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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

THE SCO GROUP, INC., a Delaware corporation, Plaintiff/Counterclaim-Defendant, vs. NOVELL, INC., a Delaware corporation, Defendant/Counterclaim-Plaintiff.	**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND PROPOSED FINAL JUDGMENT, ON BEHALF OF THE SCO GROUP, INC.** Civil No. 2:04 CV-00139 Judge Dale A. Kimball Magistrate Brooke C. Wells

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Plaintiff/Counterclaim-Defendant, The SCO Group, Inc. ("SCO"), respectfully submits these Proposed Findings of Fact and Conclusions of Law in compliance with the Court's Order dated January 15, 2008.

PROPOSED FINDINGS OF FACT

I. BACKGROUND

1. SCO is a Delaware corporation engaged in the business of developing and licensing UNIX products and other software products, including UnixWare and OpenServer, both based on the UNIX System V operating system.

2. UnixWare is the brand name for the most recent releases of UNIX System V. SCO owns UnixWare and has the exclusive right to license the UnixWare operating system. OpenServer is an operating system developed by SCO's predecessor, The Santa Cruz Operation, Inc., and originally released in the early 1990s. Novell has never owned OpenServer and has no interest in the value of the OpenServer operating system.

3. Novell is a Delaware corporation primarily engaged in the business of developing and licensing networking software products.

4. In 2004, SCO sued Novell on a single claim for slander of title based on Novell's public statements claiming ownership of UNIX copyrights. With its answer, Novell asserted a competing slander claim and claims for breach of contract and unjust enrichment. The parties amended their respective pleadings to assert additional claims and counterclaims.

5. In their final form, Novell's Counterclaims included a claim for a declaratory judgment that, inter alia, SCO lacked the authority to enter into SCOsource licenses SCO executed with Sun, Microsoft, and Linux end-users starting in 2003. Novell also brought claims for breach of

contract, unjust enrichment, breach of fiduciary duty, conversion, and accounting, based on allegations SCO had failed to remit and report to Novell revenues from those licenses.

6. Starting in September 2006, the parties submitted a number of motions for summary judgment. On August 10, 2007, the Court issued an Order resolving many of the issues.

7. Among other things, the Court dismissed SCO's slander claim, concluding that UNIX copyrights did not transfer to Santa Cruz under the 1995 Asset Purchase Agreement between Novell and Santa Cruz (the "APA"). The Court also concluded, however, that "Santa Cruz did acquire ownership of other rights in multiple versions of UNIX and UnixWare." (Order at 55.)

8. The Court also concluded that Novell had retained broad rights under the APA with respect to contracts regarding UNIX System V licenses identified in the APA as "SVRX Licenses," including the right to waive SCO's claims arising from those contracts.

9. In addition, the Court ruled that Novell had retained rights under the APA to royalties under SVRX Licenses – which the APA identifies as "SVRX Royalties" – whether or not the SVRX licenses were in existence at the time of the APA.

10. The Court further concluded that SCO's 2003 agreements with Microsoft and Sun contained SVRX Licenses. The Court, however, left open several questions regarding the Agreements at issue.

11. First, the Court set for the trial the apportionment of value in the Sun and Microsoft Agreements between the SVRX Licenses and the other components of the agreements to determine the amount of SVRX Royalties under those agreements.

12. Second, the Court also set for trial the question of whether the SCOsource agreements with Linux end-users (the "SCOsource Agreements") contained SVRX Licenses and, if so, what portion of the license fees should be attributed to those SVRX Licenses as SVRX Royalties.

13. Third, the Court set for trial the question of whether SCO was authorized to execute the SVRX Licenses in the Sun and Microsoft Agreements under a provision of the APA permitting SCO to amend or execute new SVRX licenses "incidentally" with the licensing of UnixWare. On December 21, 2007, Novell filed a motion for summary judgment on that question, arguing that SCO lacked such authority. The Court heard oral argument on this motion on the second day of trial.

14. The trial thus presented three principal issues: (1) which components of the Microsoft and Sun Agreements are "SVRX Licenses," and what value to attribute to them; (2) whether part of the SCOsource Agreements are "SVRX Licenses," and if so what value to attribute to them; and (3) whether SCO had the authority to execute the Microsoft, Sun, and SCOsource Agreements. The Court makes the following findings of fact and conclusions of law.

