MORRISON & FOERSTER LLP
Michael A. Jacobs, *pro hac vice*
Eric M. Acker, *pro hac vice*
Kenneth W. Brakebill, *pro hac vice*
Marc J. Pernick, *pro hac vice*
David E. Melaugh, *pro hac vice*
425 Market Street
San Francisco, CA 94105-2482
Telephone: (415) 268-7000
Facsimile: (415) 268-7522

ANDERSON & KARRENBERG
Thomas R. Karrenberg, #3726
Heather M. Sneddon, #9520
700 Chase Tower
50 West Broadway
Salt Lake City, UT 84101
Telephone: (801) 534-1700
Facsimile: (801) 364-7697

Attorneys for Defendant and Counterclaim-Plaintiff Novell, Inc.

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP, INC., a Delaware corporation, Plaintiff and Counterclaim-Defendant, v. NOVELL, INC., a Delaware corporation, Defendant and Counterclaim-Plaintiff.	**NOVELL'S OPPOSITION TO SCO'S MOTION FOR JUDGMENT ON THE PLEADINGS ON NOVELL'S CLAIMS FOR MONEY OR CLAIM FOR DECLARATORY RELIEF** Case No. 2:04CV00139 Judge Dale A. Kimball

I. INTRODUCTION

Novell is entitled to the SVRX Royalties improperly retained by SCO and to a declaration that the SCOsource licensing program exceeded SCO's authority as Novell's agent. SCO maintains that Novell cannot have both, and therefore seeks "judgment on the pleadings" dismissing one or the other set of claims. Not a single case cited in SCO's motion supports such a proposition.

As to the SCOsource license revenue, there are three parties that might be entitled to a share: Novell, SCO, and the licensee. At best, SCO's motion makes a case that, as between *Novell and the licensee*, there are circumstances in which the licensee might be entitled to its money back. That may depend in part on whether Novell elects to ratify the terms of the SCOsource license. Ratification is a matter between Novell and the licensee, is not a choice Novell needs to make now, and is not a decision SCO has any right to force. It therefore is not an issue properly before the Court. SCO's motion provides *no* caselaw support for the proposition that SCO should keep the SCOsource license revenue it derived from its improper attempt to license Novell's property.

Such a result would certainly be surprising. To illustrate: suppose Nathan owns a car. If Nathan's friend Scott sells that car to Marty without Nathan's permission, it is hard to see how Scott can argue he is entitled to keep any of that money. Once Nathan gets the money back from Scott, Nathan might decide to keep the money and let Marty keep the car. Or Nathan might demand the car back from Marty and return Marty's money. But in none of those scenarios does Scott get to keep the money he pocketed by selling something he didn't own.

Moreover, because, here, there is a dispute as to whether "Scott" had permission to sell Nathan's car, and because Scott has stated his intent to go on "selling cars" owned by Nathan, declaratory relief is anything but moot. SCO has proclaimed its intent to continue in the "business" of suing Linux users for purportedly using Novell's SVRX code. In bankruptcy, SCO sought approval of a $100 million loan to allow it to do precisely that. In fact, the terms of that

loan contractually committed SCO to aggressively pursue its claims against the Linux community.

Novell is therefore entitled to pursue both forms of relief at the upcoming bench trial and the Court should deny SCO's motion to the contrary.

II. ARGUMENT

A. SCO Is Not Entitled to Retain SCOsource Revenue Derived from SCO's Attempt to License Novell's Property.

Notwithstanding this Court's prior ruling that the plain language of the Asset Purchase Agreement obligates SCO to remit SVRX Royalties to Novell, SCO asks the Court to determine, as a matter of law, "that Novell cannot recover any SVRX Royalties." (Memorandum in Support of SCO's Motion for Judgment on the Pleadings on Novell's Claims for Money or Claim for Declaratory Relief ("Mot."), PACER No. 506, filed March 7, 2008, at 1.) SCO suggests the Court should reconsider its prior ruling because of Novell's (supposedly "recent") contention that Novell never approved the SCOsource licenses. Novell's contention, not at all recent, mandates no such reconsideration.[1]

SCO argues that "[t]he Tenth Circuit has long held that '[i]f the principal disclaims the agent's acts as unauthorized, he has no grounds to retain the fruits thereof.'" (Mot. at 8.) When one reads the four cases SCO cites for that proposition, it is clear that they involve situations in which the agent had already properly remitted the "fruits" to its principal and a dispute arose over whether the principal was obligated to return those fruits *to the party that originally provided them* — i.e., here, the SCOsource licensees. (Mot. at 8 n.7 & 9 n.9 (citing cases).)

