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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

<p>THE SCO GROUP, INC., a Delaware corporation,</p> <p>Plaintiff/Counterclaim-Defendant,</p> <p>vs.</p> <p>NOVELL, INC., a Delaware corporation,</p> <p>Defendant/Counterclaim-Plaintiff.</p>	<p>TRIAL BRIEF ON BEHALF OF THE SCO GROUP, INC.</p> <p>FILED IN REDACTED FORM [ORIGINALLY FILED UNDER SEAL]</p> <p>Civil No. 2:04 CV-00139</p> <p>Judge Dale A. Kimball Magistrate Brooke C. Wells</p>
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Plaintiff/Counterclaim-Defendant, The SCO Group, Inc. ("SCO"), pursuant to the Court's Order dated January 15, 2008, respectfully submits its trial brief, summarizing arguments and evidence SCO will present at trial.

INTRODUCTION

As the plaintiff here, Novell seeks relief on four of its counterclaims, concerning SCO's rights and obligations under the amended 1995 Asset Purchase Agreement ("APA") with respect to certain agreements SCO executed in 2003 and 2004. The agreements comprise SCO's 2003 agreements with Sun Microsystems, Inc. and Microsoft Corporation (the "Sun" and "Microsoft" Agreements) and the other agreements SCO entered into 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. In this trial, Novell pursues its Sixth ("Constructive Trust/Restitution/Unjust Enrichment"), Seventh ("Breach of Fiduciary Duty"), and Eighth ("Conversion") Claims (collectively, Novell's "claims for money") based on its alleged entitlement to "SVRX Royalties" for "SVRX Licenses" under the APA. Novell does not pursue, however, any claim for any alleged damages arising out of any alleged breach of any provision of the APA. Novell also seeks a declaration that SCO lacked the authority to execute all of the Agreements, based on allegations that SCO lacked such authority and that Novell has never ratified or approved the Agreements.

It bears emphasis that Novell has made no claim for royalties under the explicit provisions of the APA regarding royalties for sales of UnixWare. Under those provisions, at Section 1.2(b) and Schedule 1.2(b), SCO was obligated to remit UnixWare royalties to Novell

only if certain thresholds were met, and if they were met before 2003. Novell does not contend that it is due any royalties under these provisions, or that it is entitled to any royalties for UnixWare licenses under any of its claims for money.

The Agreements gave the counterparties rights regarding UnixWare, OpenServer and System V. Even under the Court's prior summary judgment ruling, Novell must prove both that SCO lacked the authority to enter into the Agreements and that those Agreements contain "SVRX Licenses" with some non-de minimis value. SCO had the authority to execute these Agreements, and Novell cannot recover any significant payments made thereunder, principally because any SVRX component of the Agreements was incidental and very minor compared to the rights to UnixWare, and in some cases OpenServer as well. SCO was obligated to remit UnixWare royalties to Novell only if certain thresholds were met prior to the end of 2002, the Agreements were all executed after 2002, and in addition the thresholds were never met.

The Question of Authority. SCO had the specific authority to enter into SVRX Licenses and "amendments" of SVRX Licenses "as may be incidentally involved through its rights to sell and license UnixWare." The following questions, and answers, arise:

- *Are the SCOSource Agreements simply "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. To the extent the Agreement contain licenses in addition to releases, those licenses include UnixWare binary licenses that give licensees all of the rights they needed with respect to the use of Linux.
- *Are the Sun and Microsoft Agreements "SVRX Licenses"?* Under this Court's prior summary judgment ruling, only a tertiary part of one of the five principal components

of the Microsoft Agreement is an "SVRX License." 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 these Agreements entered into "incidentally" to UnixWare?* Yes. SCO had the authority to license UnixWare with System V prior products listed in the license, which is the practice the word "incidentally" encompasses. In addition, the UnixWare and OpenServer components of these agreements gave Sun and Microsoft all the rights they sought or needed.

The Question of Apportionment of Value. In determining any "SVRX Royalties" paid for any "SVRX Licenses" in the Agreements, the questions are whether those licenses add anything to the other rights the counterparties had obtained, and whether any such rights have any significant value relative to those other rights. The following questions, and answers, arise:

- *Does Novell claim any right to SCO's UnixWare Royalties?* No. Novell acknowledges, as it must, that SCO was entitled to retain all UnixWare royalties, where Novell's own documents state that in 1995 it transferred its "existing ownership interest in UNIX System-based offerings and related products." And UnixWare licenses at the time always included a license to prior products.
- *Do the System V prior products have any significant independent value?* No. It has been many years since the sale of any stand-alone licenses for the prior System V technology were made. Indeed, the older versions of UNIX are not marketable to consumers. In licensing UnixWare with the System V prior products, where the license to such prior products did not even constitute an independent license, Novell and SCO never attributed even an incremental value or price to those products.

