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**IN THE UNITED STATES DISTRICT COURT
 DISTRICT OF UTAH, CENTRAL DIVISION**

THE SCO GROUP, INC., a Delaware
 corporation,

Plaintiff and Counterclaim-
 Defendant,

v.

NOVELL, INC., a Delaware corporation,

Defendant and Counterclaim-
 Plaintiff.

**NOVELL'S PROPOSED FINDINGS OF
 FACT AND CONCLUSIONS OF LAW**

Case No. 2:04CV00139

Judge Dale A. Kimball

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

In accordance with the Court's Order of January 15, 2008, Novell submits the attached proposed Findings of Fact and Conclusions of Law, without prejudice to later amendment based on the facts and theories advanced at the trial.

In a summary judgment order dated August 10, 2007, this Court found as a matter of law that (1) SCO was Novell's agent and fiduciary for purposes of collection of SVRX Royalties; (2) SCO breached its fiduciary duties to Novell by failing to account for and remit the appropriate SVRX Royalty payments to Novell for the SVRX portions of the 2003 Sun and Microsoft Agreements; (3) SCO was liable for conversion of such SVRX Royalty payments as well; and (4) under the APA, even an "incidental" SVRX license is considered an SVRX License.

The bench trial addressed the following issues: (1) were the additional SCOSource licenses SVRX Licenses triggering SCO's fiduciary duty to account for and remit the appropriate SVRX Royalties to Novell; (2) what was the appropriate apportionment of SVRX Royalties from the SCOSource licenses; (3) what was the amount by which SCO was unjustly enriched as a result of SCO's retention of SVRX Royalties; (4) did SCO have the authority to enter into the SCOSource licenses, including the Sun and Microsoft agreements under the APA; and (5) did SCO have the authority to amend Sun's existing license under the APA.

These issues were tried to the Court from April 29, 2008, to May 2, 2008. Following the presentation of evidence and argument at trial, both parties having rested, and based in part on prior submissions of the parties as well as undisputed facts as set forth in the Court's Summary Judgment Order (Docket No. 377, "Order"), the Court now enters the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

A. The Governing Contracts Between Novell and SCO

1. SCO's predecessor in interest, Santa Cruz Operations, Inc., and Novell entered into an Asset Purchase Agreement ("APA") dated September 19, 1995. (Order at 3.)

2. On December 6, 1995, a few months after the APA was signed and the date the transaction closed, Novell and Santa Cruz signed Amendment 1 to the APA. (Order at 8.)

3. Approximately a year after the APA was signed, on October 16, 1996, Novell and Santa Cruz executed Amendment 2 to the APA. (Order at 24.)

B. The SCOsource Initiative

4. In approximately January 2003, SCO launched its SCOsource program.

5. The terms of the specific licenses SCO executed as part of the SCOsource program are addressed below. As a general matter, the SCOsource program was an effort to obtain license fees from Linux users based on SCO's claims to UNIX intellectual property.¹ (Order at 29.)

6. The parties vigorously disputed at trial whether the SCOsource program was primarily concerned with SVRX or with SCO UnixWare. As discussed below in the Court's conclusions of law, because SCO commingled funds belonging to its principal Novell, SCO bears the burden as a fiduciary to untangle the funds and show what of SCOsource concerned SVRX and what, if anything, concerned SCO UnixWare.

¹ The parties have, both in motion papers and at trial, disputed the precise contours of the terms "SVRX," "System V," "UnixWare," and other, related terms. Without passing on how those terms may have been used in any particular document, in this Order the Court will use the term "SVRX" to refer to the versions of UNIX listed in the APA (Schedule 1.1(a), Item VI), as to which SCO is under a fiduciary obligation to remit royalties to Novell. The Court will use the term "SCO UnixWare" to refer to the versions of UNIX developed by SCO subsequent to the APA, as to which SCO is entitled to retain revenue subject to certain limitations not at issue here. The Court uses the term "UNIX" broadly to apply to all versions of that operating system.

