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Attorneys for Plaintiff, The SCO Group, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

THE SCO GROUP, INC., a Delaware corporation, Plaintiff/Counterclaim-Defendant, vs. NOVELL, INC., a Delaware corporation, Defendant/Counterclaim-Plaintiff.	**SCO'S MEMORANDUM IN OPPOSITION TO NOVELL'S MOTION FOR SUMMARY JUDGMENT ON ITS FOURTH CLAIM FOR RELIEF** **FILED IN REDACTED FORM [ORIGINALLY FILED UNDER SEAL]** Civil No. 2:04 CV-00139 Judge Dale A. Kimball Magistrate Brooke C. Wells

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Plaintiff/Counterclaim-Defendant, The SCO Group, Inc. ("SCO"), respectfully submits this Memorandum in Opposition to the Motion of Novell, Inc. ("Novell"), for Summary Judgment on Its Fourth Claim for Relief.

PRELIMINARY STATEMENT

Novell seeks summary judgment on its fourth counterclaim, concerning SCO's rights under the amended 1995 Asset Purchase Agreement ("APA") with respect to certain agreements SCO executed in 2003 or 2004 with Sun Microsystems, Inc. and Microsoft Corporation (the "Sun" and "Microsoft" Agreements) and several other counterparties as part of its SCOsource program (the "SCOsource Agreements").

SCO recognizes this Court's prior summary judgment ruling as controlling for these purposes and presents its arguments herein accordingly. Even under that ruling, however, Novell is not entitled to any declaration that SCO entered into the Sun, Microsoft, or SCOsource Agreements without authority. The Agreements fall within SCO's right to enter into SVRX licenses and "amendments" of SVRX Licenses "as may be incidentally involved through its rights to sell and license UnixWare," the brand name for the latest version of UNIX System V. Novell also is estopped by its prior conduct and statements from asserting the rights on which it here seeks a declaration (which relief Novell notably did not seek on summary judgment when it filed those general motions last year). Further, there is no need for the Court to get involved in rendering such a declaration at this time.

The linchpin of Novell's argument that the SCOsource Agreements concern only "SVRX" rights – and not UnixWare rights – as those terms are used in the APA is Novell's unsupportable and inaccurate assertion (at 5) that "[f]rom start to finish, SCO never claimed

SCOsource had anything to do with SCO's UnixWare derivative rights, and any attempt by SCO to recast SCOsource now should fail." From the very beginning SCO was concerned that technology had been taken from its OpenServer and UnixWare UNIX products and improperly used in Linux, and the contemporaneous documents – belying Novell's allusions to any SCO attempt to "recast" its concerns at the time – show that to be true.

Novell cites SCO's general allusions to "UNIX" and "UNIX System V" at the time; UnixWare is the name for the most recent version of UNIX System V, and UnixWare and OpenServer are both "UNIX" and specifically "UNIX System V" operating systems. Prior to this litigation Novell itself acknowledged in its own Guide to UnixWare that UnixWare is a "version of UNIX System V." The documents reflecting SCO's concerns at the outset and pendency of its SCOsource program repeatedly show that SCO was focused on UnixWare and OpenServer technology in Linux and on UNIX in general.

In addition, Novell's motion for summary judgment raises the following questions – and the answers provided in this memorandum:

- Is any *contract* that "relates" to SVRX an "SVRX License"? No – and the Court has not so held. Instead, the contractual language must constitute a "license" for SVRX releases listed in the APA. In addition, the presence of such language does not render the contract an "SVRX License" in its entirety.

- Are the SCOSource Agreements "SVRX Licenses" that SCO lacked the authority to execute? No. In significant part they are releases of claims that SCO had the right to pursue if it so chose, and therefore had the right to release. Any parts of the agreements that constituted a license are entirely different from the "SVRX Licenses"

referenced in the APA, and instead equivalent to the licenses for the use of UnixWare-based binary distributions which SCO had the authority to execute.

- Are the Sun and Microsoft Agreements "SVRX Licenses"? Even under this Court's prior summary judgment ruling, only a tertiary part of one of the five principal components of the Microsoft Agreement is a "license" relating to releases listed in the APA. Only a secondary part of one of the four principal components of the Sun Agreement is such a "license."

- Were the "SVRX License" parts of the Sun and Microsoft Agreements entered into "incidentally" to UnixWare? Yes. SCO had the authority to license UnixWare (the latest version of UNIX System V) with SVRX prior products (the older versions of UNIX System V) listed in the license. That was Novell's practice at the time of the APA and Santa Cruz's and SCO's practice thereafter, at Novell's behest. Other evidence confirms the incidental and secondary nature of the SVRX components of the Sun and Microsoft Agreements.

In fact, in the decade prior to this litigation, Novell never asserted any supposed authority to approve UnixWare licenses that included SVRX prior products. Novell failed to assert any such rights or to object even when SCO informed Novell of the proposed SCOsource program and had several discussions with Novell about the program. Instead, Novell told SCO it had no interest in the program and declined any participation.

Contrary to Novell's efforts to avoid or twist the facts and to the main points that underlie Novell's arguments, the following is true:

First, the discussions between SCO and Novell in the fall of 2002 directly undercut – and in fact estop – the relief Novell seeks. Such estoppel arises out of Novell's entire course of performance since 1995. SCO approached Novell, explained the proposed SCOsource program,

asked Novell to help clarify its rights, and invited Novell to participate in the program on the grounds that the enforcement of SCO's rights against Linux users might increase or slow the decrease of Novell's legacy UNIX binary-royalty stream of revenue. In response, Novell did not assert (or even intimate any grounds for asserting) any of the rights it now asserts after the fact. There was no suggestion – including in the internal reports made by Novell's own in-house counsel – that SCO did not have the right to undertake the SCOsource program or that Novell would have to approve any such SCOsource agreements. In fact, the Novell lawyer with whom SCO had several discussions before launching the program admitted that Novell was fairly apprised of the program at the time of the discussions. SCO reasonably proceeded with the program, and Novell asserted its alleged rights only many months later.

Second, as noted above, contrary to Novell's core argument that SCO's concerns with the unauthorized use of "Unix System V" technology in Linux could not have pertained to UnixWare, UnixWare is the latest version of UNIX System V, not some entirely new and unrelated product. The APA distinguishes between the two operating systems and the SCOsource Agreements refer to both, but Novell's efforts to try to create some fine distinction between them for purposes of analyzing public statements regarding "UNIX" technology is unavailing. In referring to its "UNIX" or "UNIX System V" or "SVRX" rights, SCO was including the most current version of UNIX System V, UnixWare and OpenServer.

If there were any doubt, the record shows that SCO structured the SCOsource Agreements as UnixWare binary licenses and directly based the pricing for those Agreements on such UnixWare licenses. Similarly, the textual and extrinsic evidence demonstrate that the licensing of UnixWare technology, and the multiple provisions that are not "licenses" at all, are

at the forefront of both the Sun and Microsoft Agreements.

STATEMENT OF FACTS

I. UNIX AND UNIXWARE

1. UNIX is a computer operating system originally developed in 1969 by Bell Labs. (Novell's Amended Counterclaims (Sept. 25, 2006), Docket No. 142, ¶ 6.) Since then, multiple versions of UNIX have been developed as a result of the licensing of the UNIX technology. (Id. ¶ 7; Ex. 1.) UNIX System V (or "SVRX") is the name for the versions of UNIX developed by AT&T and UNIX System Laboratories ("USL") in the 1980s and early 1990s. (Novell's Amended Counterclaims ¶ 7; Ex. 2.)

2. UnixWare is the brand name for the more recent versions of UNIX System V developed and licensed in the early 1990s by USL and Novell, and thereafter by The Santa Cruz Operation, Inc. ("Santa Cruz") and SCO. (Exs. 3, 4.) By way of example, Novell's own UnixWare sales binders include the following descriptions of UnixWare:

- "UnixWare's Competitive Advantages: Most advanced System V UNIX available on industry standard hardware."
- "Novell's UnixWare 2 is the culmination of more than 25 years of research, development, and field experience. All commercial UNIX system offerings are direct descendants of this effort."
- "Latest implementation of UNIX SVR4.2 MP Technology."
- "As the latest generation of UNIX SVR 4.2 with SVR4.2 MP, UnixWare 2 is certainly a strong candidate for a wide variety of government application needs."
- "UnixWare 2 is a full UNIX System V operating system which has incorporated specific NetWare functionality."

- "As far as we are concerned, there doesn't seem to be a case to go for another UNIX from anyone else while we have such a cost-effective SVR4 product as UnixWare."
- "Advanced SVR5 SMP operating system."
- "Powerful, scalable, reliable and open UNIX SVR5."

3. Additional evidence confirms that when UnixWare was developed in the early 1990s, it was the latest version of UNIX System V, Releases 4.2 and 4.2 MP and thus included that prior technology, and in turn prior SVRX technology. (Exs. 3, 10.) The product was called UnixWare because it was to be a combination of those latest releases of the UNIX System V source code and some components of Novell's NetWare source code. (Ex. 3.) The first releases of UnixWare contain all or virtually all of the technology included in SVR 4.2 and SVR 4.2 MP, and all of the important technology. (Exs. 3, 4; Ex. 56 ¶ 4; Ex. 87 ¶ 3.)

4. In 1995, under the Asset Purchase Agreement ("APA") between the companies, Novell sold the UnixWare business to Santa Cruz, including all of the source code, licenses, and royalties, as well as intellectual property rights associated with UnixWare. (Ex. 5 §§ 1.1, 1.3(a)(i); Schedule 1.1(a).) The core members of Novell's UNIX licensing group became employees of Santa Cruz in that company's UNIX licensing group. (Ex. 6 ¶¶ 12-14; Ex. 7 ¶¶ 8-9.)

5. Santa Cruz released several subsequent versions of UnixWare, including multiple versions of each of UnixWare Release 2 and UnixWare Release 7. (Exs. 19, 20, 85, 86.) After SCO acquired the UnixWare business from Santa Cruz in 2001, SCO released subsequent versions of UnixWare Release 7. (Exs. 85, 86.) Under the 2001 transfer of assets, the core

members of Santa Cruz's UNIX licensing group became employees of SCO in that company's UNIX licensing group. (Ex. 6 ¶¶ 12-14; Ex. 7 ¶¶ 6, 8-9.)

6. All of the releases of UnixWare subsequent to Novell's transfer of the business are also versions of UNIX System V. (See, e.g., Ex. 3; Ex. 4; Ex. 8 at 158; Ex. 9 at 239-43; Ex. 10 at 16.) All of the significant technology from the prior versions of SVRX is included in UnixWare, and UnixWare would not operate without its SVRX components. (Ex. 49 ¶¶ 3, 4; Ex. 56 ¶¶ 3, 4.) UnixWare supports the newest industry-standard hardware and is a high-performance, scalable, and reliable operating system. (Exs. 3, 4; Ex. 49 ¶¶ 3, 4; Ex. 87 ¶ 4.)

II. THE LICENSING OF UNIXWARE

7. AT&T, USL, Novell, and Santa Cruz licensed the source code for UNIX products to Original Equipment Manufacturers ("OEMs") who used the source code to develop their own versions of UNIX that they then distributed in binary format on their hardware. (Novell Memorandum in Support of its Motion for Partial Summary Judgment on its Fourth Claim for Relief (Dec. 12, 2006), Docket No. 175, ¶¶ 18, 20-21.) Such OEMs paid a one-time fee for the internal use of the source code on designated CPUs, a one-time distribution fee, and ongoing royalties for each distributed binary copy of their UNIX version. (Id. ¶¶ 18, 20-21, 23.)

8. In licensing UNIX products, AT&T, USL, and Novell also often licensed, as a matter of standard practice, the same rights with respect to the older products that predated the licensed product. (Ex. 11 ¶ 26; Ex. 12 ¶ 22; Ex. 13 ¶ 12.). Those "Prior Products" were identified as such in the license for each licensed product. (Id.) A licensee who executed a license for SVR 4.2, for example, also often received the same rights to the earlier versions of UNIX on which release 4.2 was built. (Ex. 1 at 33.) Once UnixWare was developed, Novell continued to license

UnixWare products with the same rights to the SVRX prior products. (See, e.g., Exs. 14 at 27; 15 at 26.)

