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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP, INC., a Delaware corporation, Plaintiff and Counterclaim-Defendant, v. NOVELL, INC., a Delaware corporation, Defendant and Counterclaim-Plaintiff.	**REPLY IN SUPPORT OF NOVELL'S MOTION FOR SUMMARY JUDGMENT ON ITS FOURTH CLAIM FOR RELIEF** *[REDACTED pursuant to the August 2, 2006 Stipulated Protective Order]* Case No. 2:04CV00139 Judge Dale A. Kimball

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I. SUMMARY OF ARGUMENT

The only question on this motion is whether SCO has created a genuine factual dispute that SVRX is, as Novell contends, not merely "incidental" to the SCOsource licenses. The parties agree as to the meaning of "incidental" — a minor accompaniment — so there is no need to resort to extrinsic evidence to interpret the agreement. And notwithstanding SCO's 73-page Opposition, there can be no factual dispute that SVRX is more than a minor accompaniment:

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- The remaining SCOsource licenses purport to excuse copyright infringement by Linux — infringement SCO has only ever identified as based on Novell's SVRX copyrights.

Because these facts cannot be controverted, there can be no serious dispute that Novell's SVRX plays a more than "incidental" or "minor" role in the SCOsource licenses. SCO was therefore without authority to enter into the licenses.[1]

II. ARGUMENT

A. SVRX Is More than a "Minor Accompaniment" in SCOsource, and SCO Is Therefore Without Authority to Enter into the SCOsource Licenses.

The parties agree as to the meaning of "incidental." SCO is correct that Novell's motion proceeded as though that term can be defined simply by resort to its ordinary meaning. SCO offers the following dictionary definition: "a 'minor accompaniment' or something of a 'minor'

[1] Novell addresses below only that which is necessary to resolve this motion. Novell does not concede any assertion made by SCO in its voluminous Opposition. Novell expressly reserves all its rights and objections.

or 'subordinate nature.'" (SCO's Memorandum in Opposition to Novell's Motion for Summary Judgment on Its Fourth Claim for Relief ("Opp."), filed January 25, 2008, PACER No. 490, at 51 (quoting The American Heritage Dictionary of the English Language (4th ed. 2000).) Novell agrees that is an appropriate definition. Because the face of the SCOsource licenses shows that the role SVRX played was far more than a "minor accompaniment," it was not merely incidental, and SCO was without authority to enter into the SCOsource licenses.

1. More than [redacted] of the License Fee Microsoft Paid Is Tied Directly to Pre-APA SVRX Rights.

There can be no dispute that, by its plain language, the Microsoft SCOsource license grants more than incidental SVRX rights. Indeed, the structure of the license itself undermines SCO's core arguments.

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2. SCO Had No Authority to Amend Sun's SVRX License.

SCO was without authority to amend Sun's 1994 SVRX "buy-out" License for two independent reasons. First, the plain text of Sun's 2003 SCOsource license makes it clear that SVRX is more than a "minor accompaniment." Second, SCO was specifically barred from entering into agreements that "concern" a buy-out without Novell's participation and consent, which SCO concededly did not obtain.

a. Sun's SCOsource License Provides More than Incidental SVRX Rights.

There can also be no genuine dispute that SVRX was more than merely incidental to the Sun SCOsource license. SCO does not dispute, because it cannot, that the Sun SCOsource

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[3] Inherent in the definition SCO accepts is the fact that the Court is not forced to decide which set of software rights — SVRX or UnixWare — is necessarily "incidental" to the other. Novell therefore need *not* show that UnixWare is "incidental," only that SVRX is more than incidental, as it is possible that a license conveys significant SVRX and UnixWare rights, neither of which plays a "minor" role in the overall license.

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b. Amendment No. 2 Prohibits SCO from Unilaterally Renegotiating Buy-out Agreements.

SCO concedes that the 2003 Sun SCOsource license explicitly amended a 1994 buy-out agreement between Novell and Sun. (Opp. at 70, ¶ 8.) SCO argues that Amendment 2 does not prohibit SCO from amending buy-out agreements. (Opp. at 59-61.) As it has at various points in this case, the plain language of the APA and its amendments proves SCO wrong.