II. THE MICROSOFT AGREEMENT

15. On April 30, 2003, SCO and Microsoft entered into a "Release, License and Option Agreement" (the "Microsoft Agreement"). (SCO-EX-237.) Microsoft was not a UNIX licensee at the time of the Agreement. (SCO-EX-158.) SCO received a total of $16.75 million under the Agreement.

16. The Microsoft Agreement has several components, corresponding to the sections of the Agreement. The Agreement itself provides a breakdown of the amounts Microsoft paid for its rights under the Agreement. (SCO-EX-237.) The main sections are as follows.

17. Section 2 is a "Release and Licenses." Microsoft paid $1.5 million for the release and licenses. (Id. § 1(a).) Section 2.1 is a "Release of existing general claims" that is a broad release of any claims, "known or unknown, suspected or unsuspected, or contingent or fixed" that SCO might have against Microsoft. The language of the release does not pertain to any particular technologies. (Id. § 2.1.) Section 2.2 is an "IP license to current Microsoft products and services." (Id. § 2.2.) The license permits Microsoft to use any SCO intellectual property in any of Microsoft's products.

18. Section 3 is an "Option to Purchase UnixWare License." Microsoft paid $2 million for the option granted in Section 3.5. (SCO-EX-237 § 1(b).) Microsoft thereafter paid $5 million for the UnixWare license set forth in Section 3.5. (SCO-EX-237 § D.) In its Amended Trial Brief, Novell conceded that it is not entitled to any payments for Section 3.

19. Section 4 is an "Option to Purchase License to Other SCO Assets." Microsoft paid $250,000 for the option granted in Section 4.1. (Id. § 1(c).) Microsoft could exercise the option only if it had exercised the option of obtaining the UnixWare license set forth in Section 3. (Id. § 4.1.) Having exercised its option under Section 3, Microsoft thereafter paid $8 million for the license in Section 4. (Id. § C.)

20. Sections 4.1 and 4.2 state that the License is for the Assets in Exhibits A, B, and C. (Id. §§ 4.1, 4.2.) Exhibit A lists components and features of UnixWare 7, Release 7.1.3. (Id. at SCO1300040-41.) Exhibit B pertains to components for use with UnixWare. (Id. at SCO1300042-43.) Exhibit C is a list of the following operating systems: Open UNIX 8 Release 8.x (a version of UnixWare, which was named Open Unix for a time); UnixWare Release 7.0.x and prior versions of UnixWare; OpenServer Release 5.x and all prior versions and releases; and

older versions of UNIX. (Id. at SCO1300044-45.) The Section 4 license provided Microsoft with broader rights to distribute the UnixWare source code than Section 3. (Id. §§ 3.7(b), 3.7(c).)

21. The Agreement reflects that a substantial number of the releases that the Court has found to be a basis for an SVRX License are ones that the parties agreed SCO might not even be able to deliver. Section 4.4 provided that SCO would not deliver to Microsoft the assets "identified as non-deliverable in Exhibit C." (Id. § 4.4.) Exhibit C provides, in turn: "Items in italics are not readily available and may not be recoverable," and lists in italics SVR 4.0 and all prior SVR preceding SVR 2.0. (Id., Exhibit C.)

22. The licenses to UnixWare and OpenServer that Microsoft received under Section 4 of the 2003 Microsoft Agreement allowed Microsoft to ensure that the company's software was compatible with the latest releases of UnixWare and OpenServer that hardware manufactures were using at the time.

23. The parties amended certain provisions of the Agreement regarding timing and due dates in Amendments Nos. 1 and 2, executed in June and July 2003. (Id.) In Amendment No. 3, executed on July 20 and 21, 2003, the parties specified that upon its exercise of the option set forth in Section 3.5, Microsoft would also obtain a license to "BSD Code," which does not include any SVRX releases. (Id. § C.)