9. Indeed, after it acquired the UnixWare business from Novell in 1995, Santa Cruz adopted for its UnixWare licenses the same approach that Novell had used for its UnixWare licenses. Santa Cruz did so with Novell's guidance, knowledge and approval. (Ex. 16 at SCO1299955-56, SCO1299962; Ex. 27 at 282-83; Ex. 49 ¶ 9; Ex. 56 ¶ 6.) Under the Statement of Work for the transition of UNIX licensing from Novell to Santa Cruz, the parties agreed that Santa Cruz would follow Novell's licensing approach, except for a change in the name of the licensor from Novell to Santa Cruz. (Ex. 16 at SCO1299955-56, SCO1299962.)

10. As Novell had done, as a matter of standard practice, Santa Cruz also often granted the licensee a license to the older versions of UNIX, including numerous releases of SVRX. (Ex. 17; Ex. 18 ¶ 8.) OEM licensees paid AT&T, USL, Novell, or Santa Cruz licensing fees for the licensed product only; licensees who requested the inclusion of a list of prior products in their UnixWare licenses did not have to pay any additional fees for those products. (See, e.g., Ex. 15 at SCO1039897; Ex. 19 at SCO1042612; Ex. 20 at SCO1040469.)

11. In 1995 and 1996, for example, Santa Cruz licensed UnixWare 2.0 and 2.1 to various licenses. A standard UnixWare 2.0 license included a one-time fee of $375,000 for the right to use the UnixWare 2.0 source code. (Ex. 19 at SCO1042590.) As Novell had done, Santa Cruz included for many UnixWare 2.0 licensees a listing of SVRX prior products at no additional cost. (See, e.g., Ex. 15 at SCO1039897, SCO1039921; Ex. 20 at SCO1040469, SCO1040491; Ex. 21 at SCO0977766.)

12. The $375,000 list price for a UnixWare 2.0 license with Unisys that licensed the SVRX prior products, for example, was the same as the price for a contemporaneous UnixWare license with Alps that did not list the SVRX prior products. (See, e.g., Ex. 19 at SCO1042612; Ex. 15 at SCO1039897; Ex. 20 at SCO1040469.)

13. AT&T, USL, Novell, and Santa Cruz granted rights to the prior products to facilitate the development by licensees of their versions of UNIX based on the most recent licensed product and as an assurance to the licensee that they had the rights to any of the technology included in that licensed product, including technology previously released in the prior products. (Ex. 49 ¶ 8; Ex. 56 ¶ 6.) Santa Cruz granted customers such rights in UnixWare licenses as recently as 1997 and 1998, when Santa Cruz started licensing UnixWare as a packaged product. (See, e.g., Ex. 17; Ex. 49 ¶ 9; Ex. 56 ¶ 6.)

14. By the late 1990s, Santa Cruz came to license UnixWare to distributors as a "packaged product," or product in binary format that was ready for distribution to end-users without further development. (Ex. 51 ¶ 4; Ex. 56 ¶ 9; Ex. 87 ¶ 6.) The UnixWare licenses with such distributors did not grant rights to the SVRX prior products because distributors merely replicated and distributed the packaged product as is. (Id.)

III. ROYALTIES FROM UNIX LICENSES

15. Novell, Santa Cruz, and SCO received fees and royalties that UnixWare licensees paid for the rights they obtained under their UnixWare licenses. (Ex. 5 § 1.2(b), Schedule 1.2(b).) The APA requires SCO to remit to Novell "SVRX Royalties" as defined in the APA, less a 5% administrative fee of such Royalties. (Id. § 1.2(b).) The APA gave Novell the right to conduct audits of Santa Cruz and SCO regarding the payment of such Royalties. (Id.)

16. As Novell acknowledges, SCO has the right to enter into amendments of SVRX Licenses and to enter into new SVRX licenses "as may be incidentally involved through its rights to sell and license UnixWare software." (Ex. 5 § 4.16(b); Ex. 22 § J.)

17. The word "incidentally" is not defined in either the APA or its Amendments. Novell's former General Counsel admitted that he has no view "as to what it means for Santa Cruz to license SVRX source code incidentally to UnixWare," and that he thinks the word "incidentally" is "ambiguous" and "not terribly precise." (Ex. 23 at 79.)

18. Similarly, as a company, Novell declined in discovery to take any affirmative position on the meaning of the word "incidentally" in Amendment No. 1. Instead, Novell testified that it "doesn't seem to be a term that needs more explanation" and that Novell "would probably just go to a dictionary and get the language out of that." (Ex. 24 at 78.) On whether the word incorporates the practice whereby the owner of Unix or UnixWare technology would license "older versions of Unix whenever it licensed the most recent version of Unix," Novell testified that it did not have any "knowledge" or "view" on that "one way or the other." (Id. at 79.) In training sessions that followed the closing of the APA, Novell itself communicated to members of the UNIX licensing group that the inclusion of SVRX prior products in UnixWare licenses was permitted as incidental licensing of SVRX. (Ex. 49 ¶ 11.)

19. Santa Cruz did not remit to Novell any of the fees or royalties that Santa Cruz received from any of the UnixWare licenses that Santa Cruz had acquired from Novell in 1995 or into which Santa Cruz entered after 1995. (Ex. 25 at 224; Ex. 26 at 147.) Novell never asked or suggested to Santa Cruz that it should remit any portion of the fees or royalties that Santa Cruz received under any UnixWare license even where SVRX prior products were listed as part of

those licenses. (Ex. 13 ¶¶ 9, 10, 12; Ex. 27 at 282-83; Ex. 51 ¶¶ 9, 13.) Novell held an equity position in Santa Cruz until 1999, and a Novell executive was a member of Santa Cruz's Board of Directors for every year between 1995 and 2000. (Exhibit A to Novell Reply Memorandum in Support of its Motion for Summary Judgment on SCO's First Claim for Slander of Title and Third Claim for Specific Performance (May 25, 2007), Docket No. 338, ¶ 47.) Novell never asked or suggested to Santa Cruz that it should undertake to allocate to the SVRX prior products any value of the fees or royalties that Santa Cruz received under any UnixWare license granting rights to such older versions. (Ex. 13 ¶¶ 9, 10, 12; Ex. 27 at 282-83; Ex. 51 ¶¶ 9, 13.) That was true even though Novell new that Santa Cruz was listing SVRX prior products with its UnixWare licenses because Novell had communicated to Santa Cruz that Novell's practice in that regard should be continued. (See ¶¶ 9-11, above.)

20. In 1998, Novell conducted an audit of Santa Cruz to ensure that Santa Cruz was remitting to Novell all of the royalties to which Novell was entitled under the APA and that Santa Cruz was keeping royalties that Santa Cruz was entitled to under the APA. Novell knew at that time that SCO was licensing UnixWare with prior products listed just as Novell had done, because that was discussed and agreed pursuant to the implementation of Santa Cruz licensing at the time of the transfer. (See ¶¶ 9-11, above.) In the 1998 audit, Novell did not ask Santa Cruz to produce any information regarding the fees and royalties that Santa Cruz received under its UnixWare licensing business. (Ex. 51 ¶¶ 9, 13) In the 1998 audit, Novell did not ask or suggest to Santa Cruz that it should undertake to allocate to the older versions of SVRX any value of the fees and royalties that Santa Cruz received under any UnixWare license granting rights to such older versions. (Id.)

21. Santa Cruz did not believe that it was under any obligation to remit to Novell any portion of the fees or royalties from any UnixWare licenses, because the thresholds for any such payments pursuant to Schedule 1.2 of the APA had not been satisfied. (Ex. 13 ¶ 15; Ex. 25 at 224-25.) SCO did not remit to Novell any of the royalties that SCO received from any of the UnixWare licenses that Santa Cruz had acquired from Novell in 1995 or into which Santa Cruz or SCO entered after 1995, whether or not those licenses included a list of SVRX prior products. (See ¶¶ 12-13, 19, above.)

22. Until 2003, Novell never asked or suggested to SCO that it should remit any of the fees or royalties that SCO received under any UnixWare license. (Ex. 51 ¶¶ 9, 13.) Even including the audit of SCO that Novell conducted in 2003, Novell never asked or suggested to SCO that it should undertake to allocate to the older versions of UNIX any value of the fees or royalties that Santa Cruz received under any UnixWare license granting rights to such older versions. (Id. ¶¶ 9-10; Ex. 25 at 200-01.)

23. SCO did not believe that it was under any obligation to remit to Novell any portion of the fees or royalties from any of the UnixWare business because the thresholds had not been met (and because the term under which the thresholds applied had expired). (Ex. 13 ¶ 15; Ex. 25 at 224-25.) If SCO had believed that there was any prospect that it would have to pay Novell any part of the payments received under the Sun and Microsoft Agreements for the grant of rights to SVRX technology in those Agreements, SCO would not have included those rights in the Agreements. (Ex. 58 ¶ 3.) Indeed, SCO (like Santa Cruz and Novell) routinely included those rights for free (see ¶¶ 11-13, above), and did not regard them as significant components of the Agreements in the first place. (Ex. 56 ¶ 7; Ex. 58 ¶ 3.)

24. UNIX licensees often distributed and used binary products that included code from multiple versions of SVRX, including UnixWare. (Ex. 49 ¶¶ 22-24; Ex. 51 ¶¶ 5-7; Ex, 56 ¶¶ 18-20.) Novell and its successors required (and allowed) such licensees to pay only one set of royalties for the use or distribution of such a product. (Id.) To identify the proper license under which such a product could be used or distributed and to calculate the appropriate royalty payments required for using or distributing such a product, Novell and it successors employed the "one line of code" rule. (Id.)

25. Under that rule, Novell and its successors determined if there was as little as one line of code from the latest version of SVRX code contained in a binary product and calculated royalty payments for that entire product under only that latest license. (Id.) Novell and its successors prohibited licensees from parsing out the relative amounts of code from different versions of SVRX and paying portions of the requisite royalties under multiple SVRX licenses. (Id.)

26. Accordingly, licensees that distributed a UNIX binary product that contained code from SVR 3.0, SVR 4.0, and SVR 4.2 did not pay any SVR 3.0 or SVR 4.0 royalties for distributing that product, but instead paid only SVR 4.2 Royalties (under the terms and prices of an SVR 4.2 license) for distributing that product. (Id.) Similarly, licensees that used a product that contained SVR 3.0, SVR 4.0, and UnixWare 2.0 did not pay any SVR 3.0 or SVR 4.0 royalties for distributing that product, but instead paid only "UnixWare Royalties" (under the terms and prices of a UnixWare 2.0 license) for use of such a product. (Id.)

27. At the time of the SCO source Agreements, SCO believed that code from UnixWare and OpenServer was being improperly used in Linux. (See ¶¶ 53-67, below.)

IV. THE UNISYS LICENSES

28. In the 1980s and early 1990s, before UnixWare was released, Unisys Corporation ("Unisys") had obtained SVRX licenses, including a license to SVR 4.0 MP in 1991. (Exs. 28, 29.) Those Unisys licenses each included a license to a list of SVRX prior products. (Ex. 28 at 10-11; Ex. 29 at 21.)

29. In 1995, Novell licensed UnixWare 2.01 to Unisys through a UnixWare license that also granted a license to the list of SVRX prior products. (Ex. 15 at 26.)

30. In 1996, after the APA, Santa Cruz licensed UnixWare 2.1 to Unisys through a license that also granted a license to a list of SVRX prior products. (Ex. 20 at 24.)

31. Under the UnixWare 2.01 license that it had obtained from Novell, Unisys had created an operating system based on UnixWare 2.01 on which it was required to pay binary per-copy fees each time Unisys sold hardware that included that binary operating system. (Exs. 15, 30.) After Novell transferred that license to Santa Cruz under the APA, Unisys continued to pay those fees to Santa Cruz for at least several years. (Ex. 30, 31.) Novell therefore knew Unisys was paying an ongoing UnixWare royalty stream that continued after the APA. (See Ex. 49 ¶¶ 14-16; Ex. 51 ¶¶ 11-13; Ex. 56 ¶¶ 10-12.)

32. Novell did not ask Santa Cruz for those royalties or any portion of those royalties supposedly attributable to the license to the SVRX prior products included therein, nor did Novell even inquire about those royalties in its 1998 audit of Santa Cruz. (Ex. 51 ¶¶ 9, 13.)