- *What is the importance of the UnixWare (and OpenServer) components relative to any SVRX license in the Agreements?* Overwhelming. UnixWare is the latest release of System V. The value of any SVRX license in the Agreements depends on what rights such a license provides that the UnixWare license does not provide. SCO's evidence shows that the UnixWare licenses alone give the licensees all the rights they sought or needed.

Novell's claims for "SVRX Royalties" also turn on whether Novell has ratified and approved the Agreements. Novell says it never has. Where it also claims to be SCO's principal, it follows that Novell has no right to the fruits of the Agreements. "It is repugnant in every sense of justice and fair dealing that a principal shall avail himself of the benefits of an agent's act and at the same time repudiate his authority."

If Novell chooses to approve the Agreements after trial and the Court allows it, moreover, SCO keeps all source code right-to-use fees under any new SVRX licenses in the SCOSource Agreements – that is, almost all of the alleged SVRX Royalties at issue. Indeed, the literal effect of ratification makes Novell's approval "relate back" to the time of execution of the Agreements. And any contrary interpretation of the APA would create an unenforceable penalty provision, where Novell does not even allege that it suffered any damages from the fact that SCO did not seek Novell's approval for the Agreements prior to their execution.

ARGUMENT

I. NOVELL BEARS THE BURDEN OF PROOF

A counterclaim-plaintiff bears the burden of proving the elements of its claims. See Cal. Evid. Code § 500. In addition, Novell has taken the opportunity to put on its case first at trial, and the party going first has the burden of proof. See Anheuser-Busch, Inc. v. John Labatt Ltd.,

89 F.3d 1339, 1344 (8th Cir. 1996); Martin v. Chesebrough-Pond's, Inc., 614 F.2d 498, 501 (5th Cir.1980) (per curiam); L-3 Communications Corp. v. OSI Sys., Inc., 418 F. Supp. 2d 380, 383 (S.D.N.Y. 2005). "On rare occasions, the courts have altered the normal allocation of the burden of proof. . . . But the exceptions are few, and narrow." Sargent Fletcher, Inc. v. Able Corp., 110 Cal. App. 4th 1658, 1670 (2003). The facts here do not satisfy the exception.

Novell's claims concern the interpretation of the APA. Novell's claims for money turn on the assertion that SCO failed to remit "SVRX Royalties" to Novell, where the definition of "SVRX Royalties" turns on the meaning of "SVRX Licenses" under the APA. Novell's request for a declaration also turns on what conduct the word "incidentally" encompasses. The resolution of those issues has nothing to do with SCO's status as a fiduciary. Novell therefore bears the burden of proof just as it would on its claim for breach of contract. See Sander/Moses Prods., Inc. v. NBC Studios, Inc., 142 Cal. App. 4th 1086, 1094-95 (2006); see, e.g., Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc., 247 F.3d 79, 101-02 (3d Cir. 2001) (declining to shift burden of proof on claims turning on contract interpretation where, as here, the parties were not in a fiduciary relationship when the contract was negotiated and executed).

On whether any "SVRX License" in the Agreements has any distinct value, Novell argues for a general "fiduciary" exception, but the Comments to Section 500 of the California Code make clear that there cannot be "any one general solvent for all cases." Instead, the shift in the burden between fiduciaries arises from the premise that a trustee has gained some advantage over its beneficiary in a transaction between them, in which case the court will presume that the beneficiary did not receive even-handed treatment. See Delos v. Farmers Ins. Group, Inc., 93 Cal. App. 3d 642, 656 (1979). On its face, that exception has no application here, where the

transactions at issue are not ones between SCO and Novell. In addition, where Novell has not ratified any of the Agreements at issue, no fiduciary obligations between the parties have even yet arisen. See Restatement (Third) of Agency § 4.02, comment b (2006); Part III.F, below.

The burden may otherwise shift where “the defendant’s wrongdoing makes it practically impossible for the plaintiff to prove the wrongdoing.” Nat’l Council Against Health Fraud, Inc. v. King Bio Pharms., 107 Cal. App. 4th 1336, 1346 (2003). Novell has not alleged that SCO committed any wrongdoing by including multiple components in the Agreements, or that such conduct has made it even “practically” impossible for Novell to try to assign value to any alleged SVRX License. Nor has Novell even made allegations sufficient to satisfy a necessary element reflected in the precedent – namely, that SCO had money it believed was Novell’s but mixed with other amounts anyway. Indeed, Amendment No. 1 (through its use of the “incidentally” language) shows that the parties to the APA expressly contemplated SCO’s authority to enter into agreements that “commingle” incidental SVRX licenses and UnixWare licenses.