7. SCO did not carry its burden. The evidence presented at trial established that the specific UNIX intellectual property with which the SCOsource program was concerned was SVRX. Among the compelling evidence is the fact that, SCO having expended untold man-hours aggressively litigating its claims against IBM, Novell, and a variety of other parties, the only infringing code it has ever identified is SVRX code. That is consistent with the contemporaneous press releases, correspondence, and other material introduced at trial, which describe SCOsource as focused on SVRX infringement in Linux. It is consistent as well with SCO's internal memoranda and presentations, which describe SVRX as the "trunk" from which SCOsource took its value, distinguishing SVRX from "branches" such as SCO UnixWare.

8. Though SCO argued that, to the contrary, its SCOsource program was concerned instead about SCO UnixWare, after a thorough review this Court did not find such evidence compelling.

C. The Microsoft SCOsource License

9. SCO executed an agreement with Microsoft on April 30, 2003, as well as several amendments to that agreement over the following months. (Order at 41.)

10. SCO described its license with Microsoft as part of its SCOsource campaign. (SCO's Memorandum in Opposition to Novell's Motion for Summary Judgment on Its Fourth Claim for Relief, Docket No. 490 ("SCO MSJ Opp.") at 71 ¶ 14.)

11. The Microsoft SCOsource License called for Microsoft to pay SCO a total of \$16,750,000, as follows:

- \$1,500,000 for the rights conveyed in Section 2;
- \$2,000,000 for the option to the rights conveyed in Section 3, plus \$5,000,000 to execute that option; and
- \$250,000 for the option to the rights conveyed in Section 4, plus \$8,000,000 to execute that option.

12. The evidence adduced at trial showed that SCO received \$16,680,000 from Microsoft SCOsource License, including the full amounts called for under Sections 2 and 4.

13. SCO did not pass through any of the Microsoft SCOsource revenue to Novell.

14. Section 2 of the Microsoft SCOsource License conveys three rights: a “release of existing general claims” against Microsoft, including a release of copyright infringement claims; an “IP license” of all SCO intellectual property to all “Current Microsoft Products; and a “patent license” to both current and “New Microsoft Products.”

15. The evidence presented at trial established that Section 2 of the Microsoft SCOsource License conveyed substantial rights to the SVRX intellectual property retained by Novell.

16. SCO did not establish the separate value of any SCO UnixWare intellectual property rights conveyed by Section 2.

17. Section 3 of the Microsoft SCOsource License conveyed a license to a recent release of SCO UnixWare. This Section does not, on its face, grant any SVRX rights. Before Microsoft could get the rights conveyed by Section 4, however, Microsoft needed to accept and pay for the Section 3 option. It could therefore be conceivably argued that some portion of the Section 3 license revenue ought to be apportioned to Section 4. Nevertheless, Novell conceded that this amount more appropriately constitutes SCO UnixWare revenue that SCO is entitled to retain. Based on this concession, the Court assumes that SCO is entitled to retain the Section 3 Microsoft SCOsource License revenue.

18. Section 4 of the Microsoft SCOsource License lists at least 34 versions of UNIX. At least 28 of those versions are identified in the APA as SVRX. Section 4 conveys a broad set of rights, including the right to license, sublicense, and sell the identified UNIX versions. The only substantive limitation imposed is that Microsoft can only distribute the source code of these UNIX versions “in connection with a Microsoft platform product or related offering.”

19. The evidence presented at trial established that Section 4 of the Microsoft SCOsource License conveyed substantial rights to the SVRX intellectual property retained by Novell.

20. SCO did not establish the separate value of any SCO UnixWare intellectual property rights conveyed by Section 4.

D. The Sun SCOsource License

21. In 1994, Sun entered into an SVRX License with Novell. In that agreement, Sun bought out its continuing royalty obligations regarding certain versions of SVRX.

22. On February 25, 2003, SCO executed an agreement that purports “to amend and restate” the 1994 SVRX License. (Order at 40-41.)

23. SCO described its license with Sun as part of its SCOsource campaign. (SCO MSJ Opp. at 70 ¶ 9.)

24. The Sun SCOsource License called for Sun to pay SCO \$10,000,000. The evidence adduced at trial indicated that Sun received \$9,143,451 from the Sun SCOsource License.