By its terms, Section B of Amendment 2 applies to "any potential transaction with an SVRX licensee which concerns a buy-out of such licensee's royalty obligations." (Melaugh Opening Decl., Ex. 12 at SCO1451873.) Had the drafters wanted to limit the application of Amendment 2 to *just* buy-outs (and not, in addition, to transactions that "concern" buy-outs), they could have easily done so by, for example, making Section B apply only to "a buy-out of such licensee's royalty obligations." Instead, Section B's broader language recognizes that a dispute over the IBM buy-out had almost brought the parties to litigation and acknowledges that it was in everyone's best interests that transactions *concerning* buy-outs explicitly involve both SCO and Novell.

Were Amendment 2 as SCO proposes, after the Section B–mandated joint negotiation of any buy-out, either party, if unhappy with how that process went, might then immediately renegotiate the buy-out on more favorable terms. That party could then escape Amendment 2 by claiming that the re-negotiation was not "itself" a buy-out but that it merely modified one. That is essentially what SCO has done here. Before the APA, Sun and Novell negotiated a contract governing Sun's use of technology owned by Novell. SCO then purported to renegotiate that contract, expanding Sun's rights to technology *still owned by Novell*. SCO did so in secret, to SCO's sole profit and Novell's detriment.

SCO's extrinsic evidence does not suggest a different effect for Amendment 2. SCO cites a variety of correspondence and testimony suggesting that the parties' focus during negotiations was on future buy-outs. (Opp. at 60-61.) But that does not change the fact that the Amendment 2 language was drafted more broadly. SCO also cites testimony and briefing from Novell, as well as a portion of the Court's August 10 Order indicating that Section B is limited to "buy-out transactions." (Opp. at 18-19.) But as defined in Section B itself, "buy-out transactions" are those transactions that "concern" buy-outs, such as the 2003 SCOsource amendment to Sun's 1994 buy-out.

3. SCO Had No Authority to Enter into the Other SCOsource Licenses.

SCO's arguments are similarly unpersuasive as they concern the other SCOsource licenses. As SCO has admitted, "[t]he central feature of the other SCOsource agreements is the covenant not to sue and the waiver of claims by SCO for the companies' internal Linux usage." (SCO's Memorandum in Opposition to Novell's Motion *In Limine* No. 2 to Preclude SCO from Contesting Licenses Conveying SVRX Rights Are "SVRX Licenses" ("Opp. MIL No. 2"), filed August 31, 2007, PACER No. 421, at 3.) As discussed below, despite years of effort and considerable incentive to locate every last line of supposedly infringing code, SCO has identified only pre-APA SVRX code as within Linux. *See infra* § II.B.4. It is therefore beyond dispute that SVRX plays more than a "minor" role in the other SCOsource licenses.

B. SCO's Arguments Do Not Defeat This Motion.

1. This Court Has Already Rejected SCO's SVRX License "in Part" Theory.

SCO argues that Novell is not entitled to declaratory relief as to "portions" of the Sun and Microsoft licenses because those "portions" are not SVRX Licenses. (Opp. at 47-50, 70-71.) This Court has rejected that argument once already:

> SCO's attempt, however, at making a distinction between the license as a whole being an SVRX License and only the SVRX

> component of the license being an SVRX License is contrary to the court's finding that even an incidental license of SVRX is considered an SVRX License under the APA's broad definition of SVRX License. The court rejected SCO's arguments that the Sun and Microsoft Agreements were not SVRX Licenses because they licensed SVRX only incidentally. . . . Disputes as to the court's interpretation of the contract should be left for appeal.

(Order, filed September 7, 2007, PACER No. 453, at 16-17.)

Thus, under the Court's Order, the test is whether the contract as a whole is an SVRX License. This Court has already held that the Microsoft and Sun SCOsource licenses are SVRX Licenses. (Order ("August 10 Order"), filed August 10, 2007, PACER No. 377, at 41, 101.) It is plain from the face of the remaining SCOsource licenses that they, too, license SVRX and that they are therefore SVRX Licenses. (*See* Melaugh Opening Decl., Ex. 15 (Everyone's Internet Agreement) at §§ 1.7, 1.10, 2.1 (conveying "license to use . . . SCO IP," defined as including "UNIX System V").) The only question reasonably presented by this motion is whether the Microsoft, Sun, and other SCOsource licenses license SVRX only incidentally and therefore fall within the exception to the APA's prohibition against SCO's entering into or amending SVRX Licenses.[4] As discussed above, they do not.