It also is irrelevant that, in the first instance, the terms of some of the Agreements were available to SCO but not Novell. See Sargent Fletcher, 110 Cal. App. 4th at 1672-73 (surveying the precedent establishing that courts “have refused to shift the burden of proof in other cases where plaintiffs lacked access to information, even though the information was more readily available to the defendant”). Novell was free to seek in discovery whatever input it thought relevant from SCO, Sun, and Microsoft. Novell noticed but cancelled its proposed deposition of Microsoft, and then took only a short deposition of Sun which Novell reserved its rights to continue but never did. As this Court observed in its Order of August 10, 2007, Novell has “obtained the information it needs to demonstrate its damages” under its claims. (Id. at 98.)

II. NOVELL IS NOT ENTITLED TO ANY DECLARATION.

A. The SCOSource Agreements Are Not Royalty-Bearing “SVRX Licenses.”

1. The Origins of the SCOSource Program.

Novell’s main argument is that “from start to finish” the SCOSource Agreements concerned only “SVRX” rights and SCO never claimed SCOSource had anything to do with UnixWare. It follows that if Novell is wrong about that core assertion, it is wrong about its characterization of the SCOSource program and the Agreements.

Contrary to Novell’s argument, SCO clearly was concerned – and exclusively concerned at the outset of the program – that technology had been taken from OpenServer and UnixWare and improperly used in Linux. The contemporaneous documents – belying Novell’s allusions to any SCO attempt to “recast” its concerns today – show that to be true. Novell cites SCO’s general references to “UNIX” and “UNIX System V” at the time, but UnixWare and OpenServer are both “UNIX” and specifically “UNIX System V” operating systems. Indeed, Novell acknowledged in its own UnixWare Guide that UnixWare is a “version of UNIX System V.” The documents reflecting SCO’s concerns at the outset and pendency of the SCOSource program specifically and repeatedly show that SCO was focused on UnixWare and OpenServer (both System V) technology in Linux. In referring to “SCO System V for Linux” in a January 2003 press release regarding SCOSource, for example, SCO was referring exclusively to the UnixWare and OpenServer libraries that SCO believed were being improperly used with Linux.

2. SCO’s Right to Release Its Claims.

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.”

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 that source code. In its Order dated August 10, 2007, this Court also concluded (at 55) that SCO received “ownership” rights. SCO’s ownership of such rights corresponds to its assumption of liabilities under the APA, such as for “[a]ll obligations relating to the Business which arise subsequent to the Closing Date.” (APA, Schedule 1.1(c).)

SCO therefore was entitled to release, at minimum, whatever claims it was entitled to bring concerning its “ownership” rights to the UNIX or UnixWare source code, and under the SCOSource Agreements released only those claims. There is no language in the APA even suggesting that SCO could not waive such claims. Novell argues that SCO could not have the right to release claims concerning SVRX source code because the Court has found that Novell owns the SVRX copyrights, but that argument is a red herring. Novell’s position means only that, under the Court’s ruling, the SCOSource Agreements in fact did not release any such copyright claims. It follows that the only value to be attributed to the releases in the SCOSource agreements pertains to claims that SCO did have the right to release and therefore did release as part of its SCOSource Agreements, and for which SCO was entitled to have the money.

B. The Microsoft and Sun Agreements Are “SVRX Licenses” Only in Part.

1. The Microsoft Agreement.

Section 2. Section 2 makes no reference to SVRX. In Section 2.1, SCO releases any claims it – and not Novell – might have had against Microsoft regarding any SCO intellectual property, including all claims that were assigned under the APA. Section 2.1 is not a license.

Section 2.2 is a license for Microsoft's products which does not pertain to any particular subject matter or technologies.

In addition, to the extent a release for any System V technology in any Microsoft product is a "license" for such technology, Novell has made no showing of any System V technology in any Microsoft product. If the Court were even to try to infer what Microsoft's concerns were, in Paragraph B of Amendment No. 3 to the Agreement, Microsoft reveals its concern that (in the language of Exhibit A) it was "components or features" in "SCO UnixWare 7, Release 7.1.3" (the then latest release) that might be present in Windows, and that therefore Microsoft sought to obtain rights to use. Section 2 is not an SVRX License to which Novell has any right or claim.