24. The parties also agreed in Amendment No. 3 to lift certain restrictions in the scope of Microsoft's Section 3.6 license. The parties agreed that Microsoft was permitted to distribute "parts of the Software (excluding material portions of the kernel)" in "the majority" of any particular release of a Windows server operating system; that Microsoft was permitted to

distribute "a larger portion of the Software (including material portions of the kernel)" in "some editions" of Windows, under certain specified conditions; and that "a portion of the Software constituting less than one percent of the Software may be distributed by default" with all editions of Windows. (Id. § B.)

25. The "Software" is defined in the Microsoft Agreement to comprise the technology identified in Exhibits A and B thereto (as noted). (Id. § 3.1.) Given the technologies identified in those Exhibits (detailed above), Paragraph B of Amendment No. 3 to the Microsoft Agreement reflects Microsoft's concern that (in the language of Exhibit A) it was "components or features" in "SCO UnixWare 7, Release 7.1.3" that might be present in Windows, and that therefore Microsoft sought to obtain rights to use.

III. THE SUN AGREEMENT

26. On February 25, 2003, Sun and SCO entered into a "Software Licensing Agreement" (the "Sun Agreement" or "2003 Sun Agreement"). (SCO-EX-185.) At that time, Sun was a licensee of the older UNIX technology and had developed its own version of UNIX, called Solaris, which was developed at the same time as SVR4 (which AT&T developed with Sun) and which in substantial part is based on SVR4. Sun had never obtained a license to UnixWare; instead, in 1994, Sun had entered into a Software License and Distribution Agreement with Novell. (Id.; SCO-EX-23.) SCO received a total of $10 million under the 2003 Agreement.

27. In the 1994 agreement, for $82.5 million, Sun had purchased from Novell (1) a full buyout of Sun's obligation to pay binary royalties on Solaris; and (2) the right to provide access to the Solaris source code to an unlimited number of Sun's customers and sublicensees, whether or not they had a license to UNIX source code. (SCO-EX-23 § 3.1.) The 1994 agreement did

not afford Sun any rights with respect to UnixWare. As of 2003, Sun had not licensed any new UNIX source code since the early 1990s.

28. In 2003, SCO perceived Sun as having fallen behind the industry in certain respects, because in 1985 Sun had developed its own RISC hardware architecture, called SPARC, and had continued to use that architecture through the 1990s. In contrast, SCO and its predecessors-in-interest in the UNIX business had moved away from RISC architecture to Intel-based architecture. SCO's understanding in 2003 was that Sun had tried several times to develop Intel-compatibility for Solaris (which was based on pre-UnixWare SVRX) but had not succeeded.

29. SCO understood during the negotiation of the Agreement in 2003 that Sun was very interested in developing Intel compatibility and wanted access to UnixWare for that purpose.

30. The 2003 Sun Agreement amended the 1994 agreement in certain respects. (SCO-EX-185.) The main components of the Agreement are as follows.

31. Section 4 is a "License Grant" to all of SCO's intellectual property rights in the technology listed in Attachment 1 of the Agreement. (SCO-EX-185 § 4.) Attachment 1 is a chronological list of UnixWare Releases 1.0, 1.1, 1.1.1, 2.0, 2.1, 2.1.2, 7.01, 7.01, 7.1, 7.1.1, 7.1.1+LKP, 7.1.2, MP2, MP3 and 7.1.3; the same prior UNIX products to which Sun already had a license; five releases of System V to which Sun did not already have a license; and the device drivers for UnixWare and OpenServer. (SCO-EX-185 at SCO1287218-19.) Of the five releases of System V to which Sun did not already have a license, three are not listed in the APA or its Amendments, which list the only products for "SVRX Licenses."

32. Attachment 1 comprises three specified categories of technology. (Id.) The first category, "Description of Technology," lists over two dozen releases of System V to which Sun

already had rights under the 1994 Agreement. (Id.; SCO-EX-23 at NOV 000011876.) The second category, "Description of Technology – Additional Technology," contains the list of UnixWare Releases, further prior UNIX products to which Sun already had a license, and the five releases of System V to which Sun did not already have a license. (SCO-EX-185 at SCO1287219.) The third category, "Description of Technology – Device Drivers," lists the device drivers. (Id.)