33. **REDACTED**

REDACTED

34. **REDACTED**

35. **REDACTED**

36. Even though Novell itself had granted Unisys the UnixWare 2.01 license including a license to the SVRX prior products, Novell did not audit or request any of the fees reflected in the report, or even any portion of fees supposedly corresponding to the listed SVRX prior products. (Ex. 15; Ex. 51 ¶¶ 3, 9.)

37. Novell did not request or audit such fees even when the question of allocation of fees arose between the parties in 1996. **REDACTED**

38. **REDACTED**

REDACTED

39. In response to the foregoing communications, Novell accepted Santa Cruz's calculation of the royalties payable to Novell under Unisys's SVR 4.0 MP license. (Ex. 49 ¶¶ 20-21.) Novell did not state that Santa Cruz needed to make an allocation of fees for "the UnixWare portion" itself – between UnixWare and the SVRX prior products. (Id.; Ex. 51 ¶¶ 9, 13.) Before 2003, Novell did not request or audit any fees attributable to the SVRX prior products licensed in UnixWare licenses. (Ex. 49 ¶ 21; Ex. 51 ¶ 9.)

V. OPENSERVER

40. SCO owns OpenServer. (Ex. 34.) OpenServer is the brand name for the version of UNIX System V that Santa Cruz developed in the 1980s. (Ex. 8 at 39-40.) Novell has never owned, or had any license to, OpenServer or its predecessors. (Ex. 49 ¶ 28; Ex. 51 ¶ 14; Ex. 56 ¶ 21.)

41. OpenServer was Santa Cruz's flagship product through the 1990s. (Ex. 36 at 117, 121.) OpenServer customers included and include large corporations such as McDonald's. (Ex. 37 at SCO1265967.)

42. OpenServer is a well-established operating system in the market for small- to medium-sized businesses, and is known for its excellent stability, quality, and security. (Ex. 38 at SCO1687209-10.)

VI. AMENDMENT NO. 2 AND ITS BACKGROUND

43. On April 26, 1996, Novell executed an agreement with IBM purporting to grant it a buyout of its obligations to pay SVRX Royalties and to expand its rights to distribute SVRX source code. (Ex. 39.) Novell purported to agree to this buyout agreement on behalf of Santa Cruz and even signed the agreement "for" Santa Cruz without Santa Cruz's consent. (Id.)

44. Although Novell had retained a 95% interest in the binary royalties that IBM was paying, Santa Cruz objected on the grounds that Novell had no right to license source code rights and could not unilaterally grant such buyouts. (Exs. 40-43; Ex. 44 ¶ 33)

45.

REDACTED

46. On October 16, 1996, Novell and Santa Cruz entered into Amendment No. 2. (Ex. 45.) Novell's former General Counsel admitted that "Amendment 2 outlines a procedure that the parties have to follow to enter into buyout agreements subsequent to the execution of

Amendment 2" and that "the language applies only in the context of a buyout," where the "lead" paragraph "references potential transactions which concern a buyout." (Ex. 23 at 137.)

47. Similarly, as explained by Larry Bouffard, the Novell account manager who conceived and oversaw the Novell-IBM buyout and who later became Novell's worldwide sales director for UNIX, the purpose of Amendment No. 2 was to protect Santa Cruz from any further attempts by Novell to grant unilateral buyouts:

> After Santa Cruz learned of the Novell-IBM buyout, Santa Cruz immediately objected. When I visited Santa Cruz's offices, I recall a Santa Cruz representative objecting vehemently to me in person. Novell and SCO proceeded to negotiate Amendment No. 2 to the APA. I understood Amendment No. 2 to preclude Novell from undertaking the precise type of unilateral conduct with respect to the UNIX license agreements that I had undertaken with respect to the IBM-Novell buyout.

(Ex. 44 ¶ 33.) Novell does not contend that the Sun or Microsoft Agreements granted any buyouts of any binary-royalty obligations, because neither agreement included any such buyout. In fact, those agreements could not have granted buyouts of any binary-royalty obligations, since Sun and Microsoft were under no obligation to pay binary royalties as of the execution of the Agreements. (Ex. 18 ¶¶ 11, 19.)

48. In its previous motion for summary judgment on its Fourth Claim, Novell stated:

> Section B of Amendment No. 2 requires the participation of both Novell and Santa Cruz in any prospective buy-out transaction with any SVRX licensee. It also provides that the newly prescribed procedures for managing future buy-outs would not alter the parties' existing source code rights under the APA. These buy-out provisions are not at issue in this motion since Novell's waiver actions vis-à-vis IBM and Sequent do not effectuate such a transaction.

(Novell Memorandum in Support of its Motion for Partial Summary Judgment on its Fourth Claim for Relief (Dec. 1, 2006), Docket No. 175, at 32 (emphasis added).)

49. In its Order dated August 10, 2007, this Court concluded (at 85) that "all of the subparagraphs of paragraph B are limited to buy-out transactions." (SCO's position was and is that the procedural subsections of paragraph B (subsections 1-4 and 6) pertain to potential buy-out transactions, and that subsection 5 constitutes a broader statement of the parties' rights, going beyond the procedure for potential buy-outs. Whatever the Court's view of that particular argument, it has concluded that paragraph B is "limited to buy-out transactions.")

VII. THE SCOSOURCE PROGRAM

50. In January 2003, SCO formally announced the creation of a new division, SCOsource, to protect its intellectual property and expand the licensing of its UNIX technology to authorize use in connection with the Linux operating system. (Ex. 46.) SCO's concern was that technology or derivative technology had been taken from SCO's UNIX operating systems, the latest versions of which were UnixWare and OpenServer, and improperly used to enhance Linux. (Ex. 46; Ex. 47 at 2, 4, 8, 12, 14; Ex. 48 at SCO1275739.) In its initial press release on the program, SCO mentioned both UnixWare and OpenServer as implicated. (Ex. 53.)

51. In its early months, the SCOsource division oversaw the filing of SCO's lawsuit against IBM and the execution of the Sun and Microsoft Agreements, as well as SCO's letter to "Fortune 1000" Linux users explaining that "Linux infringes on our UNIX intellectual property and other rights." (Ex. 50.)

52. In addition to the Sun and Microsoft Agreements, SCO entered into SCOsource agreements with **REDACTED**

REDACTED

(Novell Memorandum in Support of its Motion for Summary Judgment on its Fourth Claim for Relief (Dec. 21, 2007), Docket No. 482, ¶ 17.)

53. During the program, SCO made public statements regarding the technology in Linux. (Exs. 46, 52-55, 57, 59.) In describing its proposed agreements and the SCOsource program, SCO generally referred to the "UNIX" or "UNIX System V" technology it believed was in Linux. (Id.) In making its statements, SCO intended to convey and did convey that both "UnixWare" and "OpenServer" technology might have been improperly included in Linux. (Ex. 8 at 61-62, 63, 70, 75; Ex. 46; Ex. 53.)

54. Novell acknowledged, prior to this litigation, that UnixWare is a UNIX System V operating system. In the 1995 Novell's Guide to UnixWare 2, Novell says that the Guide "provides Novell's authorized guidance to its remarkable UNIX System V Release 4.2 product." (Ex. 60.) The Introduction explains that "[t]he UnixWare 2 version of UNIX System V is showcased in this book" and that "UnixWare is the brand name for Novell's UNIX System V product." (Id. at xxiii-xxvi.)

55. In January 2003, when it announced the SCOsource program, SCO focused on both UnixWare and OpenServer technology in delineating its concern for "UNIX" technology in Linux. SCO CEO Darl McBride explained that "'SCO is the developer and owner of SCO UnixWare and SCO OpenServer, both based on UNIX System V technology'" and that "'SCO

owns much of the core UNIX intellectual property, and has full rights to license this technology.'" The press release goes on to state that "[t]he System V for Linux license will provide access to SCO's UNIX System Shared Libraries," explaining such a license will be provided where "[i]n the past, SCO's UnixWare and OpenServer license agreements did not allow these UNIX libraries to be used outside of SCO's operating systems. With this announcement, customers can now license these libraries from SCO for use with Linux without having to license the entire SCO operating system." (Ex. 46.)

56. In February 2003, SCO created a "SCO System V for Linux Sales Guide." The document repeatedly refers to SCO's concern that "UnixWare" and "OpenServer" technology has been improperly used in Linux. (See, e.g., Ex. 47 at 2, 4, 8, 12, 14.) In referring generally to "SCO System V," SCO thus was including both OpenServer and UnixWare.

57. The February 2003 Sales Guide further underscored the point in its section on "Frequently Asked Questions about SCO System V for Linux":

> **1. Why is SCO creating the SCO System V for Linux product?**
>
> SCO has a large amount of intellectual property in its shared libraries that are required to run UNIX applications on top of Linux. We are simply asking vendors, developers, and customers who make use of these libraries to pay a reasonable software-licensing fee to SCO in order to use these libraries.
>
> **2. What are these SCO shared libraries called? How can they be identified?**
>
> In SCO OpenServer as an example, there is a directory named "/shlib" which stands for shared libraries. This is the directory that is copied into Linux and allows UNIX applications to then be run on Linux. The director may be called /shlib on Linux, but it can also appear as /emul/osr5.shlib. UnixWare libraries, which are located in directories like /usr/lib And /lib in UnixWare, would be in similarly named directories under /emul/uw7.

(Id. at 16 (emphasis added).) The document shows that SCO thus was referring specifically to both UnixWare and OpenServer.

58. Other SCO documents further confirm that in referring to System V and/or UNIX in a variety of contexts, SCO included UnixWare and OpenServer. In a December 2002 press release discussing SCOsource, SCO stated: "SCO's shared libraries are frequently used by customers to allow UNIX applications to run on the Linux OS. In the past, SCO's UnixWare and OpenServer license agreements never allowed these UNIX libraries to be separated from the operating systems." (Ex. 53 at SCO1270121 (emphasis added).) In a December 2002 slide presentation, in describing the proposed "SCO System V for Linux" deliverable, SCO identified "SCO's shared UNIX Libraries from OpenServer and UnixWare for use with Linux." (Ex. 48 at SCO1275739 (emphasis added).)

59. SCO's July 2003 press release regarding the SCOsource Agreements conveyed both that the program consisted of offering counterparties UnixWare licenses and that SCO's references to "UNIX" and "UNIX System V" reflected that fact. The first paragraph states:

> The SCO Group today announced that it has received U.S. copyright registrations for UNIX System V source code, a jurisdictional pre-requisite to enforcement of its UNIX copyrights. The company also announced it will offer UnixWare licenses tailored to support run-time, binary use of Linux for all commercial users of Linux based on kernel version 2.4.x and later. SCO will hold harmless commercial Linux customers that purchase a UnixWare license against any past copyright violations, and for any future use of Linux in a run-only, binary format.

(Ex. 57 (emphasis added).)

60. The contemporaneous documents demonstrate that the "SCOsource Linux Licensing Program" was designed and executed to be a UnixWare binary license. **REDACTED**

REDACTED

61. In addition, SCO charged licensees the same per-CPU prices for a SCOsource Agreement as it did for a UnixWare business edition binary license. (Compare Ex. 62 at SCO149255 with Ex. 63 at SCO 1551873.)

62. Chris Sontag is the former SCO executive who oversaw the SCOsource program with Mr. McBride. (See, e.g., Ex. 8 at 71-72.) Mr. Sontag repeatedly testified that, in describing the scope of the program, SCO always intended to include UnixWare as technology that had been improperly contributed to Linux. (Id. at 61-62, 63, 70, 75.) Mr. Sontag further testified that those public statements corresponded to SCO's intent to include UnixWare technology within the scope of the SCOsource, Sun, and Microsoft Agreements themselves. (Id.)

63. Mr. Sontag explained with respect to SCOsource, for example, that "when you're licensing intellectual property, you're licensing the most recent extantiation of that intellectual property. In my view that would be the last version of UnixWare at the time. And as part of

that, we would also be providing a license to all the precedent of that intellectual property." (Id. at 30-31; accord id. at 40-43 (Mr. Sontag offers the same testimony with respect to the language of a January 2003 press release in particular).)

64. Mr. Sontag explained that "one of the underlying purposes of SCOsource" was "to license the most recent versions of our intellectual property," which he identified as UnixWare and OpenServer. (Id. at 32.) He further explained that "a standard practice of SCO and all of its predecessors, when licensing the UNIX intellectual property, was to license all the previous versions when you provide that license." (Id.) He explained that "[g]iven that it's part of the UnixWare and OpenServer intellectual property," then older UNIX System V technology "is part of what would be licensed" under the program. (Id. at 32-33.)