Section 3. Section 3 is an option, which Microsoft exercised, to license UnixWare and certain components or features thereof (Exhibit A) and components that do not pertain to any particular operating system (Exhibit B). The UnixWare license that Microsoft obtained is not an SVRX License under any interpretation of the APA. Even if – as Novell argues, and contrary to fact – there were any evidence that Microsoft purchased the UnixWare license in part to enable it to later purchase the System V rights in Section 4, that still would not mean that Section 3 is an SVRX License. Novell does not address this section.

Section 4. Section 4 is an option – which Microsoft exercised – to expand the Section 3 UnixWare license, and also to license SCO's valuable OpenServer technology, as well as System V prior products. Even under this Court's prior summary judgment ruling, only a small part of Section 4 constitutes an "SVRX License."

2. The Sun Agreement.

Section 4. Section 4 is a license to UnixWare and previous versions of UNIX System V, most of which Sun already had a license to use under its 1994 agreement with Novell, as well as to the drivers for UnixWare and OpenServer. Of the 30 UNIX System V products identified in Section 4, at least 13 are not in Schedule 1.1(a) of the APA.¹ Accordingly, by definition, those are not “SVRX Licenses.” Even under this Court’s prior summary judgment ruling, only some other small part of Section 4 constitutes an “SVRX License.”

Section 10. Section 10 is an indemnification provision. It concerns the prospect that Sun might face lawsuits regarding the Section 4 licensed technology and requires SCO to provide comfort to Sun in such scenarios. Novell does not address this section and thus offers no explanation for how this indemnification of Sun’s activities by SCO alone – and not Novell – could constitute an SVRX License, and there is no evidence that Sun has faced any such lawsuits (let alone ones that concerned any prior System V technology).

Section 12. Section 12 is a release of any claim that SCO may have with respect to the Section 4 licensed technology or any derivatives thereof. Section 12 therefore is a release of claims that SCO had the right to pursue or release. It is not a “license” – including because the Agreement already included “licenses” in other provisions.

Section 13. Section 13 provides that if SCO grants redistribution rights to any or all of the Section 4 licensed technology on terms more favorable than those granted to Sun under the Agreement, then SCO shall offer Sun the same terms and conditions. What particular rights the section gives Sun a right to purchase is hypothetical in that it depends on SCO granting “more

¹ The 13 are 4.1 ES/3B2, 4.1 C2/3B2, 4.1 ES, 4.2, 4.2MP, 4.0 DRP (both SPARC and x86), 4.0 MNLS, 4.0 SPARC, 386 3.2 v 2.1, 386 3.2 DRP, 3.1 DRP, 80386 3.0, and 3.0 DRP.

favorable” rights to a third party and on the nature of those rights. Novell does not even contend that SCO has granted any such rights. Section 13 is not an SVRX License.

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.

C. The Microsoft and Sun Agreements License
SVRX Products “Incidentally” to UnixWare.

With respect to the limited parts of the Agreements that are SVRX Licenses under this Court’s prior summary judgment ruling, SCO had the authority to enter into those licenses. 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.”

1. The Meaning of “Incidentally”.

The word “incidentally” is not defined in either the APA or its Amendments. Novell admitted that it has no view “as to what it means for Santa Cruz to license SVRX source code incidentally to UnixWare.” 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 admitted that it did not have any “knowledge” or “view” on that “one way or the other.”

Under either of the two principal meanings of the word “incidentally,” SCO had the authority to execute the Agreements. First, the general definition of the word provides as follows: “‘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 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). Second, in the specific context of the APA, “incidentally” encompasses the regular practice – in place well before the APA and continued well after – whereby in licensing the latest release of a UNIX product, AT&T, USL, Novell, Santa Cruz and SCO licensed the same rights to the older UNIX products, identified as the “Prior Products.”

2. The Licensing of System V Prior Products.

Novell itself had licensed older UNIX technology with its UnixWare licenses. In fact, Santa Cruz followed Novell’s specific direction in using 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 UnixWare licenses, including those it had acquired from Novell. In training sessions that followed the closing of the APA, Novell itself communicated to members of the UNIX licensing group that the inclusion of System V prior products in UnixWare licenses was permitted as incidental licensing of System V. 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 System V 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 System V prior products.

This evidence (among other such evidence) belies Novell’s newly minted, post hoc argument 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. Once UnixWare was developed, Novell and Santa Cruz continued to license UnixWare products with the same rights to the prior UnixWare and/or System V products. It follows from Novell's own argument, moreover, that where SCO had the authority to execute the SCOSource Agreements, there is no basis for apportioning any value to any alleged SVRX component therein.