33. The Section 4 license permits Sun to exercise SCO's intellectual property rights in the licensed technology however Sun chooses, including through licensing Solaris, and to sublicense those rights to third parties "through multiple tiers of sublicensees." (SCO-EX-183 § 4.) The 1994 agreement had already permitted Sun to sublicense all rights with respect to Solaris, and to an unlimited number of sublicenses. (SCO-EX-23 § 3.1.) Section 4.1(b) provides that in exercising its license, "Sun will license the Technology for value." (SCO-EX-185 § 4.1(b).) In addition, any such license "will be subject to SCO's copyright interest in the Technology," provided that Sun has the license grant in Section 4.1(a), and "Sun agrees that Sun will not transfer ownership in any Technology to which Sun does not have an ownership interest." (Id.)

34. In addition to the UnixWare source code, Sun purchased drivers that would enable it to enhance the functionality of its Intel-based UNIX offering. A driver, also known as a device driver, is a file that contains information needed by a program to operate a device such as a hard disk or internet connection. Without the drivers that work with a particular operating system, a person or company in effect cannot use the operating system for any conventional tasks. Without the drivers for a hard disk or internet connection, for example, the operating system cannot be used for any task that requires a hard disk or an internet connection. With respect to a

business, the drivers are thus a prerequisite for the operating system to have any utility for conventional business purposes. SCO understood during the negotiations that Sun was particularly interested in having access to SCO's UnixWare and OpenServer drivers.

35. Sun did not obtain any right to the delivery of any drivers for any of the old System V products. Instead, Sun obtained the right to the delivery by SCO of all of the "drivers for UnixWare products and OpenServer products for which SCO has the right to license such drivers to third parties." (SCO-EX-185 § 4.1(a), Attachment 1.)

36. Section 10 sets forth SCO's obligation to indemnify Sun for any claim brought against Sun asserting that the Section 4 licensed technology infringes the rights of any third parties. (Id. § 10.) Section 10 also provides that if the intellectual property rights in the technology become the subject of a claim of infringement, SCO shall ensure that Sun has the right to continue to use the technology or replace the technology to make it non-infringing. The provision has not been implicated or applied.

37. Approximately two months after entering into the Agreement, SCO and Sun executed a Clarification of License Grant to UnixWare and OpenServer Drivers (the "Clarification Agreement") that detailed the specific drivers that Sun had received under the Agreement. (SCO-EX-189.) The Clarification Agreement and its four attachments identify more than five hundred individual source and object code drivers, exclusively relating to UnixWare and OpenServer, that SCO was obligated to provide to Sun under the Sun Agreement. (Id., Attachments A-D.)

38. Section 12 of the Sun Agreement is a release of any claim that either party may have with respect to the licensed technology or any derivatives thereof. (SCO-EX-185 § 12.) SCO also

waives claims "with respect to any 'moral' or equivalent rights" regarding the licensed technology in Section 5.3. (Id. § 5.3.)

39. Section 13 provides that if SCO grants redistribution rights to any or all of the licensed technology on terms more favorable than those granted to Sun under the Agreement, then SCO shall offer Sun the same terms and conditions. (Id. § 13.) SCO has not granted any such broader redistribution rights, and therefore the provision has not been applied.

40. Under the Agreement, Sun paid SCO the total of $10 million over four quarters. The Agreement does not ascribe any particular prices to any of the rights thereunder. (SCO-EX-185.)

IV. UNIX AND UNIXWARE

41. UnixWare is the brand name for the more recent releases of the UNIX System V, Release 4 operating system developed and licensed in the early 1990s by USL and Novell, and thereafter by Santa Cruz and SCO. UnixWare is the "latest implementation" of System V, a "full UNIX System V operating system," and "the latest generation of UNIX SVR 4.2 with SVR 4.2 MP." (SCO-EX-412; SCO-EX-413.)

42. In the 1995 Novell's Guide to UnixWare 2, Novell says that the Guide "provides Novell's authorized guidance to its remarkable UNIX System V Release 4.2 product." (SCO-EX-372.) The Introduction explains that "[t]he UnixWare 2 version of UNIX System V is showcased in this book" and that "UnixWare is the brand name for Novell's UNIX System V product." (Id. at xxiii-xxvi.)

43. The product was called UnixWare because it was to be a combination of the latest releases of System V source code and some components of Novell's NetWare source code. (SCO-EX-412.) The first releases of UnixWare contain all or virtually all of the technology

included in the immediately prior System V releases, SVR4.2 and SVR4.2 MP. (SCO-EX-412; SCO-EX-413.)