65. Mr. Sontag explained, with reference to a January 2003 press release, that the "SCO System V for Linux licenses" was a reference to "UnixWare OpenServer [sic] run-time libraries being made available to Linux users who wanted to be able to incorporate those libraries into their Linux operating system to allow for better application compatibility of those UNIX applications on top of a Linux operating system." (Id. at 44-45.)

66. With reference to the "Fortune 1500" letter that SCO sent as part of the SCOsource program, Mr. Sontag testified regarding the references to "UNIX" and "UNIX System V" in the letter that "we felt that the overall description of UNIX as owned by SCO applied to both UnixWare and OpenServer, and all of the preceding technologies that went into them." (Id. at 61.) He explained that the references to "UNIX System V" in the document are "just a label for our overall UNIX intellectual property ownership," that "the way I view that we are using the term 'UNIX System V' or 'UNIX' is also encompassing UnixWare and OpenServer." (Id. at 61-

62; accord id. at 62-63.) Mr. Sontag gave the same testimony regarding the similar, general references in subsequent SCO press releases and letters. (Id. at 69-70, 75-78.)

67. Mr. Sontag explained that SCO used a general reference to "UNIX" or "UNIX System V" rather than a reference to all of the previous names for types of UNIX, including the brand names "UnixWare" and "OpenServer," for "brevity" and because SCO "[d]idn't believe it was necessary" to make the longer reference. (Id. at 75, 78.)

68. SCO's Intellectual Property Compliance License Agreement for Linux with Questar Corporation ("Questar"), executed by Questar on December 19, 2003, and by SCO on January 16, 2004, is typical of the other SCOsource agreements. (Ex. 64.) To the best of SCO's knowledge, Questar does not distribute the Linux operating system and has neither developed any version of UNIX nor sold any version of UNIX. (Ex. 49 ¶ 28.)

69. Questar understood the release in the Agreement to be for any claims SCO might have against Questar for using any SCO intellectual property in Linux. (Ex. 65 at 9-10.) Questar and SCO intended that SCO's release pertained only to Questar's use of any SCO intellectual property in Linux, not separate from or in operating systems other than Linux. (Id. at 19-20, 44.)

70. Questar neither understood nor intended that it could use however it wanted any of the SCO intellectual property that was in Linux. (Id. at 49-50.) Questar has no view as to whether SCO has released any claims for any source code in Linux taken from any particular release of UNIX. (Id. at 13-14, 43-44

71. In 2005, SCO discontinued the SCOsource program. (Ex. 66 ¶ 2.)

VIII. "SVRX LICENSES" AND "CLAIMS" UNDER THE APA

72. Novell transferred "SVRX Licenses" to Santa Cruz under the APA and retained certain rights with respect to such Licenses. (Ex. 5 § 4.16(b).) The Court noted in its August 10 Order that there is some ambiguity in the APA's attempt to define "SVRX Licenses"; the Court concluded that "SVRX Licenses are all licenses relating to the software releases listed in Item VI" and "the natural meaning of SVRX License includes any license to the listed SVRX releases." Novell and Santa Cruz also entered into a Technology License Agreement ("TLA") with the APA. (Ex. 67.) In the TLA, Santa Cruz licensed back to Novell the trade secrets, know-how, and methods and concepts in the UNIX and UnixWare source code that Novell had transferred to Santa Cruz under the APA. (Ex. 5 § 1.6; Ex. 67 § II.A; Novell's Memorandum in Support of Novell's Motion for Summary Judgment on SCO's First Claim for Slander of Title and Third Claim for Specific Performance (Apr. 20, 2007), Docket No. 286, at 31.)

73. Novell also transferred to Santa Cruz the following assets (among others): "All of Seller's claims arising after the Closing Date against any parties relating to any right, property or asset included in the Business." (Ex. 5 Schedule 1.1(a), Section II.)

74. The rights, property, and assets included in the Business included "all versions of UNIX and UnixWare and all copies of UNIX and UnixWare (including revisions and updates in progress" (id., Section I), "all technical, design, development, installation, operation and maintenance information concerning UNIX and UnixWare, including source code" (id.), and "All copies of UNIX and UnixWare, wherever located, owned by Seller" (id., Section III). Novell also transferred to Santa Cruz the following assets (among others): "All of Seller's claims arising after the Closing Date against any parties relating to any right, property or asset

included in the Business." (Ex. 5, Schedule 1.1(a), Section II.) Santa Cruz, in turn, transferred all such claims to SCO. (Ex. 88 § 1 (vi)-(vii).) In its Order dated August 10, 2007, this Court also concluded (at 55) that SCO received "ownership" rights. SCO therefore owned any claims arising after 1995 for the unauthorized use of any intellectual property from the UNIX or UnixWare source code.

IX. NOVELL AND THE SCOSOURCE PROGRAM

75. In late 2002, SCO and Novell engaged in several telephone conversations concerning SCO's plans to protect its intellectual property in Linux through agreements for Linux users. (Exs. 68-70.) SCO asked Novell, whom SCO of course knew was a predecessor-in-interest in the UNIX business, to "perform due diligence on UNIX intellectual property" before SCO launched the SCOsource program. (Ex. 70.) Specifically, SCO asked for documents "to understand its IP rights" for purposes of "IP tracking" and for "documents that help give the history of SCO's rights to UNIX." (Exs. 68, 69.)

76. SCO did not ask Novell for permission to enter into the contemplated agreements for Linux users, explaining that it was going to license its UNIX intellectual property to those who were using Linux. (Exs. 69, 70.) Novell did not tell or suggest to SCO that such agreements were SVRX Licenses under the APA, that Novell needed to approve them, or that SCO needed to remit revenues from those agreements to Novell. (Exs. 68-71; Ex. 72 at 185-188.) In fact, Novell internal emails enumerate Novell's responses to SCO's requests for "documents" or "due diligence" without any reference to or discussion of any asserted rights to dictate the terms of the contemplated agreements or to any payments thereunder. (Exs. 68, 69.) Novell was firm that it

was not interested in providing the requested information to SCO and that it had no "interest" in participating whatsoever in SCO's proposed program. (Exs. 70, 71.)

77. In his November 20, 2002, email to Jim Lundberg and Josepha LaSala, Novell Associate General Counsel Greg Jones recounted his conversation of earlier that day with Darl McBride, the CEO of SCO, in which Mr. McBride asked for "Novell documents that help give the history of SCO's rights to UNIX." (Ex. 69.) Mr. Jones reported that in response he "advised Darl that: 1. Novell carefully considers any request for information in support of a third party's litigation activities; and 2. As he expressed a specific interest in agreements between Novell and UNIX System Laboratories, to the extent any such documents are not publicly available through EDGAR, they would probably be subject to confidentiality agreements." (Id.)

78. In his December 4, 2002, email to several Novell employees, Mr. Jones reported on his follow-up conversation with Mr. McBride of earlier that day, in which "Darl reiterated his request for Novell's assistance" with "due diligence." (Ex. 70.) Mr. Jones reported that he and another Novell employee, David Wright, had declined the request by offering four reasons enumerated and specifically described in the email. None of those reasons were remotely related to the parties' rights under the APA. (Id.)

79. Indeed, as in the email of November 20, 2002, Mr. Jones did not report that SCO asked Novell for permission to enter into the contemplated SCOsource agreements, or that Novell had told SCO that such agreements would be SVRX Licenses under the APA, that Novell needed to approve them, or that SCO would be obligated to remit revenues from those agreements to Novell. (Exs. 69, 70.) In his deposition, Mr. Jones confirmed that he had not told SCO anything other than some of the points enumerated in the foregoing internal emails. (Ex. 72 at 185-88.)

80. During his conversations with Novell in late 2002, Mr. McBride pointed out to Mr. Jones that SCO's efforts to enforce its intellectual property in Linux would indirectly help the sale of the various UNIX flavors that compete with Linux in the marketplace. Mr. McBride explained that a boost in the sale of such UNIX products would potentially increase the declining SVRX Royalty stream that SCO remitted to Novell from contracts that licensed out the older products. (Ex. 70; Ex. 73 at 243-44.)

81. Novell clearly considered the nature and scope of the program SCO had described – as reported in a Novell internal email of December 4, 2002, for example, Mr. Jones and Mr. Wright responded to Mr. McBride by explaining that "any increase" in revenues to Novell "would not necessarily occur and the amount would likely not be significant to Novell." (Ex. 70.)

82. Novell concedes that its contacts with SCO in 2002 "at least suggested to us [Novell]" that "SCO's intention" was to "collect license revenue from vendors for licenses associated with SVRX code." (Ex. 74 at 86-87.) During this time, moreover, Novell had an active interest in becoming directly involved in Linux. Mr. Jones explained to his colleagues on December 4, 2002, for example, that during his and Mr. Wright's conversation with Mr. McBride that day, "We did not mention in any way Novell's own interest in becoming more active in the Linux area in a more direct manner." (Ex. 70.)

83. In its Fourth Claim in its Amended Counterclaims, among other requests for declaratory relief, Novell seeks a declaration "that SCO had no authority to enter into the Sun and Microsoft SVRX Licenses, as well as the Intellectual Property Licenses with Linux end users and UNIX vendors." (Novell's Amended Counterclaims ¶ 123.)

X. THE MICROSOFT AGREEMENT

84. On April 30, 2003, SCO and Microsoft entered into a "Release, License and Option Agreement" (the "Microsoft Agreement"). (Ex. 75.) Although it had previously licensed earlier versions of UNIX, Microsoft was not a UNIX (either UnixWare or OpenServer) licensee at the time of the Agreement. (Ex. 11 ¶ 35.)

85. **REDACTED**

86. **REDACTED**

87. **REDACTED**

88. **REDACTED**

89. **REDACTED**

90. **REDACTED**

91. **REDACTED**

92. **REDACTED**

93. **REDACTED**

94. **REDACTED**

REDACTED

XI. THE SUN AGREEMENT

95. On February 25, 2003, Sun and SCO entered into a "Software Licensing Agreement" (the "Sun Agreement" or "2003 Sun Agreement"). (Ex. 80.) At that time, Sun was a licensee of the older UNIX technology and had developed its own version of UNIX, called Solaris. (Ex. 49 ¶ 25.) Sun had never obtained a license to UnixWare; instead, in 1994, Sun had entered into a Software License and Distribution Agreement with Novell. (Id.; Ex. 81.)

96. In the 1994 agreement, **REDACTED**

97. **REDACTED**

REDACTED

98. **REDACTED**

99. **REDACTED**

100. **REDACTED**

101. **REDACTED**

102. **REDACTED**

103. **REDACTED**

A driver, also known as a device driver, is a file that contains information needed by a program to operate a device such as a hard disk or internet connection. (Ex. 49 ¶ 26; Ex. 87 ¶ 8.) Without the drivers that work with a particular operating system, a person or company in effect cannot use the operating system for any conventional tasks. Without the drivers for a hard disk or internet connection, for example, the operating system cannot be used for any task that requires a hard disk or an internet connection. (Id.) With respect to a business, the drivers are thus a prerequisite for the operating system to have any utility for conventional business purposes. (Id.) **REDACTED**

104. **REDACTED**

105. Sun's public statements reflect its view that the Sun Agreement primarily concerned the drivers. In 2003, for example, current Sun CEO Jonathan Schwartz stated with respect to the 1994 and 2003 Agreements:

> We took a license from AT&T initially for $100 million as we didn't own the IP. The license we took also made clear that we had rights equivalent to ownership. When we did the deal with SCO earlier this year we bought a bunch of drivers and when we give money to a company oftentimes we get warrants, which is part of the negotiations. I have warrants in 100 different companies, we have a huge venture portfolio.

(Ex. 83 (emphasis added).)

106. **REDACTED**

107. **REDACTED**

REDACTED

108. **REDACTED**

109. **REDACTED**

XII. STAND-ALONE LICENSES FOR OLDER UNIX TECHNOLOGY

111. It has been many years, in some cases more than two decades, since SCO or its predecessors-in-interest (including Novell) have entered into stand-alone licenses for the older UNIX (including SVRX) technology to which SCO has granted licenses as prior products in UnixWare licenses such as the Sun and Microsoft Agreements. (See ¶¶ 112-113, below; Ex. 49, Attachment A, B.)