25. SCO did not pass through any of the Sun SCOsource revenue to Novell.

26. The Sun SCOsource License added five additional versions of SVRX and two versions of UnixWare to the licensing rights Sun “bought out” in 1994. Before its SCOsource License, Sun had no rights to these UNIX versions.

27. The 1994 Sun Agreement had a 20-year confidentiality restriction prohibiting Sun from publicly disclosing the licensed source code.

28. Sun produces and markets a proprietary operating system, “Solaris.” Solaris is based on UNIX code versions listed in APA Schedule 1.1(a), Item VI — i.e., SVRX. Sun distributes Solaris without additional royalty obligations to Novell based on Sun’s rights under the 1994 Sun Agreement.

29. The 1994 Sun Agreement prevents Sun from publicly releasing or “opensourcing” the Solaris source code, because of the confidentiality obligations included in that agreement.

30. The Sun SCOSource License permits Sun to unilaterally remove any confidentiality restrictions governing the licensed UNIX code if “such Technology is licensed by Sun to a third party without a confidentiality obligation.”

31. After entering into the Sun SCOSource License, Sun released an opensource version of its UNIX-based product, called “OpenSolaris.” As its name suggests, OpenSolaris is based on Sun’s Solaris operating system, which is in turn based on Novell’s SVRX intellectual property. Absent the removal of the 1994 Sun Agreement’s confidentiality restrictions, Sun would not have been licensed to publicly release the OpenSolaris source code.

32. The evidence presented at trial established that the Sun SCOSource License conveyed substantial rights to the SVRX intellectual property retained by Novell.

33. SCO did not establish the separate value of any SCO UnixWare intellectual property rights conveyed by the Sun SCOSource License.

E. The Other SCOSource Licenses

34. SCO also entered into 22 additional SCOSource licenses (“Other SCOSource Licenses”):

- Computer Associates Int’l; Everyone’s Internet, Ltd.; HEB; Questar Corp.; CDM; Leggett & Platt Inc.; Parkhead Systems; and Siemens AG (Océ Printing Sys.) executed written SCOSource licenses.
- Denise Evans; Gotley Nix Evans Pty Ltd.; John Curtis; Jose Garcia Rodriguez; Kellogg Corporation; Robert Twigg; Sphinx CST Ltd.; and Stephen McManus executed electronic SCOSource licenses.

- Cymphonix; DTR Business Systems, Inc.; IMCORP Inc.; MPA Systems Pty Ltd.; Synnex Canada Ltd.; and Seneca Data Distributors Inc. each acted as a distributor for a SCOsource license.

(SCO MSJ Opp. at 72 ¶ 17.)

35. SCO obtained \$1,156,110 from the Other SCOsource Licenses.

36. SCO did not pass through any of the Other SCOsource Licenses' revenue to Novell.

37. Though the Other SCOsource License terms differ in certain respects, for purposes of the issues before the Court, the terms of the SCOsource license with Everyone's Internet, Ltd. ("EI") are representative of the terms of the Other SCOsource Licenses.

38. The EI SCOsource license grants, with certain limitations, the "right and license to use . . . SCO IP." The definition of "SCO IP" makes it clear that these licenses convey 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.

39. SCO has acknowledged that "[t]he central feature of the other SCOsource agreements is the covenant not to sue and the waiver of claims by SCO for the companies' internal Linux usage." (SCO's Memo. in Opp. to Novell's Motion *In Limine* to Preclude SCO from Contesting Licenses Conveying SVRX Rights are "SVRX Licenses," Docket No. 421, at 3.)

40. As noted above, SCO's complaint about "companies' internal Linux usage" was in fact a complaint that those companies were using SVRX code that SCO claims is in Linux. SCO has never identified any unique SCO UnixWare code in Linux and therefore has never identified any SCO UnixWare infringement supposedly excused by the Other SCOsource Licenses.

41. The evidence presented at trial established that the Other SCOsource Licenses conveyed substantial rights to the SVRX intellectual property retained by Novell.