2. The Supposed "Course of Performance" Does Not Support SCO.

Throughout its Opposition, SCO argues that the supposed "course of performance" between Novell and SCO excuses its entry into the SCOsource licenses. As the Court has held, where there is a dispute over the meaning of contract language, extrinsic evidence "is admissible both to support interpretations of contracts to which the language at issue is reasonably susceptible and to demonstrate the parties' intent under contractual provisions that the court

[4] Even if it were relevant, many of the "portions" to which SCO refers in fact license SVRX.

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deems to be ambiguous." (August 10 Order at 52.) But here, there is no dispute as to the meaning of "incidental" — both sides agree that it means "a minor accompaniment." Resort to a supposed "course of performance" is therefore inappropriate.

Even if the Court did admit SCO's evidence, it does not support SCO. SCO places great weight on the contracts and correspondence regarding Unisys. (Opp. at 14-16, 53.) Far from supporting SCO, this material shows how SCO *should have behaved* with regard to the SCOsource licenses. The Unisys story, according to SCO, is as follows:

- In 1995, Novell licensed UnixWare 2.01 to Unisys. That license contained incidental rights to prior versions of UNIX. (Opp. at ¶ 29 & Ex. 15.)
- Unisys subsequently developed an operating system based on UnixWare 2.01. Post-APA, Unisys paid royalties to SCO for the distribution of that UnixWare operating system, which SCO did not pass along to Novell. (*Id.*, ¶ 30.)
- When Unisys wanted to distribute a pre-APA version of SVRX alongside its UnixWare-derived version, it approached SCO. (*Id.*, ¶ 37.)
- SCO — acknowledging that the APA "require[s] prior written approval from NOVELL for all new agreements or changes to current agreements relating to UNIX® System V" — sought Novell's approval for the Unisys proposal. (*Id.*, ¶ 37 & Ex. 32.) In seeking that approval, SCO suggested a method of dividing the resulting Unisys royalties so that Novell would get the share attributable to SVRX. (*Id.*)
- Novell approved the Unisys/SCO proposal and the royalty division, permitting SCO to enter into the necessary arrangements with Unisys. (*Id.*, ¶ 39.)

Here, in contrast, SCO entered into the SCOsource licenses in secret, refused to share the license terms with Novell until forced to do so in discovery, and steadfastly refuses to

acknowledge that even a penny of the tens of millions of dollars of license fees derived from the licenses belongs to Novell.

Even were the history otherwise, the parties' prior performance is *nothing like* what is happening now. The Unisys license and the other prior performance are part of a strictly regimented system of UNIX licensing with established per-copy binary distribution fees, severe sublicensing restrictions, and source code rights so limited that the licensee had to pay per CPU with access to the code. (*Id.*, Ex. 15.) The Microsoft and Sun SCOsource licenses, by contrast, convey REDACTED It is simply not believable that SCO somehow thought the parties' behavior in the context of the Unisys-type licenses permitted SCO to execute the SCOsource licenses without so much as consulting Novell.

3. Whether "System V" Sometimes Means "UnixWare" Is of No Consequence.

SCO seeks to inject uncertainty into this motion by claiming that the phrases "System V" and "SVRX" sometimes include "UnixWare." (Opp. at 19-25.) Whether or not that is true in the abstract is irrelevant. What is clear is that, in the context of the SCOsource campaign generally and in the context of the specific SCOsource licenses at issue here, SCO used those terms distinctly.

There cannot be any dispute about the nature of the SCOsource program. SCO claimed UNIX code was in Linux. Based on such claims, SCO approached various companies and demanded that they buy a SCOsource license granting them the right to use such code in their Linux. (August 10 Order at 29 ("SCOsource . . . was an effort to obtain license fees from Linux users based on claims to Unix System V intellectual property.").)