The only 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 earlier System V releases, and from the fact that Novell itself had an established practice of licensing prior System V technology with its UnixWare licenses, is that the word refers to that practice. Novell fails even to propose an alternative interpretation.

3. The Sun and Microsoft Agreements.

Under both definitions of the APA's provision regarding licensing of SVRX technology "incidentally," SCO therefore had the authority to license System V rights in these Agreements, where SCO had regularly licensed System V prior products with its UnixWare licenses and the overwhelming value of these Agreements lies in the UnixWare components thereof. The relatively minor System V rights afforded in the Agreements were provided as a matter of course, consistent with the prior practice of providing System V rights with licenses to the most recent version of System V (here, UnixWare), and the value of the rights afforded in the Agreement lay in UnixWare. (See Parts II.D & E, below.)

D. SCO Has Complied with Amendment No. 2.

Under Section B of Amendment No. 2 to the APA, the parties must consult with each other on “any potential transaction with an SVRX licensee which concerns a buy-out of any such licensee’s royalty obligations.” Novell argues that SCO lacked the authority to execute the Sun Agreement because SCO did not consult with Novell and because, Novell argues, the Agreement “concerns” Sun’s 1994 buyout with Novell. Novell’s argument is mistaken.

First, the Sun Agreement did not “concern” the 1994 buyout within the meaning of Amendment No. 2. Novell 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. (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. If more were needed, in its Order dated August 10, 2007, this Court has already concluded (at 85) that “all of the subparagraphs of paragraph B are limited to buy-out transactions,” and in one of its motions for summary judgment, Novell described Section B of Amendment No. 2 as having that very scope. This makes sense, in that once a buyout has occurred, Novell has already gotten whatever entitlement it had to SVRX royalties. In this case, Novell received \$84 million.

Second, the only buyout at issue in the Sun Agreement pertains to the potential UnixWare royalties Sun would have had to pay, and SCO had the right unilaterally to enter into such buy-outs. With respect to rights Sun did not already have, the Agreement gives Sun the right to make binary distributions based on UnixWare and the four immediately prior versions of System V (4.1 ES/3B2, 4.1 C2/3B2, 4.1 ES, 4.2, and 4.2 MP) – none of which are “SVRX” releases under the APA. If any of the technology on which Sun were to base any binary distribution were included in UnixWare, under the “one line of source code” rule, Sun would pay a UnixWare royalty for that distribution. UnixWare incorporates the vast bulk of the technology in those prior releases, and all of the technology with commercial value. Accordingly, to the extent any significant value in the Agreement can be attributed to the foregoing buyout, it pertained to royalties that SCO indisputably had the right to buy-out on its own.

III. SCO DOES NOT OWE NOVELL ANY SIGNIFICANT AMOUNT OF ALLEGED “SVRX ROYALTIES.”

A. Novell’s Burden of Proof.

In determining any “SVRX Royalties” paid for any “SVRX Licenses” in the Agreements, the questions are whether those licenses added anything to the other rights the counterparties had obtained, and whether any such rights have any significant value relative to those other rights. Notwithstanding its burden, Novell does nothing more than ask the Court to presume that the main value of the agreements lay in “SVRX” rights – drawing inference upon inference and supposing that the UnixWare and OpenServer rights must have been of little consequence.

In sharp contrast, rather than asking the Court to make its best guess, SCO has direct and concrete evidence that demonstrates that the exact opposite is true – that the System V prior products have no significant independent value, and that the UnixWare and OpenServer components of the Agreements give the licensees all of the rights they sought. (See Parts B-E, below.) In addition, SCO shows that even with respect to any “SVRX Royalties,” there may be a sweeping category of such Royalties that SCO retains. (See Part F, below.)

Novell’s burden of proof takes on particular importance in light of the main inference Novell asks the Court to draw. That is, Novell asks why any rights to earlier releases of System V would have been included in the agreements if they had no value – as if by posing the question Novell meets its burden. It does not. The opposite inference could be equally drawn from the face of the agreements – if the UnixWare, OpenServer, and many other rights were included in the agreements, they must have had value. Unlike Novell – and without even having the burden to do so – SCO shows that Novell’s proposed inference is wrong.

B. The System V Prior Products Have No Significant Independent Value.

It has 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 System V technology. Such products or releases 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 (among other reasons) 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.