112. With respect to some versions of UNIX, such as UNIX/32V Time-Sharing System, Version 1.0, the product has not been separately licensed since 1982. (Ex. 49, Attachment A, B.)

UNIX System V, Releases 1 and 2 have not been separately licensed since the late-1980s. (Id.) UNIX System V, Releases 3 and 4 have not been separately licensed since the late 1980s or early 1990s. (Id.)

113. As separate operating systems, the older versions of UNIX are not marketable to consumers because those earlier versions do not take advantage of hardware enhancements made to new processors and peripherals adopted by computer manufacturers. (Ex. 49 ¶ 5; Ex. 56 ¶ 5; Ex. 87 ¶ 5.) The current version of UnixWare includes the important parts of the prior versions of UNIX coupled with modifications that take advantage of improvements made to computer systems by hardware manufacturers. (Id.) As a practical matter, purchasers would not have the option to purchase the hardware on which the older versions of UNIX had run because computer manufacturers have adopted the newer hardware. (Id.) Given the market realities, it would not be practical to run an older version of the UNIX operating system on a newer system. (Id.)

ARGUMENT

I. LEGAL STANDARD ON SUMMARY JUDGMENT

"Summary judgment should not be granted unless the evidence, viewed in the light most favorable to the party opposing the motion, shows there are no genuine issues of material fact and the moving party is due judgment as a matter of law." Blackhawk-Cent. City Sanitation Dist. v. Am. Guar. & Liab. Ins. Co., 214 F.3d 1183, 1188 (10th Cir. 2000). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). "The evidence of the non-movant is to be believed, and all justifiable inferences are

to be drawn in his favor." Id. This Court has often recognized these principles.[1] The Tenth Circuit also has often cited and applied them.[2]

II. NOVELL IS NOT ENTITLED TO ANY DECLARATION ON THE ALLEGED MERITS OF ITS FOURTH CLAIM

A. An "SVRX License" Is Not Any Contract That Relates to SVRX.

An agreement must be construed as a whole, Nish Noroian Farms v. Agric. Labor Relations Bd., 35 Cal. 2d 726, 735 (1984), and interpreted practically to give effect to every provision, Cal. Civ. Code § 1641. Extrinsic evidence is admissible to support interpretations to which the language is reasonably susceptible and to demonstrate the parties' intent under ambiguous provisions. Dore v. Arnold Worldwide, Inc., 39 Cal. 4th 384, 391 (2006).

The Court noted in its August 10 Order that there is some ambiguity in the APA's attempt to define "SVRX Licenses"; the Court concluded that "SVRX Licenses are all licenses

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[1] See, e.g., Williams v. Tim Dahle Imports, Inc., No. 2:03CV46 DAK, 2007 WL 752170, at *1 (D. Utah Mar. 7, 2007) (Ex. F.) (all inferences drawn in favor of non-moving party); McReynolds v. Wynn, No. 2:05CV122 DAK, 2006 WL 456256, at *2 (D. Utah Feb. 23, 2006) (Ex. C.) (same); Canopy Corp. v. Symantec Corp., 395 F. Supp. 2d 1103, 1110-11 (D. Utah 2005) (credibility determinations are for trial, not summary judgment); Solutions Int'l, LLC v. Aloe Commodities Int'l, Inc., No. 2:04CV314 DAK, 2005 WL 1866159, at *1 (D. Utah Aug. 5, 2005) (Ex. D.) (all inferences drawn in favor of non-moving party); Techni-Graphic Servs., Inc. v. Majestic Homes, Inc., No. 2:02CV923 DAK, 2005 WL 357208, at *3-4 (D. Utah Feb. 11, 2005) (Ex. E.) (credibility determinations are for trial, not summary judgment); Granieri v. Burnham, No. 2:03 CV 771 DAK, 2004 WL 966300, at *4 (D. Utah Apr. 28, 2004) (Ex. B.) (all inferences drawn in favor of non-moving party); Allen v. H.R. Wagstaff Co., No. 2:96CV119K, 2000 WL 33347723, at *3 (D. Utah Feb. 27, 2000) (Ex. A.) (court does not weigh the evidence on summary judgment); Cooperative Communications, Inc. v. AT&T, 31 F. Supp. 2d 1317, 1319 (D. Utah 1999) (same).

[2] See, e.g., Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133, 1149-50 (10th Cir. 2005); Marcus v. McCollum, 394 F.3d 813, 820-23 (10th Cir. 2004); Brooks v. Barnhart, 78 Fed. Appx. 52, 54-55 (10th Cir. 2003); Stinnett v. Safeway, Inc., 337 F.3d 1213, 1216-19 (10th Cir. 2003); Garrett v. Hewlett-Packard Co., 305 F.3d 1210, 1222 (10th Cir. 2002); Foster v. AlliedSignal Inc., 293 F.3d 1187, 1194-96 (10th Cir. 2002); Mason v. Butcher Shop Steakhouse, 48 Fed. Appx. 221, 222 (10th Cir. 2002); First Sec. Bank of N.M. v. Pan Am. Bank, 215 F.3d 1147, 1154 (10th Cir. 2000); Corneveaux v. Cuna Mut. Ins. Group, 76 F.3d 1498, 1504 (10th Cir. 1996); see also Olsen v. Layton Hills Mall, 312 F.3d 1304, 1313-30 (10th Cir. 2002) (disputed issues of fact precluded summary judgment).

relating to the software releases listed in Item VI" and "the natural meaning of SVRX License includes any license to the listed SVRX releases." (¶ 72.) Novell ignores plain language in the APA and in the Court's Order in arguing (at 8) that "licenses that excuse a company's purported past and future infringement of SVRX copyrights are 'SVRX Licenses' within the meaning of the APA" and (at 9) any "litigation-avoidance agreement" must be a "license." The mechanism by which the SCOsource Agreements and relevant portions of the Sun and Microsoft Agreements "excuse" those counterparties' possible infringement is a "release," and there is a plain difference in how releases as opposed to "SVRX Licenses" must be treated under the APA.

Among the assets Novell transferred to Santa Cruz were all "claims arising after the Closing Date against any parties relating to any right, property or asset included in the Business." (¶ 73.) The rights, property and assets included in the Business included all copies of the UNIX and UnixWare source code and any trade secrets, know-how, and methods and concepts in the UNIX source code. (¶ 74.) In its Order dated August 10, 2007, this Court also concluded (at 55) that SCO received "ownership" rights. (Id.) SCO therefore owned any claims arising after 1995 for the unauthorized use of any intellectual property from the UNIX or UnixWare source code. There is no language in the APA even suggesting that SCO could not waive such claims.

In addition, the terms of the 1995 Technology License Agreement ("TLA") defeat Novell's argument that "SVRX Licenses" includes even any "license" relating to the SVRX releases. In the TLA, Santa Cruz licensed back to Novell the trade secrets, know-how, and methods and concepts in the SVRX source code that Novell had transferred to Santa Cruz under the APA. (¶ 72.) The TLA thus is a license relating to the SVRX releases listed in the APA. If Novell's interpretation were correct, then under Section 4.16(b) of the APA Novell could have

breached the TLA but then simply required Santa Cruz or SCO to waive the breach. Novell has never asserted that its waiver rights extend to the TLA, and the Court concluded in its summary judgment order that SCO's claim for Novell's breach of the TLA may proceed in part. The TLA alone thus demonstrates that not any contract relating to SVRX was intended to constitute an SVRX License.

B. The SCOSource Agreements Are Not "SVRX Licenses".

1. The Origins of the SCOsource Program.

The linchpin of Novell's argument that the SCOsource Agreements concern only "SVRX" rights and not UnixWare rights as those terms are used in the APA is Novell's unsupportable and inaccurate assertions that (at 2) "SCO has never claimed SCOsource had anything to do with SCO's UnixWare derivative rights," that (at 5) "[f]rom start to finish, SCO never claimed SCOsource had anything to do with SCO's UnixWare derivative rights, and any attempt by SCO to recast SCOsource now should fail," and that (at 6) "there can be no debate that SCOsource is, fundamentally, a program to license Novell's SVRX rights."[3] It follows that if Novell is wrong about those assertions, it is wrong about its characterization of the SCOsource program and the concomitant SCOsource Agreements. And it is.

Contrary to Novell's arguments, SCO was concerned that technology had been taken from OpenServer and UnixWare and improperly used in Linux, and the contemporaneous

[3] Novell asserts (at 5) that the Court has "observed" that "SCOsource was, fundamentally, a campaign to exact licensing revenue based on SCO's now-rejected claim to own the SVRX copyrights." In the portion of the Court's Order dated August 10, 2007, to which Novell refers, the Court states (at 29) that SCOsource "was an effort to obtain license fees from Linux users based on claims to Unix System V intellectual property." There is no citation to the statement, nor any indication if by "Unix System V" the Court somehow meant to exclude the UNIX System V operating systems UnixWare and OpenServer or the other "ownership" rights, including trade secrets, that the Court has found SCO owns.

documents – belying Novell's allusions to any SCO attempt to "recast" its concerns at the time – show that to be true. (¶¶ 50-70.) Novell cites SCO's general allusions to "UNIX" and "UNIX System V" at the time, but UnixWare and OpenServer are both "UNIX" and specifically "UNIX System V" operating systems. (¶¶ 2, 3, 54.) Indeed, prior to this litigation Novell acknowledged in its own UnixWare Guide that UnixWare is a "version of UNIX System V." (¶ 54.) The documents reflecting SCO's concerns at the outset and pendency of SCOsource specifically and repeatedly show that SCO was focused on UnixWare and OpenServer technology in Linux. (¶¶ 50-67.)

SCO's July 2003 press release regarding the SCOsource Agreements, for example, conveyed both that the program comprised UnixWare licenses and that SCO's references to "UNIX" and "UNIX System V" reflected that fact. The first paragraph states:

> The SCO Group today announced that it has received U.S. copyright registrations for UNIX System V source code, a jurisdictional pre-requisite to enforcement of its UNIX copyrights. The company also announced it will offer UnixWare licenses tailored to support run-time, binary use of Linux for all commercial users of Linux based on kernel version 2.4.x and later. SCO will hold harmless commercial Linux customers that purchase a UnixWare license against any past copyright violations, and for any future use of Linux in a run-only, binary format.

(¶ 59.) The first sentence illustrates SCO's synonymous use of "UNIX System V" and "UNIX." The second sentence reinforces that the SCOsource Agreements are "UnixWare" licenses. (The third sentence confirms that the agreement to "hold harmless" – which Novell claims to partially constitute an "SVRX License" – is incidental to the UnixWare license.)

2. SCO's Right to Release Its Claims.

In the SCOsource Agreements, SCO releases any claims against Linux users for the unauthorized use in Linux of any intellectual property from UNIX or UnixWare. (¶¶ 68-70.) Where SCO had the right to pursue such claims under the APA, including possessing "ownership" rights (¶¶ 72-74), it also had the right to release them.[4] The primary question is not whether releases and licenses are the same or different in some academic sense, but rather whether the parties to the APA intended a release of the claims to which SCO had the rights to be equivalent to a license of technology. As a matter of contract interpretation, courts have emphasized that "[i]t is important to differentiate between the Agreement's release and license provisions." Dogloo, Inc. v. Doskocil Mfg. Co., 893 F. Supp. 911, 920 (N.D. Cal. 1995). The plain text of the APA shows that they did not so intend. In addition, a release is not the same as a license. In contrast to a release, for example, the granting of a license does not preclude lawsuits for accrued damages for past infringement. See, e.g., Schering Crop. v. Rousell-UCLAF SA, 204 F.3d 341, 345 (Fed. Cir. 1997).[5]

Further, to the extent there is licensing of rights in the SCOsource Agreements, that portion of those Agreements is entirely different from the "SVRX Licenses" that Novell transferred in 1995. Whereas the transferred SVRX Licenses gave the licensees the rights to use

[4] That is true regardless of the Court's subsequent ruling on summary judgment regarding the scope of SCO's ownership rights.