42. SCO did not establish the separate value of any SCO UnixWare intellectual property rights conveyed by the Other SCOsource Licenses.

II. CONCLUSIONS OF LAW

A. SCO's Duties Under the APA

1. When Santa Cruz and Novell began negotiating the deal that became the APA, it was quickly clear that Santa Cruz did not have resources sufficient to purchase the entirety of Novell's UNIX business. Instead, to bridge this resources gap, the parties agreed, under section 1.2(b) of the APA, that Novell would continue to receive one hundred percent of the SVRX Royalties. Santa Cruz was to collect and pass through these royalties to Novell, and Novell, in turn, would pay Santa Cruz an administrative fee of five percent of the SVRX Royalties. Novell retained "all rights to the SVRX Royalties notwithstanding the transfer of the SVRX Licenses to [Santa Cruz]." The APA further specifies that Santa Cruz "only has legal title and not equitable interest in such royalties within the meaning of Section 541(d) of the Bankruptcy Code." (Order at 31-32.)

2. The APA created an agency relationship between the parties with respect to SVRX Royalties.

3. Section 1.2(b) states that SVRX Royalties are "defined and described in Section 4.16." Section 4.16(a) of the APA provides that Santa Cruz was to "administer the collection of

all royalties, fees and other amounts due under all SVRX Licenses (as listed in detail under Item VI of Schedule 1.1.(a) hereof and referred to as ‘SVRX Royalties’).” Item VI of Schedule 1.1(a), in turn, refers to “[a]ll contracts relating to SVRX Licenses listed below.” Instead of providing a list of license agreements with other parties, however, the Schedule 1.1(a) then provides a list of Unix System V software releases up to and including Unix System V Release No. 4.2MP. (Order at 32.)

4. Section 4.16(b) of the APA provides that Santa Cruz “shall not, and shall not have the authority to, amend, modify, or waive any right under or assign any SVRX License without the prior written consent” of Novell. Under this section, Novell retained the sole discretion to direct Santa Cruz to amend, supplement, modify, waive, or add any rights under or to any SVRX Licenses. (Order at 32.)

5. Amendment 1 to the APA modifies section 4.16(b) to create two limited exceptions whereby Santa Cruz has “the right to enter into amendments of the SVRX Licenses.” Amendment 1 § J. Santa Cruz can enter into amendments of SVRX Licenses (1) as may be incidentally involved through its rights to sell and license SCO UnixWare software or the Merged Product or (2) to allow a licensee under a particular SVRX License to use the source code of the relevant SVRX products on additional CPUs or to receive additional distribution from Santa Cruz of such source code. (Order at 34.)

6. Novell’s rights and SCO’s obligations under section 4.16(b), as amended, apply to “any SVRX License.” “SVRX Licenses” are defined in the APA to include all contracts relating to the list of SVRX products provided in Item VI of Schedule 1.1(a). Even incidental licenses of SVRX are considered an SVRX License within the meaning of the APA. (Order at 95.)

7. Amendment 2 to the APA included an additional amendment to section 4.16(b). Under Section B of Amendment 2, Novell and Santa Cruz agreed to a procedure that would govern “any potential transaction with an SVRX licensee which concerns a buy-out of any such

licensee's royalty obligations." The parties agreed to provide written notification to each other upon becoming aware of any potential transaction concerning a buy-out, to both attend any meetings or negotiations with the licensee unless agreed otherwise, to jointly consent to any written proposals to be presented to licensees, and to meet to discuss any potential buy-out transaction. The parties further agreed that a transaction concerning a buy-out should not occur without the prior written consent of both Novell and Santa Cruz. Amendment 2 at ¶ B(1)-(5). (Order at 35.)

B. The SCOsource Licenses Were SVRX Licenses Within the Meaning of the APA.

8. It is readily apparent that each of the SCOsource licenses is an SVRX License. The Microsoft SCOsource License conveys a broad license to at least 28 versions of SVRX products provided in Item VI of Schedule 1.1(a). The Sun SCOsource License increases Sun's rights to at least 30 versions of SVRX products provided in Item VI of Schedule 1.1(a) and gives Sun broad rights to several versions of SVRX where Sun previously had none. The Other SCOsource Licenses grant, with certain limitations, the right and license to use "SCO IP," which the licenses expressly define to include SVRX.