[1] As Novell's evidence makes clear, Novell has always maintained that SCO had no power to enter into the SCOsource licenses. (*See, e.g.,* Reply Decl. of David E. Melaugh in Support of Novell's Motion for Summary Judgment on Its Fourth Claim for Relief, PACER No. 500, filed February 19, 2008, Exs. 5-11 (2003-2004 correspondence objecting to SCOsource licenses).) There are therefore no "newly available facts or changed circumstances" warranting reconsideration. Nor has SCO undertaken any effort at all to show that "manifest injustice" would result from the Court's refusal to reconsider its plain holding that Novell is entitled to the SVRX Royalties. (Mot. at 8-9 n.8.)

Because these are the only cases SCO cites that might plausibly support its motion, detailed examination is warranted:

- *Maryland Cas. Co. v. Queenan*, 89 F.2d 155 (10th Cir. 1937): A bank cashier who was also city treasurer embezzled $8,000 from the bank and billed the city's accounts that amount to cover the debit. The bank's insurer refused to cover the loss, claiming that the cashier embezzled from the city, not the bank. The court noted that the bank could not both claim the benefits of the insurance and seek to enforce the debit against the city's account. There was, not surprisingly, no suggestion by the court that the embezzling bank cashier (i.e., SCO) might retain the funds.
- *In re Maxwell Newspapers, Inc.*, 164 B.R. 858 (Bankr. S.D.N.Y. 1994): A debtor-principal sought to avoid debts to third-party creditors, blaming the fraudulent acts of its owner-agent. The creditors claimed that because the fraud supposedly allowed the debtor to stay afloat, the company benefited from the fraud and could not disclaim it. The court held that, far from a benefit, the fraud destroyed the company, causing its eventual liquidation, and therefore declined to impute the owner's acts to the company. Again, there was no suggestion that the defrauding owner could keep any monies.
- *United Chems., Inc. v. Welch*, 460 So. 2d 540 (Fla. App. 1984): A United Chemicals agent accepted Welch's forklifts on a 60-month lease. United Chemicals used the machinery for over a year, then disclaimed the lease. The court held that use of the forklifts over a prolonged period with knowledge that Welch believed there to be a 60-month lease was "tantamount to ratification" and that United Chemicals was therefore bound by the leases. *Id.* at 541. No benefits of the arrangement were retained by the United Chemicals agent.
- *Advance Mortgage Corp. v. Concordia Mut. Life Assoc.*, 481 N.E.2d 1025 (Ill. App. 1985): The plaintiff-agent advanced funds necessary to foreclose property on behalf of

the defendant-principal, then sought reimbursement. The defendant argued that advancing the funds was outside the plaintiff's authority as an agent and that the plaintiff was therefore not entitled to reimbursement. The court held that, by accepting the fruits of the advanced funds, the defendant ratified the advance and owed the plaintiff the funds. It was therefore only the *agent's own* funds at issue in *Advance Mortgage*.

None of these cases hold that, where an agent improperly takes money from third parties in the principal's name, the *agent* is entitled to keep that money if the principal disclaims the agent's authority.

SCO fills additional, voluminous footnotes with other authority, but these remaining cases concern three unremarkable principles, none of which is relevant to this motion:

1. Some contracts entered into in excess of an agent's authority are unenforceable.[2]
2. Ratification can sometimes render an otherwise deficient contract enforceable.[3]

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[2] *Sarkes Tarzian, Inc. v. U.S. Trust Co. of Fla. Sav. Bank*, 397 F.3d 577, 582, 583, 585 (7th Cir. 2005) (reciting general caselaw, finding attorney had no actual or apparent authority to bind client); *Nash v. Y&T Distribs.*, 616 N.Y.S.2d 402, 403 (N.Y. App. Div. 1994) (vacating settlement negotiated in excess of attorney's authority).