44. In 1995, under the Asset Purchase Agreement ("APA") between the companies, Novell sold the UnixWare business to Santa Cruz, including all of the source code, licenses, and royalties, as well as intellectual property rights associated with UnixWare. (SCO-EX-38 §§ 1.1, 1.3(a)(i); Schedule 1.1(a).) The core members of Novell's UNIX licensing group became employees of Santa Cruz in that company's UNIX licensing group.

45. Santa Cruz released several subsequent releases of UnixWare, including multiple versions of each of UnixWare 2 and UnixWare 7. (SCO-EX-369; SCO-EX-371.) Under the 2001 transfer of assets from Santa Cruz to SCO (SCO-EXS-167, 168, 170, 172, 175, 361, 362, 363, 364), the core members of Santa Cruz's UNIX licensing group became employees of SCO in that company's UNIX licensing group.

46. All of the releases of UnixWare subsequent to Novell's transfer of the business are releases of System V. (See, e.g., SCO-EX-412; SCO-EX-413.) All of the commercially valuable technology from the prior versions of System V is included in UnixWare, and UnixWare would not operate without its System V components. UnixWare supports the newest industry-standard hardware and is a high-performance, scalable, and reliable operating system. (SCO-EX-412; SCO-EX-413.)

V. STAND-ALONE LICENSES FOR OLDER UNIX TECHNOLOGY

47. It has been many years, in some cases more than two decades, since SCO or its predecessors-in-interest (including Novell) have entered into stand-alone licenses for the older UNIX (including System V) technology.

48. With respect to some versions of UNIX, such as UNIX/32V Time-Sharing System, Version 1.0, the product has not been separately licensed since 1982. UNIX System V, Releases 1 and 2 have not been separately licensed since the late-1980s. UNIX System V, Releases 3 and 4 have not been separately licensed since the late 1980s or early 1990s.

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

VI. THE LICENSING OF UNIXWARE

50. AT&T, USL, Novell, and Santa Cruz licensed the source code for UNIX products to Original Equipment Manufacturers ("OEMs") who used the source code to develop their own versions of UNIX that they then distributed in binary format on their hardware. Such OEMs paid a one-time fee for the internal use of the source code on designated CPUs, a one-time distribution fee, and ongoing royalties for each distributed binary copy of their UNIX version.

51. In licensing UNIX, AT&T, USL, and Novell also regularly, as a matter of standard practice, licensed the same rights with respect to the older releases that predated the licensed product. Those "Prior Products" were identified as such in the license for each licensed product.

A licensee who executed a license for SVR4.2, for example, had the same rights to the earlier versions of UNIX on which release 4.2 was built, and the list of prior products reflected that right. (SCO-EX-393 at 33.) When it owned the UNIX business, in the early 1990s, Novell itself licensed UnixWare products with the same rights to the System V prior products. (See, e.g., SCO-EX-27 at 27; SCO-EX-370 at 26.)

52. After it acquired the UnixWare business from Novell in 1995, Santa Cruz adopted for its UnixWare licenses the same approach that Novell had used for its UnixWare licenses. Santa Cruz did so with Novell's guidance, knowledge, and approval. (SCO-EX-84 at SCO1299955-56, SCO1299962.) Under the Statement of Work for the transition of UNIX licensing from Novell to Santa Cruz, for example, the parties agreed that Santa Cruz would follow Novell's licensing approach, except for a change in the name of the licensor from Novell to Santa Cruz. (SCO-EX-84 at SCO1299955-56, SCO1299962.)

53. As Novell had done, as a matter of standard practice, Santa Cruz regularly listed the older releases of UNIX, including numerous releases of System V, with the current license. Customers paid no additional fees for the rights to the prior products. (See, e.g., SCO-EX-370 at SCO1039897; SCO-EX-369 at SCO1042612; SCO-EX-371 at SCO1040469.)