SCO will offer the only evidence of any value given to System V prior products – which was none, or a purely de minimis value. Giving weight to the fact that the licenses to the prior products were not even independent licenses, Santa Cruz and SCO never attributed any independent value or price for the licensing of System V prior products. All of the licensees who entered into System V prior product licenses with Santa Cruz and SCO paid the same price as those who did not receive such licenses. The \$375,000 list price for a UnixWare 2.0 license with Unisys that licensed the System V prior products, for example, was the same as the price for a contemporaneous UnixWare license with Alps that did not list the System V prior products.

C. In the SCOSource Agreements, the UnixWare Licenses Alone Give the Licensees the Right to Use Linux.

Novell argues that the only material that SCO ever alleged had been improperly contributed to Linux is “SVRX” material. That argument is wrong – SCO was indeed concerned that technology had been taken from OpenServer and UnixWare and improperly used in Linux. (See Part II.A.1, above.) Novell's argument is also beside the point. As to the material that IBM

improperly contributed to Linux from the AIX (derived from SVR3) and Dynix/ptx (derived from SVR4) operating systems, a UnixWare license alone gives the SCOsource licensees the right to use that material in Linux, because a UnixWare licensee has the right to use the System V prior products and their derivatives. Similarly, the UNIX technology that was improperly contributed to Linux and that makes Linux a derivative of SVR4 is contained in UnixWare, so that a UnixWare license alone gives the SCOsource licensees the right to use that material in Linux. It also follows that if the Court were to agree with Novell and conclude that the “releases” in the SCOsource Agreements somehow constitute “licenses,” then the UnixWare “licenses” alone afford the licensees all of the rights they sought. Any SVRX License contained therein therefore added no independent incremental value.

D. In the Microsoft Agreement, the UnixWare and OpenServer Licenses Give Microsoft All of the Rights It Sought.

The evidence shows that only part of Section 4 of the Microsoft Agreement is an “SVRX License.” (See Part II.B.1, above.) In addition, any part of Section 4 that is found to be an “SVRX Licenses” has no distinct or significant value. The same is true of Section 2, to the extent Novell claims part thereof is an SVRX License.

Section 2. Section 2.2 is a license of SCO’s intellectual property for Microsoft’s products which does not pertain to any particular technology. In addition, if Microsoft’s products did contain any UNIX technology as of 2003, the UnixWare license alone gives Microsoft the right to use that technology. It is also important to note that Amendment No. 3 of the Agreement reflects Microsoft’s concern that it was “components or features” in “SCO UnixWare 7, Release 7.1.3” that might have been present in Windows. As to Section 2.1, it is not a license; it is a release because it releases those claims SCO has the right to bring. In addition, if (contrary to

the facts and law) Section 2.1 were regarded as a license, then it would follow that the UnixWare component alone of the “license” protects Microsoft from suit. **REDACTED**

Section 3. Section 3 is clearly an option to purchase a UnixWare license and a UnixWare license, not an SVRX License. The section bears directly on any assessment of Section 4 because Microsoft could not take the Section 4 license to UnixWare and OpenServer without having first taken the Section 3 license, and because the UnixWare license in Section 3 is one with limitations that were subsequently lifted in Section 4. Only with the full and complete UnixWare license under Section 4 would it naturally follow that, under the longstanding practice of the owners of the UNIX technology, Microsoft would have rights to the System V prior products. **REDACTED**

Section 4. Once Microsoft had taken its Section 3 license to UnixWare, it had the right to take the Section 4 license to UnixWare, OpenServer, and System V prior products.

REDACTED

Rather than address the substance of the Microsoft Agreement, as SCO will do in detail at trial, and ignoring the assets “identified as non-deliverable,” Novell simply argues that 28 of the 34 software versions licenses in Section 4 are System V releases. That argument 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.” 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. Only one of the at least 23 releases 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 was a “UnixWare” license and that Santa Cruz and SCO never paid, and Novell never sought, any payments allegedly made for such System V prior products. Instead, Santa Cruz proposed – and Novell agreed – that all of the fees for what was a UnixWare license would be retained by Santa Cruz, and that Novell would continue to receive royalties for the stand-alone System V license that Unisys had obtained in 1991. The point here is not merely that SCO reasonably believed that it owed Novell nothing for the licensing of System V prior products with UnixWare – although that is true as well – but that the breakdown of the amounts paid by Unisys make very clear that Novell did not treat the System V prior products as having any independent value. That treatment is consistent with the fact that a licensee like Alps did not pay any additional right-to-use fee for the System V prior products included with its UnixWare license.

Contrary to Novell’s argument, moreover, there is no reasonable basis for inferring from Sections 3 and 4 that the “SVRX” component of Section 4 must be valuable. The restricted UnixWare license under Section 3 gave Microsoft the chance to review the code and determine if it wanted to exercise the fuller license in UnixWare, and to OpenServer. From a sales perspective, knowing that Microsoft was not prepared to commit to the full UnixWare or OpenServer licenses up front, SCO was able to maximize the prices for the two licenses by offering a tiered license that would permit Microsoft to review the code.