[3] *Summit Props., Inc. v. New Tech. Elec. Contractors, Inc.*, No. CV-03-748-ST, CV-03-6394-ST, 2004 U.S. Dist. LEXIS 13053 (D. Or. July 2, 2004) (Attached as Exhibit A) (company's occupation of property for two years held sufficient to ratify lease); *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 300 F. Supp. 2d 606, 627 (N.D. Ill. 2003) (noting retention of payments can act to ratify contract, finding ratification unwarranted under facts presented); *Cent. States Indus. Supply, Inc. v. McCullough*, 279 F. Supp. 2d 1005 (N.D. Iowa 2003) (reciting general notion that principal can ratify contract entered into in excess of authority); *QAD Investors, Inc. v. Kelly*, 776 A.2d 1244, 1250 (Me. 2001) (compliance with terms of deal negotiated by agent, coupled with renegotiation of aspects of deal by principal, ratified deal); *De La Cerda v. Hutchison*, No. 93-1743, 1994 WL 255873 (Tex. Co. Ct. Mar. 8, 1994) (Attached as Exhibit B) (reciting general caselaw); *Martin v. Fed. Life Ins. Co. (Mutual)*, 644 N.E.2d 42 (Ill. Ct. App. 1994) (whether executive had authority to bind company at time of promise was immaterial given executive's later promotion to a position acknowledged to have such authority, and the fact that executive did not repudiate promise after promotion); *Perkins v. Philbrick*, 443 A.2d 73 (Me. 1982) (reciting general caselaw, declining to find ratification); *Newco Land Co. v. Martin*, 213 S.W.2d 504, 511 (Mo. 1948) (defendant used funds embezzled by agent from plaintiff to pay debt; by keeping benefits of embezzlement, defendant ratified embezzler's actions); *Poudre Valley Furniture Co. v. Craw*, 251 P. 543, 543 (Colo. 1926) (accepting good in trade and keeping possession for several months sufficient to ratify agreement by agent to reduce value of good from purchase price).

3. A licensee cannot assign or sublicense rights the licensee's own contract does not convey.[4]

Again, none of these cases support the proposition that an agent acting in excess of its authority is entitled to keep the proceeds of that excess.

B. Whether Novell Will at Some Point Ratify the SCOsource Contracts Is Irrelevant.

SCO's motion could be read as an attempt to force Novell to decide now whether to ratify the SCOsource contracts. SCO claims Novell owes an "obligation as a principal to timely determine whether to accept or reject its agent's contracts." (Mot. at 10.) SCO cites no caselaw establishing such an "obligation," much less an obligation that inures to the benefit of and is enforceable by *the agent*. On the contrary, Novell is under no obligation to decide now whether to ratify SCO's improper acts. And even if there were such an obligation, SCO does not explain why it is "timely" for Novell to make ratification decisions now. Instead, one might reasonably expect Novell to wait until the propriety of SCO's acts is resolved by this Court before it makes any decisions regarding the SCOsource licenses.

More to the point and as further discussed below, even if Novell decided today to ratify the existing SCOsource contracts as against the SCOsource licensees, that would have no effect on the propriety of SCO's acts in entering into the existing SCOsource licenses or on its authority to continue entering into such licenses.

C. Declaratory Relief Is Not Moot.

SCO concedes that declaratory relief is appropriate where such relief will "have some effect in the real world." (Mot. at 10, quoting *United Sch. Dist. No. 259, Sedgwick County, Kan.*

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[4] *Gardner v. Nike, Inc.*, 279 F.3d 774 (9th Cir. 2002) (voiding assignment of license without licensor's permission); *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14 (2d Cir. 1976) (holding licensor cannot grant more rights than it owns); *Major League Baseball Promotion Corp. v. Colour-Tex, Inc.*, 729 F. Supp. 1035, 1042 (D.N.J. 1990) (where license required written approval of sublicenses, holding failure to obtain approval meant no sublicense).

v. Disability Rights Ctr. of Kan., 491 F.3d 1143, 1147 (10th Cir. 2007).) Novell's request for declaratory relief easily meets that standard.

As with the arguments addressed above, SCO's own cases undermine any claim that the relief sought is moot. SCO's cases each involve some change in circumstances that rendered the requested declaratory relief totally unnecessary. In *Prier v. Steed*, 456 F.3d 1209, 1213-14 (10th Cir. 2006), the plaintiff dismissed his claims with prejudice, but the parties nevertheless sought a ruling on an affirmative defense. In *Nat'l Adver. Co. v. City & County of Denver*, 912 F.2d 405, 412 (10th Cir. 1990), the plaintiff sought declaratory judgment regarding a statute repealed during the course of the litigation, despite the fact that the statute that replaced it was held constitutional.