9. As such, the SCOsource licenses are SVRX Licenses within the meaning of the APA.

C. SCO Breached a Fiduciary Duty by Entering into the SCOsource Licenses and Is Liable for Conversion of SVRX Royalties Due from the SCOsource Licenses.

10. Because California law governs actions arising from the APA, and Novell's claims arise from the agency relationship created by the APA, California law governs. *Nedlloyd Lines B.V. v. Super. Ct.*, 3 Cal. 4th 459, 468, 470 (1992).

11. To establish a breach of fiduciary duty under California law, Novell must show "the existence of a fiduciary relationship, its breach, and damages proximately caused by that breach." *Roberts v. Lomanto*, 112 Cal. App. 4th 1553, 1562 (2003) (internal quotation and

citation omitted). As Novell's agent for purposes of the SVRX Royalties, SCO owed Novell a fiduciary duty.

12. The Court concludes that SCO breached its fiduciary duties to Novell by failing to account for and remit the appropriate SVRX Royalties to Novell for the SVRX portions of the SCOSource licenses.

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

14. Novell held equitable title to the SVRX Royalties under the APA. SCO's failure to pass through to Novell the SVRX Royalties due under the SCOSource agreements was a wrongful act inconsistent with Novell's rights. The Court concludes that Novell has established SCO's conversion of the SVRX Royalties due under the SCOSource agreements.

D. SCO Bore the Burden of Apportioning Its Revenues from the SVRX Royalties to Account for Amounts Validly Withheld from Novell.

15. The APA required SCO to obtain Novell's prior written approval before amending, modifying, or waiving any right under any SVRX License. The APA also required SCO to account for SVRX Royalties, even in the circumstances where SCO was entitled to keep 100% of those Royalties. These provisions were intended, among other things, to further SCO's duties as Novell's agent to account for and remit SVRX Royalties.

16. Under California law, "where a fiduciary has a legal duty to allocate receipts between those in which its beneficiary has some interest and those in which the beneficiary has none, and is fully and singularly capable of making that allocation but fails to do so, a court is justified in calling upon the fiduciary to bear the burden of differentiation at trial." *Rosenfeld*,

Meyer & Susman v. Cohen, 191 Cal. App. 3d 1035, 1051-52 (1987); *Kennard v. Glick*, 183 Cal. App. 2d 246, 250-51 (1960) (“An agent who fails to keep an account raises thereby a suspicion of infidelity or neglect, creates a presumption against himself, and brings upon himself the burden of accounting to the utmost for all that has come into his hands; and in such case every doubt will be resolved against the agent, and in favor of the principal . . .”).

17. This rule is well established when it comes to accounting for copyright royalties and in other contexts as well:

[T]he defendants must be content to accept much of the embarrassment resulting from mingling the plaintiff’s property with their own. . . . [W]e must make an award which by no possibility shall be too small. It is not our best guess that must prevail, but a figure which will favor the plaintiffs in every reasonable chance of error.

Sheldon v. Metro-Goldwyn Pictures Corp., 106 F.2d 45, 51 (2d Cir. 1939); *see also Kim v. Fujikawa*, 871 F.2d 1427, 1430-31 (9th Cir. 1989) (“In determining the amount that a breaching fiduciary must restore to the Funds as a result of a prohibited transaction, the court should resolve doubts in favor of the plaintiffs” (internal quotation and citation omitted)); *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985) (“The burden of proving that the funds would have earned less than that amount is on the fiduciaries found to be in breach of their duty. Any doubt or ambiguity should be resolved against them. . . . This is nothing more than application of the principle that, once a breach of trust is established, uncertainties in fixing damages will be resolved against the wrongdoer.”); *Leigh v. Engle*, 727 F.2d 113, 138-39 (7th Cir. 1984) (“[T]he burden is on the defendants who are found to have breached their fiduciary duties to show which profits are attributable to their own investments apart from their control of the Reliable Trust assets [W]hile the district court may be able to make only a rough approximation, it should resolve doubts in favor of the plaintiffs.”).