E. In the Sun Agreement, the UnixWare License and OpenServer Drivers Give Sun All of the Rights It Sought.

The evidence shows that only part of Section 4 of the Sun Agreement is an “SVRX License.” (See Part II.B.2, above.) Indeed, Novell does not appear to contend that either Section 10 (an indemnification provision) or Section 13 (a most-favored-nation provision) is an SVRX License. Novell has not specifically addressed Section 12 (a release), but by its other arguments appears to reserve the right to argue that it is an SVRX License. No part of Section 4 or 12 that is found to be an “SVRX Licenses” has any distinct or significant value.

Section 12. Section 12 is not a license; it is a release. In addition, if (contrary to the facts and law) Section 12 were regarded as a license, then it would follow that the UnixWare component alone of the “license” protected Sun from suit with respect to the use of any technology from UNIX System V or its derivatives.

Section 4. Section 4 is a license to UnixWare and System V prior products, as well as to the drivers for UnixWare and OpenServer. The license to UnixWare is very valuable: The UnixWare license permits Sun to develop Intel-compatibility for Solaris, which is something Sun had not succeeded in doing, where it had never taken a UnixWare license. The UnixWare license alone also gives Sun the right to use all System V prior products.

The licenses to the UnixWare and OpenServer drivers also are very valuable: Only with the drivers can Sun actually use UnixWare for any conventional tasks or purposes, which Sun needs to do in order to assess how applications run on UnixWare and thereby develop Intel-compatibility for Solaris. Without the drivers, for example, Sun cannot use UnixWare for any task that requires a hard disk or an internet connection. In short, the drivers enable Sun to

enhance the functionality of Solaris. In sharp contrast, as SCO will demonstrate at trial, the formal license to some System V prior products does not have any significant value.

F. If Novell Ratifies the Microsoft and Sun Agreements, SCO Is Entitled To SVRX Royalties Under Section 1.2(e)(iii) of the APA as Amended.

If the Court finds that Microsoft or Sun entered into distinctly valuable SVRX Licenses, there can be no question that the vast majority of what the companies paid for such licenses are source code right to use fees attributable to new SVRX licenses. Under the APA, SCO 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.” Under its own version of the facts, as explained in SCO’s memoranda in support of its pending Motion for Judgment on the Pleadings, if Novell wants to recover any SVRX Royalties, it must ratify and approve the Agreements. “It is repugnant in every sense of justice and fair dealing that a principal shall avail himself of the benefits of an agent’s act and at the same time repudiate his authority.” Yahola Sand & Gravel Co. v. Marx, 358 P.2d 366, 372 (Okla. 1960) (citing authority, quotations omitted).

If Novell decides to ratify and approve the Sun and Microsoft Agreements after trial, and if the Court permits it to do so, then SCO is entitled to retain the source code right-to-use fees paid thereunder for any new SVRX licenses. Indeed, the literal effect of ratification makes Novell’s approval “relate back” to the time of execution of the Agreements. Restatement (Third) of Agency § 4.02, comment b (2006). Novell’s only basis for contesting SCO’s right to retain all of those fees would be that Novell did not give its approval to the “new SVRX licenses” prior to their execution. Such an interpretation would fail as a matter of law because it renders the provision an unenforceable penalty.

Under that interpretation, SCO would have to forfeit potentially millions of dollars simply because Novell gave its consent to the new SVRX licenses after their execution rather than before it. Such a result would be permissible only if there were some reasonable relationship between SCO's forfeiture and any actual damages to Novell. There is no such relationship here, and in fact no evidence at all for Novell even to make any such argument. Novell does not even allege that it has suffered any harm or damage from the fact that SCO did not seek Novell's approval to execute the Agreements at issue. The only recovery Novell seeks is for the alleged "SVRX Royalties" that SCO received under the SCOsource Agreements.