[5] The lone case Novell cites does not remotely say otherwise. In Evolution, Inc. v. Prime Rate Premium Fin. Corp., No. 03-2315-KHV, 2004 U.S. Dist. LEXIS 25017, at *15 (D. Kan. Aug. 13, 2004) (Ex. G.), the court denied cross-motions for summary judgment on a copyright infringement claim, noting that "the existence of a license, exclusive or non-exclusive, creates an affirmative defense to a claim of copyright infringement." The court addresses the nature of a license, but does not address, let alone define, the nature of a release. In fact, neither of the parties in Evolution purported to have entered into a release or invoked such a defense to the copyright infringement claim at issue.

and modify the SVRX source code to create royalty-bearing UNIX derivatives, SCOsource licensees did not have the right to use or modify any UNIX source code to create any such derivatives, and there is no evidence that any SCOsource counterparties with SCO sought to do so. (¶ 68.) In fact, the SCOsource Agreements did not give any licensee the right to use any UNIX intellectual property apart from binary code in Linux. (¶¶ 68-70.)

3. The Parties' Course of Performance.

The question of whether parts of the Agreements at issue constitute "SVRX Licenses" further exposes ambiguity in the meaning of that term. Novell's argument that the SCOsource Agreements constitute "SVRX Licenses" contradicts the parties' course of performance. The California Supreme Court has emphasized the "familiar rule that when a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by the court." Universal Sales Corp., Ltd. v. Cal. Press Mfg. Co., 128 P.2d 665, 671-72 (Cal. 1942) (citations omitted); accord Crestview Cemetery Ass'n v. Dieden, 356 P.2d 171, 176-77 (Cal. 1960); Hernandez v. Badger Constr. Equip. Co., 28 Cal. App. 4th 1791, 1814-15 (1994).

The court in Universal Sales emphasized that "a practical construction placed by the parties upon the instrument is the best evidence of their intention." 128 P.2d at 672; accord Crestview, 356 P.2d at 176-77. The court in Universal Sales reasoned:

> Parties are far less liable to have been mistaken as to the intention of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law, and one of them then seeks a construction at variance with the practical construction they have placed upon it.

Id.; accord Crestview, 356 P.2d at 176-77; S. Cal. Edison, 37 Cal. App. 4th at 850-51 (further explaining that one party's practical interpretation of the contract is relevant extrinsic evidence in addition to the "joint conduct of the parties in the course of performance of the contract"); Hernandez, 28 Cal. App. 4th at 1814-15 & n.19.

UNIX licensees often distributed and used binary products that included code from multiple versions of SVRX, including UnixWare. Novell and its successors required such licensees to pay only one set of royalties for the use or distribution of such a product. To identify the proper license under which such a product could be used or distributed and to calculate the appropriate royalty payments required for using or distributing such a product, Novell and it successors employed the "one line of code" rule. (¶ 24.) Under that rule, Novell and its successors required licensees to identify the latest version of SVRX code contained in a binary product – even if there was as little as one line of code from that version – and calculate royalty payments for that entire product under only that latest license. (¶ 25.) Novell and its successors prohibited licensees from parsing out the relative amounts of code from different versions of SVRX and paying portions of the requisite royalties under multiple SVRX licenses. (Id.)

Accordingly, licensees that distributed a UNIX binary product that contained code from SVR 3.0, SVR 4.0, and SVR 4.1 did not pay any SVR 3.0 or SVR 4.0 royalties for distributing that product, but instead paid only SVR 4.1 Royalties (and thus SVR 4.1 prices) for distributing that product. (¶ 26.) Similarly, licensees that used a product that contained SVR 3.0, SVR 4.0, and UnixWare 2.0 did not pay any SVR 3.0 or SVR 4.0 royalties for distributing that product, but instead paid only "UnixWare Royalties" (under the terms and prices of a UnixWare 2.0 license) for use of such a product. (Id.)

When SCO started and while it pursued the SCOsource program, it believed that UnixWare code was being improperly used in Linux. (¶ 27.) Accordingly, consistent with the parties' course of performance, payments for the use of Linux were to be calculated as UnixWare royalties (and UnixWare royalties only) under Novell's "one line of code" rule. Indeed, the contemporaneous documents – drafted before SCO entered into any of the SCOsource Agreements – demonstrate that the "SCOsource Linux Licensing Program" was designed and executed to be a UnixWare binary license, and the pricing of the SCOsource Agreements was exactly the same as the per-CPU pricing for SCO's UnixWare binary licenses. (¶¶ 60-61.) Novell thus improperly asks the Court to abrogate Novell's own "one line of code" rule – that would require all payments for the use of Linux to be calculated as "UnixWare Royalties" only – and instead characterize the SCOsource payments as SVRX Royalties.

In addition, UnixWare is simply the brand name for the latest version of UNIX System V; UnixWare encompasses the SVRX operating systems. (¶¶ 1-3.) Accordingly, in order to prove that SCO lacked the authority to enter into the SCOsource Agreements, Novell would have to demonstrate that SCO afforded Linux users the right to use SVRX technology that was not included in any version of UnixWare and was included in Linux. Novell fails to adduce any evidence even suggesting any such category of technology.

It bears emphasis, moreover, that Novell's own conduct belies its claim that these Agreements constitute "SVRX Licenses." SCO asked Novell, as a predecessor-in-interest in the UNIX business, to "perform due diligence on UNIX intellectual property" and to assist and participate in the program before SCO launched the SCOsource program. (¶¶ 75-82.) SCO did not ask Novell for permission to enter into the contemplated agreements, because it did not

believe there was any need to do so. Just as importantly, despite several opportunities to do so, Novell did not claim that such agreements were SVRX Licenses, that Novell needed to approve them, that SCO did not have the authority or right to enter into such agreements, or that SCO needed to remit revenues from them. Nor did SCO even suggest that Novell would receive any fees paid under the contemplated Agreements. (¶¶ 76-82.) Instead, after deliberation, Novell simply stated that it had no "interest" in participating in the program and that Novell would not receive any certain or direct financial benefit from the payments SCO received. (¶¶ 76-81.)

C. The Microsoft and Sun Agreements Are "SVRX Licenses" Only in Part.

1. The Microsoft Agreement.

Novell argues otherwise (at 7), but this Court has not held that the Microsoft Agreement is an "SVRX License" in its entirety. The question of what portion of the Agreement constitutes an "SVRX License," and of its comparative importance to the other components of the Agreement, is an issue this Court has not resolved and has been set for trial.

REDACTED

In addition, Novell has made no showing of any SVRX technology, let alone the prior SVRX products, in any Microsoft product. Novell has previously asked the Court to draw inferences from SCO's public assertions regarding intellectual property in Linux – which statements in any event clearly concerned UnixWare and OpenServer – but that does not bear on what technology may or may not be included in Microsoft's proprietary products. To the contrary, **REDACTED**

REDACTED

2. The Sun Agreement.

REDACTED

REDACTED

Novell therefore is not entitled to its requested declaration as it pertains to the SCOsource Agreements; Sections 2 and 3 of the Microsoft Agreement; or Sections 10, 12, and 13 of the Sun Agreement, because those parts of the agreements are not SVRX Licenses.

D. The Microsoft and Sun Agreements Licensed SVRX Products "Incidentally" to UnixWare.

With respect to the limited parts of the Agreements that do constitute, in part, an SVRX License – Section 4 of the Microsoft Agreement and Section 4 of the Sun Agreement – SCO had the authority to enter into those types of SVRX Licenses. Novell acknowledges that under Amendment No. 1 to the APA, SCO has the right to enter into amendments of SVRX Licenses and to enter into new SVRX licenses "as may be incidentally involved through its rights to sell and license UnixWare software." (¶ 16.)

1. The Meaning of "Incidentally".

The word "incidentally" is not defined in either the APA or its Amendments. Novell's former General Counsel admitted that he has no view "as to what it means for Santa Cruz to license SVRX source code incidentally to UnixWare," and that he thinks the word "incidentally" is "ambiguous" and "not terribly precise." (¶ 17.) Similarly, as a company, Novell declined in discovery to take any affirmative position on the meaning of the word "incidentally" in Amendment No. 1. Instead, Novell testified that it "doesn't seem to be a term that needs more explanation" and that Novell "would probably just go to a dictionary and get the language out of that." (¶ 18.) On whether the word incorporates the practice whereby the owner of UNIX or UnixWare technology would license "older versions of Unix whenever it licensed the most recent version of Unix," Novell testified that it did not have any "knowledge" or "view" on that "one way or the other." (Id.) Indeed, in its motion, Novell makes no effort at all to define what

"incidentally" means. Instead, Novell assumes that whatever the term means, there cannot be "incidental" licensing here.

"'Incidental' obviously means depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal, something incidental to the main purpose." Kelly v. Hill, 104 Cal. App. 2d 61, 65 (1951). The dictionary definition (to which Novell alluded) explains that "incidental" means a "minor accompaniment" or something of a "minor" or "subordinate nature." The American Heritage Dictionary of the English Language (4th ed. 2000).

In licensing UNIX products, AT&T, USL, Novell, and Santa Cruz also often licensed the same rights to the older UNIX products, identified as the "Prior Products." (¶ 8.) Once UnixWare was developed, Novell and Santa Cruz continued to license UnixWare products with the same rights to the prior UnixWare and/or SVRX products. (¶¶ 9-10.) The rights to the prior products were clearly subordinate to the rights to and utility of the most recent version of the software. (¶¶ 11-13.) Their significance was minor, including because the most recent version of the software was built upon and incorporated prior-product technology. (¶¶ 1-3, 11-13.) The only reasonable conclusion – and certainly on summary judgment a reasonable conclusion – to draw from the context in which the APA as amended uses the phrase "incidentally," from the fact that UnixWare is based on and derivative of UNIX System V, Release 4, and from the fact that Novell itself had an established practice of licensing prior SVRX technology with its UnixWare licenses, is that the word refers to that practice. Novell fails even to propose any alternative interpretation.

2. The Parties' Course of Performance.

Novell itself had licensed older UNIX technology with its UnixWare licenses. (¶ 8.) In fact at Novell's prompting, Santa Cruz used the same approach that Novell had used, which licensed older versions of UNIX with UnixWare, and Santa Cruz did not remit to Novell any royalties from any such licenses or from the licenses it had acquired from Novell. (¶¶ 9-13, 19.) In training sessions that followed the closing of the APA, Novell itself communicated to members of the UNIX licensing group that the inclusion of SVRX prior products in UnixWare licenses was permitted as incidental licensing of SVRX. (¶ 18.) And consistent with that understanding, Novell, for its part, never asked Santa Cruz to account for any UnixWare royalties, where Novell knew that Santa Cruz was following the same approach of listing SVRX prior products in the UnixWare licenses that Novell had used and even where Novell knew and received confirmation from Santa Cruz that former Novell licensees such as Unisys were continuing to pay royalties under their UnixWare licenses that included licenses to the prior SVRX products. (¶¶ 19-20.)

In the audit of Santa Cruz that Novell conducted in 1998, Novell sought only information for stand-alone SVRX licenses, and did not ask Santa Cruz to produce any information regarding the fees and royalties that Santa Cruz received under prior product SVRX licenses (that is, its UnixWare licenses that included incidental licenses to prior SVRX technology) or even SVRX prior product licenses that Novell had signed and transferred to Santa Cruz. (¶ 20.) Novell did not ask or suggest to Santa Cruz that it should undertake to allocate to the older versions of UNIX any value of the fees and royalties that Santa Cruz received under any UnixWare license granting rights to such older versions because there was no fee paid for that portion of the

license. (Id.) The same is true of Novell's 2003 audit of SCO, even in the face of imminent litigation between the companies. (¶ 22.)

Novell has argued that SCO's UnixWare license with Unisys suggests that SCO had previously allocated monies to Novell from such licenses, but the facts concerning Novell's own selected example show the exact opposite. Correspondence from Santa Cruz to Novell indicated the parties' agreement that Santa Cruz would not pay Novell any portion of the royalties from the 1995 UnixWare license with Unisys in which Novell itself had incidentally licensed to Unisys the same SVRX prior products; Novell received only the binary royalties that Unisys owed under its other, stand-alone 1991 SVRX license. (¶¶ 28-39.) Novell never asked Santa Cruz or SCO for any portion of the UnixWare royalties that Santa Cruz had informed Novell that Santa Cruz was retaining. (Id.) The parties have always treated all royalties from UnixWare licenses as SCO's, even when there was also an incidental license of SVRX included in that UnixWare license. (¶¶ 9-13, 19-20.) Such course of conduct and practice should control here.