Under that caselaw, to render declaratory relief moot, SCO would need to acknowledge that it exceeded its authority in entering into the SCOsource licenses and bind itself not to enter into any such contracts again. SCO has done exactly the opposite. It persists in maintaining the validity of the SCOsource licenses and avows its intent to continue to license Novell's intellectual property:

- In its bankruptcy proceedings, SCO sought approval of a plan that committed SCO to "aggressively" pursue the litigation and licensing activities embodied in its SCOsource program. (Declaration of David Melaugh in Support of Novell's Opposition to SCO's Motion for Judgment on the Pleadings on Novell's Claims for Money or Claim for Declaratory Relief, filed herewith, Ex. 1 at Ex. A p. 3.)
- SCO's "SCOsource" website is still live, offering SCOsource licenses to the public. (*Id.*, Ex. 2, available at *http://www.sco.com/scosource/*.)
- SCO is telling the public that this Court has a "dismal record on appeals" and that SCO will therefore be able to continue its SCOsource program notwithstanding the Court's

ruling on the parties' motions for summary judgment. (*Id.*, Ex. 3 (Computerworld interview with Darl McBride).)

Novell's request for declaratory judgment therefore presents the classic case for such relief — disputed contract language requiring judicial interpretation, coupled with the possibility that such relief will guide the parties' future conduct. *See, e.g., Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 671 (9th Cir. 2004) (finding contract interpretation dispute ripe for declaratory judgment); *Lyons Sav. & Loan Assoc. v. Geode Co.*, 641 F. Supp. 1313, 1319 (N.D. Ill. 1986) ("A suit under the Declaratory Judgment Act is appropriate for a contracting party seeking resolution of actual disputes regarding the interpretation of that contract.").[5]

CONCLUSION

There is no inconsistency in Novell pursuing both the SVRX Royalties SCO has wrongfully withheld and a declaration that SCO is without authority to enter into the SCOsource licenses. Pursuing one therefore does not merit dismissal of the other. For that reason, this Court should deny SCO's motion for judgment on the pleadings dismissing Novell's Sixth, Seventh, and Eighth Claims for Relief or, in the alternative, dismissing the Fourth Claim for Relief.

[5] In addition, declaratory relief is relevant as to the existing SCOsource licenses. A holding that SCO exceeded the authority granted it in the Asset Purchase Agreement by entering into those SCOsource agreements would considerably bolster any later decision by Novell not to ratify those agreements. Conversely, a decision by this Court that SCO did have the authority to enter into the agreements renders any ratification decision-making unnecessary. Whether SCO had the authority to enter into the SCOsource agreements is fundamentally a dispute between Novell and SCO, and this Court, having reviewed thousands of pages of briefing, declarations, and exhibits, is the appropriate forum in which to decide what the Asset Purchase Agreement does and does not permit SCO to do.

DATED: April 7, 2008

ANDERSON & KARRENBERG

By: */s/ Heather M. Sneddon*

Thomas R. Karrenberg
Heather M. Sneddon

-and-

MORRISON & FOERSTER LLP
Michael A. Jacobs, *pro hac vice*
Eric M. Acker, *pro hac vice*
Kenneth W. Brakebill, *pro hac vice*
Marc J. Pernick, *pro hac vice*
David E. Melaugh, *pro hac vice*

Attorneys for Defendant and Counterclaim-Plaintiff Novell, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of April, 2008, I caused a true and correct copy of **NOVELL'S OPPOSITION TO SCO'S MOTION FOR JUDGMENT ON THE PLEADINGS ON NOVELL'S CLAIMS FOR MONEY OR CLAIM FOR DECLARATORY RELIEF** to be served to the following:

Via CM/ECF:

Brent O. Hatch
Mark F. James
HATCH JAMES & DODGE, P.C.
10 West Broadway, Suite 400
Salt Lake City, Utah 84101

Stuart H. Singer
William T. Dzurilla
Sashi Bach Boruchow
BOIES, SCHILLER & FLEXNER LLP
401 East Las Olas Blvd., Suite 1200
Fort Lauderdale, Florida 33301

David Boies
Edward J. Normand
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504

Devan V. Padmanabhan
John J. Brogan
DORSEY & WHITNEY, LLP
50 South Sixth Street, Suite 1500
Minneapolis, Minnesota 55401

Via U.S. Mail, postage prepaid:

Stephen Neal Zack
BOIES, SCHILLER & FLEXNER LLP
100 Southeast Second Street, Suite 2800
Miami, Florida 33131

/s/ Heather M. Sneddon