The nature of the SCOsource program is therefore dictated by the nature of the code SCO claimed was in Linux. Is the UNIX code that is supposedly in Linux pre-APA SVRX code, or is it post-APA UnixWare code? SCO's brief is largely silent on this point. The most SCO says is

that UnixWare code "might have" been in Linux, that SCO sometimes "focused on" UnixWare when "delineating its concern" about infringement in Linux, and that SCO at times described a SCOsource license as a UnixWare license and at times as a System V license. (Opp. at 20-24.) It is unclear what any of that means. What *is* plain, though, is that after years of litigation, thousands of hours of investigation, and millions of dollars in expert fees, SCO has never identified a single line of post-APA code in Linux.[5] *SCO's Opposition does not assert otherwise.* There can therefore be no genuine dispute that SCOsource is really about SVRX. Instead, SCOsource was an effort to extract money using unsupported claims of copyright infringement based solely on copyrights this Court has held were and are owned by Novell. And, in any case, all Novell needs to show here is that SVRX was more than a "minor accompaniment" to those licenses, which it plainly was.

It is just as plain that, when the SCOsource contracts convey license rights, they treat UnixWare and SVRX as distinct concepts rather than subsuming both within either term. As discussed above, the Microsoft SCOsource agreement REDACTED And the remaining SCOsource licenses define the licensed "SCO IP" to separately include "UNIX

[5] *See, e.g.*, Reply Declaration of David E. Melaugh in Support of Novell's Motion For Summary Judgment on Its Fourth Claim for Relief ("Melaugh Reply Decl."), filed herein, Exs. 1 (SCO opposition to IBM's motion for summary judgment on IBM's claim seeking declaration that it does not infringe any UNIX copyright, identifying only "SVr4" material as infringing, see esp. at 92-93, ¶ 181, admitting that infringing material comes from SVr4 and previous releases), 2 (expert report submitted by SCO purporting to collect infringing code in Linux, identifying only SVr4 material as infringing), 3 at 2 (IBM submission noting "the only allegedly infringed copyrights are, under the Novell Decision, owned by Novell, not SCO"), 4 (SCO letter informing arbitration panel that proceeding with arbitration is "pointless" because all copyrights relevant to SUSE's purported infringement have been held owned by Novell); *see also* Melaugh Opening Decl., Exs. 4 (letter identifying "UNIX System V" infringing material as "distributed by AT&T" — *i.e.*, well before UnixWare), 5 (same), 6 (same), 7 (same), 8 at Ex. 1 (letter identifying only pre-APA code as infringing), 8 at Ex. 2 (same).

System V" *and* "UnixWare." (*See, e.g., id.*, Ex. 15 (Everyone's Internet Agreement) at §§ 1.7, 1.10.) Were stating either term sufficient to include the other, none of these distinctions would have been necessary.

4. A "Release" of Purported SVRX Infringement Is an SVRX License.

SCO argues that the APA transferred "claims" arising from Novell's retained copyrights to SCO and that the portions of the SCOsource agreements that release such claims are not SVRX Licenses. (Opp. at 39-41, 43-44.) SCO is wrong on both counts.[6]

SCO argues it may enter into "releases" regarding the SVRX infringement because the APA transferred to SCO "claims arising after the Closing Date against any parties relating to any right, property or asset included in the Business." (Opp. at 40.) The Court has *unequivocally* held that Novell is the owner of the pre-APA UNIX copyrights and that the APA did not transfer any such rights as part of the "Business" sold to SCO. (August 10 Order at 99.) It is therefore beyond debate that the APA did *not* grant SCO any ownership of supposed "claims" relating to such copyrights, notwithstanding SCO's fervent effort to press precisely such claims by way of its SCOsource program.

Nor can there be any dispute that when SCO purports to authorize the use of SVRX by way of a "release," such a contract falls within the broad definition of an SVRX License. SCO does not dispute that releases convey the same rights as licenses — *i.e.*, the right to use the code at issue free from the threat of an infringement suit. One need only examine the actual terms of the "release" in SCO's SCOsource "Intellectual Property License" with EV1 to see how closely intertwined the terms are:

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[6] Also, as noted above, this Court has rejected SCO's claims that only "portions" of a contract are SVRX Licenses. *See supra* § II.B.1.