18. SCO commingled the SVRX Royalties it obtained through the SCOsource licenses with SCO’s own funds it that claims it obtained from SCO UnixWare rights conveyed in

those licenses and failed to account for them as required by the APA. The Court therefore concludes that SCO has the burden of differentiating royalties properly retained by SCO from SVRX Royalties that it improperly retained.

E. SCO Was Unjustly Enriched by Retention of the SVRX Royalties.

19. Novell seeks restitution of the amount by which SCO was unjustly enriched by its retention of SVRX Royalties. Unjust enrichment is measured as the benefit the defendant wrongfully received at the expense of the plaintiff. *First Nationwide Sav. v. Perry*, 11 Cal. App. 4th 1657, 1662 (1992); *Morlife, Inc. v. Perry*, 56 Cal. App. 4th 1514, 1528-29 (1997).

20. Here, SCO was unjustly enriched by retaining SVRX Royalties that should have gone to Novell. Novell has established that SCO obtained the following royalties for SVRX Licenses:

Microsoft SCOsource License:	\$16,680,000
Sun SCOsource License:	\$9,143,451
Other SCOsource Licenses:	\$1,156,110
TOTAL:	\$26,979,561

21. Novell concedes that the \$7 million paid for Microsoft SCOsource Section 3 rights represented SCO UnixWare royalties, and the Court therefore need not address this amount. SCO has not met its burden of proof to establish that it was entitled to retain any of the remaining amounts. Accordingly, the Court concludes that SCO was unjustly enriched by the amount of \$19,979,561 and must disgorge this amount to Novell.

22. Under the APA, SCO undertook a fiduciary duty to collect and remit 100% of the SVRX Royalties. Although ordinarily SCO was entitled to keep 5% of the SVRX Royalties, this payment was an “administrative fee” paid “in consideration of” SCO’s exercise of its fiduciary duties. Here, the Court has found that, as a matter of law, SCO breached its fiduciary duties and

converted revenue meant for Novell, and thus has not earned the 5% fee to which it would have been entitled if it had accounted for and paid the SVRX Royalties it owed.

F. SCO Has No Authority to Enter into SCOsource Licenses Under Section 4.16(b) of the APA.

23. Section 4.16 of the APA originally barred SCO from amending existing SVRX Licenses or entering into new ones. As amended, however, the APA permits only three exceptions: (1) SCO may enter into or amend SVRX Licenses with Novell's written permission; (2) SCO may enter into SVRX Licenses "incidentally involved through [SCO's] rights to sell and license" SCO UnixWare; and (3) SCO may enter into SVRX Licenses "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."

24. The Court concludes that SCO did not meet any of these conditions with regard to the Microsoft, Sun or Other SCOsource Licenses. First, SCO never sought Novell's consent for the SCOsource licenses. SCO sought Novell's participation in the SCOsource initiative, and Novell refused.

25. Second, as the Court has found, SCO's claimed SVRX rights played more than an "incidental" role in the SCOsource licenses.² The Microsoft and Sun SCOsource Licenses conveyed significant rights to Novell's SVRX intellectual property. The Other SCOsource Licenses were offered to protect Linux users from claims that Linux infringes the SVRX copyrights and therefore also convey significant SVRX rights.

² There was some dispute as to the meaning of the term "incidental." The parties appear to agree that, at least, its common English meaning is "a minor accompaniment." (SCO MSJ Opp. at 51.) Given the prominent role SVRX played in SCOsource, it is not necessary for the Court to set the precise contours of what might or might not be an "incidental" license of SVRX, as under any reasonable definition, SVRX played more than an incidental role in the SCOsource licenses.

26. Third, the SCOsource licenses are not “additional CPU” licenses. In the case of Sun and Microsoft, the licenses conveyed broad rights to use, distribute, sublicense, etc. SVRX in both binary and source form, and contain no mention of CPU limitations. The Other SCOsource Licenses permit the licensee to use SVRX in Linux and, again, contain no CPU limitations.