In addition, UNIX licensees often distributed and used products that included code from multiple versions of SVRX, including UnixWare. Novell and its successors required such licensees to pay only one set of royalties for the use or distribution of such a product, as per Novell's own "one line of code" rule. (¶¶ 24-26.) As such, Novell and its successors evidenced the incidental nature of SVRX code, when that code was distributed or used in combination with UnixWare. Indeed, Novell and its successors prohibited licensees from parsing out the relative amounts of SVRX code and paying portions of the requisite royalties under SVRX licenses, instead allowing licensees to pay only UnixWare royalties for a product that contained SVRX code combined with any amount of UnixWare code. (Id.)

All of this evidence belies Novell's newly minted, post hoc argument (in its trial brief) that a supposed "primary benefit" of Novell's right to approve new SVRX Licenses was to allow the parties to work out a fair apportionment of licensing revenue and to structure licenses to clarify the parties' rights. There is no evidence of any such rationale in the APA or in the parties' conduct, and when SCO approached Novell in 2002 to discuss SCOsource, Novell said nothing about any of its supposed rights, about any obligation on SCO's part to await Novell's approval, or about any need to structure the contemplated agreements in any particular way and Novell affirmatively represented to SCO that Novell had no interest in the program and did not want to participate. (¶¶ 75-82.)

3. The Licensing of SVRX Prior Products.

Novell fails to account for the central and crucial SVRX technology in UnixWare. Novell's argument regarding "incidental" licensing thus suffers from a fatal flaw common to each of the Sun, Microsoft, and SCOsource Agreements. UnixWare is based on and derivative of the SVRX prior products. (¶¶ 1-3.) In assessing whether technology has been licensed "incidentally" with UnixWare, a central question therefore is what value has the SVRX License component of the license added to the UnixWare component. What is the "prior SVRX" that is not included in the "UnixWare"? Novell has failed even to address such questions.

It has also been many years, in some cases more than two decades, since SCO or its predecessors-in-interest have entered into separate licenses for the older UNIX (including SVRX) technology. (¶¶ 111-13.) That fact shows that such versions lack value independent of the most recent version of UNIX. As separate operating systems, the older versions of UNIX are not marketable to consumers because those earlier versions do not take advantage of hardware

enhancements made to new processors adopted by computer manufacturers, which are critical to any company's practical use for an operating system. (¶ 113.)

The evidence also shows that Santa Cruz and SCO never attributed any independent value or price for the licensing of SVRX prior products. All of the licensees who entered into SVRX prior product licenses with Santa Cruz and SCO paid the same price as those who did not receive such licenses. (¶¶ 10-12.) The $375,000 list price for a UnixWare 2.0 license with Unisys that licensed the SVRX prior products, for example, was the same as the price for a contemporaneous UnixWare license with Alps that did not list the SVRX prior products. (¶ 12.)

4. The Microsoft Agreement.

REDACTED

That fact alone shows that UnixWare was the predominant technology at issue in the Agreement.

In addition, **REDACTED**

The license to the SVRX prior products was consistent with Novell's and SCO's prior practice; it appertained to, and was dependent on and subordinate to, the UnixWare license. (¶¶ 8-13.)

In addition, **REDACTED**

That assertion serves to underscore SCO's foregoing arguments. In 1995, for example, Novell and Unisys entered into "Fully Executed Agreements for the UnixWare 2.01 Software." (¶ 29.) The attached "Schedule for UnixWare Release 2.0 and UnixWare Release 2.0 International Edition" lists the "Prior Products" for which Unisys had obtained a license under its UnixWare license. (Id.) Only one of the at least 23 software versions in the Schedule – the number is actually much larger, because the last six entries in the list are for "all prior releases" of multiple UNIX releases – was for a UnixWare release. Yet it is undisputed that the license constituted a "UnixWare" license and that Santa Cruz and SCO never paid, and Novell never sought, any payments allegedly made for such SVRX prior products. (¶¶ 19-23, 31-39.)

REDACTED

REDACTED

5. The Sun Agreement.

REDACTED

A driver, also known as a device driver, is a file that contains information needed by a program to operate a device such as a hard disk or internet connection. Without the drivers that work with a particular operating system, a person or company in effect cannot use the operating system for any conventional tasks. Without the drivers for a hard disk or internet connection, for example, the operating system cannot be used for any task that requires a hard disk or an internet

connection. With respect to a business, the drivers are thus a prerequisite for the operating system to have any utility for conventional business purposes. (¶ 103.)

REDACTED

In summarizing the Sun Agreement in 2003, for example, Sun's current CEO described the purchase as one in which Sun "bought a bunch of drivers," with no mention of any rights to SVRX prior products granted in the Agreement. (¶ 105.)

In addition, **REDACTED**

REDACTED

Amendment No. 2. Novell also argues, incorrectly, that SCO breached Amendment No. 2 to the APA by failing to consult with Novell in connection with the Sun Agreement. Under Section B of Amendment No. 2, the parties must follow certain procedures for their joint management of "any potential transaction with an SVRX licensee which concerns a buy-out of any such licensee's royalty obligations." The Sun Agreement amended and restated the 1994 Sun agreement under which Novell granted Sun its buyout. Novell asserts that the 2003 Sun Agreement falls within the scope of Section 5 because it "concerns" a buyout.

Novell's argument takes the merely introductory language to Section B out of context and defies the plain language of the substance of the Amendment. The language at issue in the Amendment applies to an agreement that itself grants a royalty buyout. (¶¶ 43-49.) (SCO disputes that Paragraph B.5 somehow applies solely to buyouts, or to transactions concerning past buyouts.) Paragraph B.4, for example, states that "Prior to either parties' unilateral determination as to the suitability of any potential buyout transaction, the parties will meet face to face and analyze the potential merits and disadvantages of the transaction." (Emphasis added.) Paragraph B.6 provides that "The parties agree that no member of Novell's sales force

will receive a bonus, commission, quota attainment credit, or other type of sales incentive as a result of the buy-out of an SVRX licensee." (Emphasis added.) Paragraph C, moreover, provides as follows:

> Novell may execute a buy-out with a licensee without any approval or involvement of SCO, and will no longer be bound by any of the requirements stated in Section B. above, if: (I) SCO ceases to actively and aggressively market SCO's UNIX platforms; or (II) upon a change of control of SCO as stated in schedule 6.3(g) of the Agreement.

(Emphasis added.) This language makes clear that "Section B" concerns "a buy-out with a licensee." All of the foregoing language, taken together, shows that Section B does not apply when a licensee already has a buyout and now enters into a subsequent agreement that merely relates to the prior agreement in which the buyout was granted.[6] If more were needed, in its Order dated August 10, 2007, this Court concluded that "all of the subparagraphs of paragraph B are limited to buy-out transactions." (¶ 49.)

At a minimum, the foregoing language and conclusions of this Court shows that Section B of Amendment No. 2 is ambiguous as to its application beyond actual buyouts. With respect to extrinsic evidence on that issue, Novell ignores the circumstances that led to the execution of Amendment No. 2. The parties entered into Amendment No. 2 after Santa Cruz objected to

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[6] In this litigation, Novell has previously described Section B of Amendment No. 2 as having that very scope. In its previous motion for summary judgment on its Fourth Claim, Novell stated:

> Section B of Amendment No. 2 requires the participation of both Novell and Santa Cruz in any prospective buy-out transaction with any SVRX licensee. It also provides that the newly prescribed procedures for managing future buy-outs would not alter the parties' existing source code rights under the APA. These buy-out provisions are not at issue in this motion since Novell's waiver actions vis-à-vis IBM and Sequent do not effectuate such a transaction.

(¶ 48 (emphasis added, citations omitted).)

Novell's unilateral attempt to grant IBM a buyout of its binary-royalty obligations. After the issue had arisen, in the summer of 1996, Santa Cruz repeatedly addressed with Novell "this issue of future buyout transactions." (¶¶ 43-45.) Santa Cruz stated its position as follows: "Any future discussion with a third party of a buyout would be handled solely by SCO, with help from Novell Corporate Development if required by SCO. The Novell Sales organization would play no role. If Novell and SCO mutually agreed, SCO would take action to conclude the transaction." (¶ 45 (emphasis added).) Santa Cruz explained that its position "pertains to any future buyout concerning binaries. (Id. (emphasis added).)

Larry Bouffard, the Novell account manager who conceived and oversaw the Novell-IBM buyout, explains that the purpose of Amendment No. 2 was to protect Santa Cruz from any further attempts by Novell to grant unilateral buyouts. (¶ 47.) Novell's former General Counsel admitted at deposition that "Amendment 2 outlines a procedure that the parties have to follow to enter into buyout agreements subsequent to the execution of Amendment 2" and that "the language applies only in the context of a buyout," where the "lead" paragraph "references potential transactions which concern a buyout." (¶ 46.) Accordingly, the extrinsic evidence confirms that the language in Paragraph B of Amendment No. 2 pertaining to buyouts is reasonably read to pertain only to actually royalty buyouts, not to any agreement that merely relates to a prior buyout.

III. ESTOPPEL PRECLUDES THE RELIEF NOVELL SEEKS.

The equitable doctrine of estoppel is based on a foundation of conscience and fair dealing. Where a company acts in a way that causes another company to believe a certain state of things, and induces that second company to act on that belief, the first company cannot assert

a contrary position or a different state of things at a later date. Feduniak v. Cal. Coastal Comm'n, 148 Cal. App. 4th 1346, 1359 (2007); see also Cal. Evid. Code § 623.

The defense of such estoppel is, by its very nature, fact intensive. As a result, "equitable estoppel ordinarily presents an issue of fact," and summary judgment is almost never appropriate. Shamrock Dev. v. City of Concord, 656 F.2d 1380, 1386 (9th Cir. 1981).[7] Summary judgment is not the place for the necessary factual determinations on equitable defenses. See Jacobsen v. Deseret Book Co., 287 F.3d 936, 949 (10th Cir. 2002) (reversing district court's holding that "the facts regarding laches and equitable estoppel are to be determined by the court" on summary judgment).

SCO has produced extensive evidence to show that Novell by its words and deeds caused Santa Cruz and SCO to believe that in licensing UnixWare to third parties, Santa Cruz and SCO was entitled to license SVRX technology with UnixWare, just as was Novell's practice. (¶¶ 8 – 10, 19-39.) If SCO had believed that there was any prospect that it would need to seek Novell's prior approval for the grant of rights to SVRX technology in the Sun or Microsoft Agreements, SCO would not have included those rights in the Agreements. (¶ 23.) Indeed, Santa Cruz did not regard those rights as significant components of the Agreements in the first place, offering similar rights at no charge to licensees since 1996. (Id.)

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[7] See also MGE UPS Sys., Inc. v. Fakouri, 422 F. Supp. 2d 724, 736 (N.D. Tex. 2006) ("The inference [supporting equitable estoppel] is one that only a fact-finder can draw."); Dallal v. New York Times, 386 F. Supp. 2d 319 (S.D.N.Y. 2005), rev'd, No. 05-29, 2006 WL 463386 (2d Cir. Feb. 17, 2006) (finding genuine issues of material fact precluded summary judgment); DeCarlo v. Archie Comic Pubs., 127 F. Supp. 2d 497, 511 n. 81 (S.D.N.Y. 2001) (noting that, "[t]hough a defense of equitable estoppel often raises issues of fact," summary judgment may be granted "[i]f there is no evidence upon which a trier of fact could reasonably find for the plaintiff") (emphasis added); Hadady Corp. v. Dean Witter Reynolds, 739 F. Supp. 1392, 1400 (C.D. Cal. 1990) (noting that "summary judgment on equitable estoppel is inappropriate unless only one conclusion can be reached on the undisputed facts").

Novell has previously argued that SCO must prove an affirmative "waiver" by Novell and that it cannot be held to a standard of "estoppel by silence" because it was entitled to rely on its fiduciary. Novell's "waiver" argument misapprehends the law of estoppel and the factual assertions underlying the argument ignore Novell's affirmative right to audit Santa Cruz and SCO and the fact that Novell did undertake such audits of both companies without even suggesting the rights it now claims. "Waiver is distinguishable from estoppel in that it involves voluntary, intentional relinquishment of a known right either by affirmative acts or knowledgeable non-action." Britamco Underwriters, Inc. v. Nishi, Papagjika & Assocs., 20 F. Supp. 2d 73, 77 n.2 (D.D.C. 1998); see also K. Bell & Assocs. v. Lloyd's Underwriters, 827 F. Supp. 985, 989 (S.D.N.Y. 1993) (explaining that "[w]aiver differs from estoppel in that it depends on the intent of the party against whom the assertion lies").