"California law prohibits enforcement of contractual penalties." Applied Elastomerics, Inc. v. Z-Man Fishing Prods., Inc., 521 F. Supp. 2d 1031, 1044 (N.D. Cal. 2007). "A penalty need not take the form of a stipulated fixed sum; any provision by which money or property would be forfeited without regard to the actual damage suffered would be an unenforceable penalty." Freedman v. The Rector, 37 Cal. 2d 16, 21-22 (1951); accord Baypoint Mortgage v. Crest Premium Real Estate Investments Retirement Trust, 168 Cal. App. 3d 818, 829-30 (1985). The California courts "have consistently ignored form and sought out the substance of arrangements which purport to legitimate penalties and forfeitures." Garrett v. Coast & S. Fed. Sav. & Loan Ass'n, 9 Cal. 3d 731, 737 (1973); accord Baypoint, 168 Cal. App. 3d at 829-30 (citing authority). "Whether an amount to be paid upon breach is to be treated as liquidated damages or as an unenforceable penalty is a question of law." Harbor Island Holdings, L.L.C. v. Kim, 107 Cal. App. 4th 790, 794 (2003). "The agreement itself . . . can be sufficient to show that it contains contractual penalties and not liquidated damages." Z-Man, 521 F. Supp. 2d at 1045.

Under California law, a penalty clause is unenforceable “if it bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach.” Ridgley v. Topa Thrift and Loan Ass’n, 17 Cal. 4th 970, 977 (1998). In other words, the “characteristic feature of a penalty is its lack of proportional relation to the damages which may actually flow from failure to perform under a contract.” Garrett, 9 Cal. 3d at 739; accord San Joaquin Community Hosp. v. San Joaquin Valley Med. Group, Nos. F039938, FO40280 & FO41430, 2004 WL 1398551, at *22 (Cal. App. Ct. June 23, 2004) (Ex. A). Accordingly, under the foregoing precedent, there must be some reasonable relationship between the measure of the SVRX Royalties Novell would be entitled to have in the absence of pre-contract approval and the range of any actual damages to Novell. Poseidon Dev. Inc. v. Woodland Lane Estates, LLC, 152 Cal. App. 4th 1106, 1115-16 (2007); Parkside Apartment Partners v. Cadle Co. II, Inc., No. C049821, 2007 WL 1395471, at *8-9 (Cal. App. May 14, 2007) (Ex. B); San Joaquin, 2004 WL 1398551, at *22 (citing authority). In the absence of any proof of loss even comparable to the amount of the forfeiture at issue here, Novell’s argument for the necessity of pre-approval of any new SVRX license fails. See, e.g., Atel Fin. Corp. v. Quaker Coal Co., 321 F.3d 924, 926 (9th Cir. 2003); Z-man, 521 F. Supp. 2d at 1044-46; Poseidon, 152 Cal. App. 4th at 1115-16; Parkside, 2007 WL 1395471, at *8-9; Harbor Island, 107 Cal. App. 4th at 796-97.

“A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.” Cal. Civ. Code § 1643. Accordingly, if a contractual provision constitutes an unenforceable penalty but can be otherwise interpreted so as to make it lawful, the

Court should employ that interpretation.' See, e.g., Poseidon, 152 Cal. App. 4th at 1115-16; Parkside, 2007 WL 1395471, at *8-9. The only way to reach that result here, if Novell were to ratify and approve the Microsoft and Sun Agreements, would be to permit SCO to retain 100% of the source code right to use fees for any new SVRX Licenses deemed to have been included in the Microsoft and Sun Agreements and to have been a source of any significant consideration that SCO received thereunder.

IV. ESTOPPEL PRECLUDES ANY RELIEF FOR NOVELL.

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.

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 continue to license System V technology with UnixWare, just as was Novell's practice. 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 System V technology in the Sun or Microsoft Agreements, SCO would not have included those rights in the Agreements. 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 it bought the business in 1995.

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 it 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 System V) 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. 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." Novell was emphatic with SCO that Novell had "no interest" in the program.

CONCLUSION

SCO respectfully submits, for the reasons set forth above and on the basis of the evidence to be presented at trial, that the Court should conclude that Novell is not entitled to any declaration or to recover any significant amount of "SVRX Royalties."

DATED this 23rd day of April, 2008.

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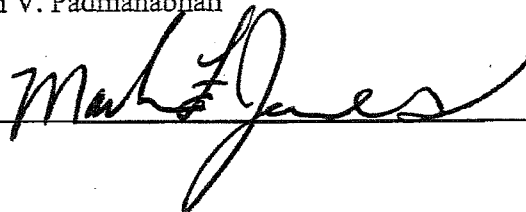
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By: _____

A handwritten signature in black ink, appearing to read "Mark F. James", is written over a horizontal line. The signature is cursive and somewhat stylized.

CERTIFICATE OF SERVICE

Plaintiff/Counterclaim-Defendant, The SCO Group, Inc., hereby certifies that a true and correct copy of the foregoing Trial Brief, in redacted form, was served on this 24th day of April, 2008, via CM/ECF to the following:

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