27. In addition to its opposition on the merits, SCO opposed declaratory relief claiming it was “moot.” As SCO acknowledges, declaratory relief is available provided it will “have some effect in the real world.” *United Sch. Dist. No. 259, Sedgwick County, Kan. v. Disability Rights Ctr. of Kan.*, 491 F.3d 1143, 1147 (10th Cir. 2007). Here, the evidence shows that SCO intends to continue its SCOsource program. A declaration that SCO is without authority to enter into SCOsource licenses will certainly “have some effect” on such plans.

28. The Court thus concludes and declares that SCO has no authority to enter into the SCOsource licenses.

G. SCO Had No Authority to Amend the 1994 Novell-Sun Buy-Out Agreement Under Amendment 2 of the APA.

29. Amendment 2 of the APA placed additional limitations on SCO’s rights with respect to SVRX Licensees. Section B of Amendment 2 concerns “any potential transaction with an SVRX licensee which concerns a buy-out of any such licensee’s royalty obligations.” This provision requires either party who even “become[s] aware of any such potential transaction” to immediately notify the other in writing. Amendment 2 § B ¶ 1. The provision further requires that any negotiations with the licensee be attended by both parties, and that both parties consent to any such transaction. *Id.* at ¶¶ 2-4.

30. There is no dispute that Sun’s 1994 agreement with Novell was a “buy-out” of Sun’s SVRX royalty obligations as that term is used in Amendment 2. Sun’s 2003 SCOsource license explicitly acknowledges that it is intended to “amend and restate” the 1994 buy-out agreement, including expansion of Sun’s existing license rights to permit opensource licensing of

SVRX code. The Court concludes that Sun’s 2003 SCOSource License therefore “concerns” a buy-out, and SCO was required to follow the additional restrictions imposed by Amendment 2 on transactions that concern buy-outs. SCO did not comply with these terms.

31. The Court thus concludes and declares that SCO was without authority to enter into the 2003 Sun license under Amendment 2, Section B, of the APA.

H. Both Monetary and Declaratory Relief Is Appropriate.

32. SCO contended that, for a variety of reasons, Novell is not entitled to both monetary and declaratory relief. The Court was not persuaded by these arguments.

33. SCO cited a variety of precedent that, at best, suggests Novell may be obligated to turn over to SCOSource licensees some portion of this judgment should Novell choose not to honor the terms of the SCOSource licenses. That is a matter between the SCOSource licensees and Novell. None of the precedent SCO cited to this Court holds that, where a fiduciary conveys rights exceeding its authority and retains the proceeds, the fiduciary is entitled to retain those proceeds.

34. SCO also claimed that if Novell does later decide to ratify the SCOSource licenses, a money judgment against SCO will be an unfair penalty. SCO claimed that is so because, had Novell approved the SCOSource licenses before their execution, SCO would be entitled to all of the SCOSource revenue, and the mere fact that such “approval” (ratification) occurred later is an insufficient reason to deprive SCO of that revenue. This argument conflates the legal concept of “ratification” with the APA’s requirement that Novell “approve” the terms of SVRX Licenses. SCO is correct that the APA as amended gives SCO the right to revenue from “source code right to use fees attributable to new SVRX licenses approved by [Novell].” But Novell did not approve any SCOSource license. Had SCO sought Novell’s approval, there is nothing in the APA that would have prevented Novell from conditioning its approval on a suitable division of the resulting royalties. Later ratification by Novell, if it occurs, will not work

an ex post facto “approval” of the SCOsource licenses under the relevant terms of the APA. the Court therefore declines to find anything punitive about the ordered judgment.

I. SCO’s Affirmative Equitable Defenses

35. The Court has considered SCO’s equitable defenses and finds them without merit.

36. SCO raised estoppel as an affirmative defense. Estoppel arises out of the rule that “[w]henever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.” Cal. Evid. Code § 623.