In addition, Novell by its words and deeds caused SCO to believe that SCO was authorized to enter into the SCOsource Agreements. Beginning in the fall of 2002, through several discussions, Novell knew that SCO was planning to enter into agreements to license the rights to use existing UNIX technology (including SVRX) in Linux; and that until litigation had arisen, Novell never asked or suggested to SCO that it was obligated to seek Novell's approval for such contracts or that SCO did not have the right to enter into such agreements or that SCO would have to remit any and all revenue to Novell – as it now claims. (¶¶ 75-82.) Novell concedes that its contacts with SCO in 2002 "at least suggested to us [Novell]" that "SCO's intention" was to "collect license revenue from vendors for licenses associated with SVRX code." (¶ 82.) Rather, Novell was emphatic with SCO that Novell had "no interest" in participating in the program. (¶ 76.)

At the time, moreover, Novell had every incentive to exercise its supposed rights with respect to SCO's proposed program, because it had an active interest in becoming directly involved in Linux. Mr. Jones explained to his colleagues on December 4, 2002, for example, that during his and Mr. Wright's conversation with Mr. McBride that day, "We did not mention in any way Novell's own interest in becoming more active in the Linux area in a more direct manner." (¶ 82.) Novell's failure to pursue its alleged rights where any such rights so fit with its own interests underscores the reasonableness of SCO's decision to move forward with the program without any expectation of interference from Novell.

IV. THE DECLARATORY RELIEF NOVELL SEEKS IS MOOT.

In its Fourth Claim in its Amended Counterclaims, among other requests for declaratory relief, Novell seeks a declaration "that SCO had no authority to enter into the Sun and Microsoft SVRX Licenses, as well as the Intellectual Property Licenses with Linux end users and UNIX vendors." (¶ 83.) In both its motion (at 1) and supporting memorandum (at 10), Novell seeks summary judgment on that specific declaration – "that SCO was without authority to enter into the SCOsource licenses."

Novell bears the burden of demonstrating the propriety of a requested declaratory judgment. See Unified Sch. Dist. No. 259, Sedgwick County, Kan. v. Disability Rights Ctr. of Kan., 491 F.3d 1143, 1147 (10th Cir. 2007) (citing authority). The Court has broad discretion under the Declaratory Judgment Act. See United States v. City of Las Cruces, 289 F.3d 1170, 1179-80 (10th Cir. 2002); U.S. Synthetic Corp. v. Reedhycalog, Ltd., 407 F. Supp. 2d 1274, 1279-80 (D. Utah 2005). If the requested declaration is "moot," such relief is unwarranted. See Prier v. Steed, 456 F.3d 1209, 1212-13 (10th Cir. 2006) (citing cases). Novell's request for

summary judgment on its proposed declaration fails for each of the following, independently sufficient reasons.

A. Novell's Proposed Declaration Is Merely Academic and Would Have No Practical Effect on the Parties.

The Tenth Circuit has explained that declaratory actions "will be moot unless the effect of our decision settles some dispute which affects the behavior of the defendant toward the plaintiff." Id. at 1213 (quotations and citation omitted). The resolution of the declaration must "have some effect in the real world." Sch. Dist. No. 259, 491 F.3d at 1147 (quotation and citation omitted).

Novell's proposed, backward-looking declaration is merely academic and would have no practical effect on the parties. Novell asks the Court to declare that SCO lacked the authority to execute the SCOsource Agreements, yet Novell claims the right to approve and ratify the Agreements, and Novell has exercised that supposed right – in the years of this litigation, Novell has never claimed to disavow the Agreements or described any intent to do so.[8] Novell's assertion that SCO lacked the authority to execute the Agreements therefore presents merely an academic question whose resolution will not affect the relationship between SCO and Novell.

B. Novell's Proposed Declaration Concerns Past Conduct Not Likely to Recur.

A proposed declaration also is moot or improper if it concerns "past conduct not likely to recur." GF Gaming Corp. v. City of Black Hawk, Colo., 405 F.3d 876, 883 (10th Cir. 2005); accord Utah Animal Rights Coalition v. Salt Lake City Corp., 371 F.3d 1248, 1256-57 (10th Cir.

[8] SCO of course is entitled to retain 100% of "source code right to use fees attributable to new SVRX licenses approved by Seller pursuant to Section 4.16(b) hereof." (APA Amendment No. 1, § E(e)(iii).)

2004). The declaratory judgment plaintiff "cannot maintain a declaratory or injunctive action unless he or she can demonstrate a good chance of being likewise injured by the defendant in the future." Sch. Dist. No. 259, 491 F.3d at 1147 (quotation and citation omitted). Novell has failed to present any evidence that its proposed declaration concerns conduct that is likely to recur. SCO discontinued the SCOsource program. (¶ 71.) Accordingly, for each of the foregoing reasons, Novell has plainly failed to meet its burden of demonstrating the propriety of the declaration it seeks.

CONCLUSION

SCO respectfully requests, for the reasons set forth above, that the Court deny Novell's Motion for Summary Judgment on Its Fourth Claim for Relief.

DATED this 25th day of January, 2008.

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Appendix A

Response to Novell's Statement of Undisputed Facts[9]

The APA and its Prohibitions

1. The Asset Purchase Agreement prohibits SCO from modifying existing SVRX Licenses and from entering into new SVRX Licenses. (Declaration of David E. Melaugh in Support of Novell's Motion for Summary Judgment on its Fourth Claim for Relief, filed herewith ("Melaugh Decl."), Ex. 9 (APA) at § 4.16; Order at 92.)

Disputed in that the statement is an incomplete description of SCO's rights to modify existing SVRX Licenses and enter into new SVRX Licenses pursuant to the APA. The referenced prohibitions are subject to exceptions. (APA, Amendment No. 1, § E; SCO's Response to Novell Statement of Undisputed Fact No. 2.)

2. SCO can amend existing SVRX Licenses only "as may be incidentally involved through its rights to sell and license [UnixWare software]" or "to allow a licensee under a particular SVRX License to use the source code of the relevant SVRX product(s) on additional CPU's or to receive an additional distribution, from [SCO], of such source code." (*Id.*; *see also* Melaugh Decl., Ex. 10 (Amendment No. 1) ¶ 10 (amending APA § 4.16).)

Undisputed.

3. SCO can enter into new SVRX Licenses only "as may be incidentally involved through its rights to sell and license [UnixWare software]." *(Id.)*

Undisputed.

4. In addition, before entering into "any potential transaction with an SVRX licensee which concerns a buy-out of any such licensee's royalty obligations," SCO must obtain Novell's consent. (Melaugh Decl., Ex. 12 (Amendment No. 2) at § B.) This prohibition is subject to no exceptions.

Disputed in that, by taking the quoted language out of context, the statement is an

[9] In citing its basis for disputing a Novell statement of fact, SCO cites herein paragraphs in SCO's Statement of Facts. SCO acknowledges, for purposes of these responses, that the terms of the Court's Order dated August 10, 2007, are controlling. SCO makes its responses accordingly, reserving the right to appeal from that Order.

incomplete and potentially inaccurate description of the transactions to which Paragraph B of Amendment No. 2 applies, as Paragraph B pertains solely to transactions which themselves constitute buyouts of royalty obligations. (¶¶ 43-49.)

SCOSource

5. SCO's "SCOsource" program was, fundamentally, a campaign to extract licensing revenue based on SCO's now-rejected claim to own the SVRX copyrights. (Order at 29 ("SCOsource...was an effort to obtain license fees from Linux users based on claims to Unix System V intellectual property.").)

Disputed to the extent that Novell's use of the terms "SVRX" and/or "Unix System V intellectual property" is meant to exclude SCO's asserted ownership of the copyrights in UnixWare and of SCO's ownership of the copyrights in OpenServer, both of which technologies were part of the SCOsource program. (¶¶ 2-3, 53-67.)

6. SCO has never claimed SCOsource had anything to do with SCO's UnixWare derivative rights.

Disputed in that SCO's UnixWare derivative rights, ownership of the technology in UnixWare, and asserted ownership of the copyrights in UnixWare were at part the SCOsource program. (¶¶ 53-67.) Disputed to in that the phrase "UnixWare derivative rights" is vague and ambiguous.

Sun's SCOsource License

7. In 1994, Sun Microsystems, Inc. ("Sun") entered into an SVRX License with UNIX Systems Laboratories. Sun's 1994 SVRX License was a "buy-out," as that term is used in Amendment No. 2. (Order at 94; Melaugh Decl., Ex. 12 (Amendment No. 2).)

Undisputed that Sun entered into an agreement with USL in 1994 granting Sun a buyout of its obligations to pay fees under its SVRX License. Disputed to the extent the statement

equates the buyout granted in that agreement with the agreement itself. (¶¶ 43-49.)

8. In 2003, SCO entered into a "Software License Agreement" with Sun. (Melaugh Decl., Ex. 11 at SCO1287208; Order at 94.) That agreement is explicitly intended to "amend and restate" the 1994 license agreement.

Undisputed.

9. SCO characterizes the 2003 Sun Software License Agreement as a "SCOsource" license. (Melaugh Decl., Ex. 14 (SCO interrogatory response listing SCOsource licenses) at NOVTR 4238, 4241.)

Undisputed.

10. Both the 2003 Sun SCOsource license and the 1994 license are "SVRX Licenses" within the meaning of the APA. (Order at 41, 101.)

Disputed in that only a part of the 2003 Sun Agreement and 1994 Sun Agreement constitute an "SVRX License." (¶¶ 95-110; see e.g., Ex. 81 §§ 12, 13; see also Argument at Section II.C.2.)

11. The principal effects of the Sun SCOsource license were to:

REDACTED

Disputed in that Novell inaccurately describes the "principal effects" of the 2003 Sun Agreement and in that in the Agreement SVRX rights were licensed to Sun only "incidentally" to SCO's rights to license UnixWare. (¶¶ 95-110; see also Argument at Section II.C.2.)

12. **REDACTED**

Disputed in that it does not logically follow that the presence of **REDACTED**

REDACTED

Microsoft's SCOsource License

13. In 2003, SCO entered into a "Release, License and Option Agreement" with Microsoft. (Melaugh Decl., Ex. 13 (Microsoft SCOsource license).)

Undisputed.

14. SCO characterizes the 2003 Microsoft Release, License and Option Agreement as a "SCOsource" license. (Melaugh Decl., Ex. 14 (SCO interrogatory response listing SCOsource licenses) at NOVTR 4238, 4241.)

Undisputed.

15. The 2003 Microsoft SCOsource license is an SVRX License. (Order at 41, 101.)

Disputed in that only part of the 2003 Microsoft Agreement constitutes an "SVRX License." (¶¶ 95-110; see also Argument at Section II.C.2.)

16. **REDACTED**

Disputed in that the statement inaccurately suggests that the **REDACTED**

Other SCOsource Licenses

17. **REDACTED**

Undisputed.

18. These licenses were each entered into under standardized terms. "The central feature of [these] other SCOsource agreements is the covenant not to sue and the waiver of claims by SCO for the companies' internal Linux usage." (SCO's Memo. in Opp. to Novell's Motion *In Limine* No.2 to Preclude SCO from Contesting Licenses Conveying SVRX Rights are "SVRX Licenses," Docket No. 421 ("SCO SVRX Opp."), at 3.)

Disputed to the extent the phrase "standardized terms" is ambiguous.

19. The Everyone's Internet SCOsource license is representative of the rights these licenses conveyed. That license grants, with certain limitations, the "right and license to use...SCO IP." (Melaugh Decl., Ex. 15 (Everyone's Internet Agreement) at § 2.1.) The definition of "SCO IP" makes clear that the license conveys SVRX rights:

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

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

(*Id.* at §§ 1.7, 1.10 (emphasis added).)

Disputed in that the above-quoted SCOSource Agreement, and all of the SCOsource Agreements, convey rights relating to more than "SVRX." (¶¶ 50-70, 84-110; see also Argument at Sections II.B-C.)

CERTIFICATE OF SERVICE

Plaintiff/Counterclaim-Defendant, The SCO Group, Inc., hereby certifies that a true and correct copy of the foregoing Memorandum in Opposition to Novell's Motion for Summary Judgment on Its Fourth Claim for Relief, in redacted form, was served on this 20th day of February, 2008, via CM/ECF to the following:

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