Microsoft Agreement during discovery. It is also apparent that Novell has received relevant financial records and documentation from SCO because it is aware of how SCO accounted for the payments under the 2003 Sun and Microsoft Agreements. Because Novell has the information that it would otherwise obtain through an accounting, the court denies Novell's Ninth Claim for Relief for an accounting.

VI. Novell's Motion for Preliminary Injunction

As an alternative to its Motion for Partial Summary Judgment on these claims, Novell seeks a preliminary injunction imposing a constructive trust and an accounting on the wrongfully withheld revenues from the 2003 Sun and Microsoft Agreements. The court views this motion as essentially moot given is rulings above. The question of fact that precludes the court from imposing a constructive trust for the appropriate amount of SVRX Royalties due to Novell under the 2003 Sun and Microsoft Agreements also precludes the granting of a preliminary injunction. Therefore, the court denies Novell's motion for a preliminary injunction.

CONCLUSION

For the reasons stated above, the court concludes that Novell is the owner of the UNIX and UnixWare copyrights. Therefore, SCO's First Claim for Relief for slander of title and Third Claim for Relief for specific performance are dismissed, as are the copyright ownership portions of SCO's Fifth Claim for Relief for unfair competition and Second Claim for Relief for breach of the implied covenant of good faith and fair dealing. The court denies SCO's cross-motion for

summary judgment on its own slander of title, breach of contract, and unfair competition claims, and on Novell's slander of title claim. Accordingly, Novell's slander of title claim is still at issue.

The court also concludes that, to the extent that SCO has a copyright to enforce, SCO can simultaneously pursue both a copyright infringement claim and a breach of contract claim based on the non-compete restrictions in the license back of the Licensed Technology under APA and the TLA. The court further concludes that there has not been a change of control that released the non-compete restrictions of the license, and the non-compete restrictions of the license are not void under California law. Accordingly, Novell's motion for summary judgment on SCO's non-compete claim in its Second Claim for breach of contract and Fifth Claim for Relief for unfair competition is granted to the extent that SCO's claims require ownership of the UNIX and UnixWare copyrights, and denied in all other regards.

Furthermore, the court concludes, as a matter of law, that the only reasonable interpretation of the term "SVRX License" in the APA is all licenses related to the SVRX products listed in Item VI of Schedule 1.1(a) to the APA. Therefore, Novell is entitled to a declaration of rights under its Fourth Claim for Relief that it was and is entitled, at its sole discretion, to direct SCO to waive its claims against IBM and Sequent, and SCO is obligated to recognize Novell's waiver of SCO's claims against IBM and Sequent. Accordingly, Novell's motion for partial summary judgment on its Fourth Claim for Relief for declaratory judgment is granted, and SCO's cross-motion for summary judgment on Novell's Fourth Claim for Relief is denied.

Finally, the court concludes, as a matter of law, that the only reasonably interpretation of

all SVRX Licenses includes no temporal restriction of SVRX Licenses existing at the time of the APA. The court further concludes that because a portion of SCO's 2003 Sun and Microsoft Agreements indisputably licenses SVRX products listed under Item VI of Schedule 1.1(a) to the APA, even if only incidental to a license for UnixWare, SCO is obligated under the APA to account for and pass through to Novell the appropriate portion relating to the license of SVRX products. Because SCO failed to do so, it breached its fiduciary duty to Novell under the APA and is liable for conversion.

The court, however, is precluded from granting a constructive trust with respect to the payments SCO received under the 2003 Sun and Microsoft Agreements because there is a question of fact as to the appropriate amount of SVRX Royalties SCO owes to Novell based on the portion of SVRX products contained in each agreement. Furthermore, because Novell has obtained the information that it would otherwise obtain through an accounting during the course of this litigation, the court denies Novell's Ninth Claim for Relief for an accounting. However, the court also notes that SCO has a continuing contractual obligation to comply with the accounting and reporting requirements set forth in the APA.

Accordingly, Novell's Motion for Partial Summary Judgment or Preliminary Injunction [Docket No. 147] is GRANTED IN PART AND DENIED IN PART; SCO's Cross-Motion for Summary Judgment or Partial Summary Judgment on Novell's Third, Sixth, Seventh, Eighth and Ninth Counterclaims [Docket No. 180] is GRANTED IN PART AND DENIED IN PART; Novell's Motion for Partial Summary Judgment on its Fourth Claim [Docket No. 171] is GRANTED; SCO's Cross-Motion for Partial Summary Judgment on Novell's Fourth Claim [Docket No. 224] is DENIED; SCO's Motion for Partial Summary Judgment on its First,

Second, and Fifth Claims and Novell's First Claim [Docket No. 258] is DENIED; Novell's Motion for Partial Summary Judgment on Copyright Ownership of SCO's Second Claim for Breach of Contract and Fifth Claim for Unfair Competition [Docket No. 271] is GRANTED; Novell's Motion for Partial Summary Judgment on SCO's Non-Compete Claims in its Second and Fifth Claims [Docket No. 273] is GRANTED IN PART AND DENIED IN PART; Novell's Motion for Summary Judgment on SCO's First Claim for Slander of Title and Third Claim for Specific Performance [Docket No. 275] is GRANTED; and Novell's Motion for Summary Judgment on SCO's First Claim for Slander of Title for Failure to Establish Special Damages [Docket No. 277] is MOOT.

DATED this 10th day of August, 2007.

BY THE COURT:

Dale A. Kimball

DALE A. KIMBALL,
United States District Judge