> **3.0 SCO COVENANT, RELEASE AND WAIVER OF CERTAIN CLAIMS**
>
> Upon full payment of the one-time licensing fee described in Exhibit A of this Agreement, SCO will not consider any prior use of the SCO IP or future use of the SCO IP and Updates licensed by Licensee under the rights granted under this Agreement . . . to be in violation of SCO's IP ownership rights and SCO shall not bring any legal action alleging infringement of the SCO IP by Licensee or Licensee's Customers for usage of SCO IP solely in connection with Licensee's Businesses. . . .

(Melaugh Opening Decl., Ex. 15 at NOV-PLA-00453 (emphasis added).)

SCO notes only that releases sometimes convey *broader* rights than licenses, claiming that releases excuse past infringement and licenses do not. (Opp. at 43.) Whether or not that is so, it cuts against SCO — if SCO doesn't have the authority to convey a narrower set of rights, it certainly doesn't have the authority to convey a broader set. Were the circumstances otherwise, SCO could easily evade the prohibitions of the APA. It could approach every current and potential SVRX user and offer to "release" the use of SVRX in lieu of a "license." That is inconsistent with this Court's holding that the plain language of the APA sets a broad definition of "SVRX License" — *i.e.*, "all contracts relating to the UNIX System V releases listed in Item VI." (August 10 Order at 77 (reciting Novell's proposed definition) & 86 (rejecting SCO's alternative definition, accepting Novell's); *see also id.* at 84 (obligations "apply to all of the agreements associated with licenses to SVRX technology").)[7]

5. Estoppel Does Not Bar the Relief Novell Seeks.

SCO made the same estoppel arguments it makes now in an earlier effort to graft "existing at the time of the APA" into the definition of "SVRX License." The Court rejected the argument then as a matter of law, and it is appropriate to do so again. (*Id.* at 90-93.) To make

[7] SCO also claims that it can enter into releases excusing infringement of its post-APA UnixWare code, even if such releases also convey the right to use pre-APA SVRX. Again, whether or not that is true in the abstract, it is not what is happening here. SCO has not identified any infringing UnixWare code whose use in Linux requires a license. Instead, its accusations of infringement have all focused on pre-APA SVRX code. *See supra* § II.B.3.

out estoppel, "four elements must be present . . . (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." *Lentz v. McMahon*, 777 P.2d 83, 85 (Cal. 1989). SCO cannot possibly make out those elements here.

Even if one concedes every fact in SCO's "course of performance" argument (which Novell does not), the most that course might show is that SCO occasionally licensed SVRX incidentally to UnixWare and that Novell never requested any revenue from such contracts. The Sun and Microsoft SCOsource licenses, by contrast, grant major market players essentially

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Nothing in Novell's conduct could have possibly convinced SCO that Novell would assent to such arrangements. The same is true of the other SCOsource contracts. What the facts show, in contrast, is that, at every turn, Novell has objected to SCOsource as an extortion racket based on property SCO does not even own. (Melaugh Reply Decl., Exs. 5-11.) That is, after all, why SCO started this lawsuit against Novell in the first place, claiming that Novell's objections to SCOsource caused SCO hundreds of millions of dollars in damages.

6. The Declaratory Relief Novell Seeks Is Not Moot.

SCO claims that the relief Novell seeks is moot because the SCOsource program is "discontinued." (Opp. at 65-66.) That is directly controverted by SCO's bankruptcy filings. SCO is currently seeking approval of a deal that will contractually obligate SCO to "aggressively" pursue its claims against the Linux community. (Melaugh Reply Decl., Ex. 12 at Ex. A, p.3 (seeking approval of financing deal).)

SCO also claims that the relief is moot because Novell has supposedly "approved" the SCOsource licenses. (Opp. at 65.) Nothing could be further from the truth — as discussed immediately above, Novell has objected to these licenses at every step and has always contested SCO's authority to enter into the licenses or to retain any revenue from them. *See supra* § II.B.5.

CONCLUSION

For the reasons stated above, Novell is entitled to a declaration that SCO was without authority to enter into the SCOsource licenses.

DATED: February 19, 2008

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of February, 2008, I caused a true and correct copy of the **REPLY IN SUPPORT OF NOVELL'S MOTION FOR SUMMARY JUDGMENT ON ITS FOURTH CLAIM FOR RELIEF** *[REDACTED pursuant to the August 2, 2006 Stipulated Protective Order]* to be served to the following:

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