37. To make out estoppel, “four elements must be present . . . (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.” *Lentz v. McMahon*, 49 Cal. 3d 393, 399 (1989). To prevail on its estoppel claim, therefore, SCO would have to have shown that Novell knew whether and to what extent SCO collected but did not remit SVRX Royalties, that Novell failed to seek such Royalties and intended for that failure to be taken by SCO as indication it could keep the money, and that SCO relied on Novell to SCO’s injury.

38. The Court concludes that SCO cannot make out any element of its estoppel defense. SCO had an obligation to keep Novell apprised of the facts concerning SVRX Licenses and failed to do so. Novell repeatedly objected to SCO’s SCOsource campaign and repeatedly demanded audits and accounting of the Sun and Microsoft SCOsource licenses.

39. SCO introduced evidence it claims shows that Novell was silent when SCO withheld SVRX Royalties in connection with a 1996 audit. At best, this evidence showed that Novell said nothing when SCO licensed SVRX incidentally. That is not sufficient to estop Novell from contesting an SVRX License that conveys greater-than-incidental rights. Even were

the evidence otherwise, courts typically require a duty to speak before imparting preclusive effect to silence. *See, e.g., Feduniak v. Cal. Coastal Comm'n*, 148 Cal. App. 4th 1346, 1362 (2007) (“It is settled that when the party to be estopped does not say or do anything, its silence and inaction may support estoppel only if it had a duty to speak or act under the particular circumstances.”). In fiduciary relationships, where the presumption is that the principal need *not* investigate the activities of its agent and can instead rely on the agent to fulfill its duties faithfully, there is no such duty. *Hobbs v. Bateman Eichler, Hill Richards, Inc.*, 164 Cal. App. 3d 174, 201-02 (1985) (“Where there is a fiduciary relationship, the usual duty of diligence to discover facts does not exist.”). The Court concludes that Novell is not estopped to pursue its claims to SVRX Royalties.

40. SCO also raised “unclean hands” as an affirmative defense. The doctrine of unclean hands, as partially codified in California Civil Code section 3517, provides that “[n]o one can take advantage of his own wrong.” *See, e.g., Rosenfeld v. Zimmer*, 116 Cal. App. 2d 719, 722 (1953) (“A court of equity will not assist a party to a fraudulent scheme to secure the objective of such plan.”); *Reynolds v. Roll*, 122 Cal. App. 2d 826, 836 (1954) (“courts will not lend assistance to persons whose claim for relief rests on an illegal transaction” (internal quotation marks and citation omitted)).

41. Even where such conduct is shown, it must be part of the same transaction at issue, and the nature of the plaintiff’s conduct must be *worse* than that of the defendant. *See, e.g., Watson v. Poore*, 18 Cal. 2d 302, 313 (1941) (“[I]mproper conduct not necessarily connected with the transaction particularly involved . . . is not a reason for denying equitable relief on the ground of unclean hands.”); *Belling v. Croter*, 57 Cal. App. 2d 296, 304 (1943) (unclean hands does not apply “if it be shown that [the plaintiff] is the one ‘least at fault,’ and that the party against whom relief is sought was guilty of wrongdoing in respect to the same matters and is ‘most in fault’”).

42. SCO has not shown any conduct by Novell that was in bad faith or wrongful. The Court thus concludes that no affirmative equitable defenses protect SCO's conduct here.

J. Prejudgment Interest

43. Novell is directed to file a brief within 21 days of this Order describing what, if any, prejudgment interest Novell seeks based on the amounts awarded in this Order. At its option, SCO may then file within 15 days a brief opposing Novell's request for prejudgment interest. Novell may file a reply within 7 days in further support of its claim for prejudgment interest. This briefing shall not affect the deadlines to file requests for costs or attorneys' fees, which, pursuant to District of Utah Local Rule 54-2, shall run from the entry of final judgment.

DATED: April 29, 2008

ANDERSON & KARREBERG

By: /s/ Heather M. Sneddon

Thomas R. Karrenberg
Heather M. Sneddon

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of April, 2008, I caused a true and correct copy of **NOVELL'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** to be served to the following:

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