54. In 1995 and 1996, for example, Santa Cruz licensed UnixWare 2.0 and 2.1 to various licensees. A standard UnixWare 2.0 license included a one-time fee of $375,000 for the right to use the UnixWare 2.0 source code. (SCO-EX-369 at SCO1042590.) As Novell had done, Santa Cruz included for many UnixWare 2.0 licensees a listing of System V prior products at no additional cost. (See, e.g., SCO-EX-370 at SCO1039897, SCO1039921; SCO-EX-371 at SCO1040469, SCO1040491; SCO-EX-141 at SCO0977766.)

55. The $375,000 list price for a UnixWare 2.0 license with Unisys that licensed the SVRX prior products, for example, was the same as the price for a contemporaneous UnixWare license with Alps that did not list the System V prior products. (See, e.g., SCO-EX-369 at SCO1042612; SCO-EX-370 at SCO1039897; SCO-EX-371 at SCO1040469.)

56. AT&T, USL, Novell, and Santa Cruz granted rights to the prior products to facilitate the development by licensees of their versions of UNIX based on the most recent licensed product and as an assurance to the licensee that they had the rights to any of the technology included in that licensed product, including technology previously released in the prior products.

57. By the late 1990s, Santa Cruz came to license UnixWare to distributors as a "packaged product," or product in binary format that was ready for distribution to end-users without further development. The UnixWare licenses with such distributors did not list System V prior products because distributors merely replicated and distributed the packaged product as is.

VII. THE UNISYS LICENSES

58. In the 1980s and early 1990s, before UnixWare was released, Unisys Corporation ("Unisys") had obtained System V licenses, including a license to SVR4.0 MP in 1991. (SCO-EX-389; SCO-EX-390.) Those Unisys licenses each included a license to a list of System V prior products. (SCO-EX-389 at 10-11; SCO-EX-390 at 21.)

59. In 1995, Novell licensed UnixWare 2.01 to Unisys through a UnixWare license that also granted a license to the list of System V prior products. (SCO-EX-370 at 26.)

60. In 1996, after the APA, Santa Cruz licensed UnixWare 2.1 to Unisys through a license that also granted a license to a list of System V prior products. (SCO-EX-371 at 24.)

61. Under the UnixWare 2.01 license that it had obtained from Novell, Unisys had created an operating system based on UnixWare 2.01 on which it was required to pay binary per-copy fees each time Unisys sold hardware that included that binary operating system. (SCO-EX-370; SCO-EX-387.) After Novell transferred that license to Santa Cruz under the APA, Unisys continued to pay those fees to Santa Cruz for at least several years. (SCO-EX-387; SCO-EX-388.) Novell therefore knew Unisys was paying Santa Cruz an ongoing UnixWare royalty stream that continued after the APA.

62. Novell did not ask Santa Cruz for those royalties or any portion of those royalties supposedly attributable to the license to the SVRX prior products included therein, nor did Novell even inquire about those royalties in its 1998 audit of Santa Cruz.

63. Santa Cruz forwarded to Novell a document entitled "Quarterly Royalty Amounts Reported by Unisys – Summary of SCO UnixWare2 and UNIX SVR4 Products." (SCO-EX-387; SCO-EX-410.) Those reports show that Unisys continued distributing an operating system based on UnixWare 2.01 in both its "SMP" computers and "Clearpath 2200 HMP Servers" through at least the second quarter of 2000. (Id.)

64. One such report shows, for example, that Unisys paid Santa Cruz a net total of $117,273 in the first quarter of 1997 and $152,966 in the first quarter of 1999 in "UnixWare 2.0 O/S Royalty Fees" from various regions of the world. (SCO-EX-387.) Unisys paid well over a million dollars in royalties under the UnixWare 2.0 license after the APA. (SCO-EX-387; SCO-EX-410.)

65. These reports thus confirm that Novell knew Unisys continued widely distributing its UnixWare 2.01-based operating system and that Santa Cruz continued collecting for itself per-copy fees for those distributions. (SCO-EX-387; SCO-EX-388; SCO-EX-410.)

66. Even though Novell itself had granted Unisys the UnixWare 2.01 license including a license to the SVRX prior products, Novell did not audit or request any of the fees reflected in the report, or even any portion of fees supposedly corresponding to the listed SVRX prior products. (SCO-EX-370.)

67. Novell did not request or audit such fees even when the question of allocation of fees arose between the parties in 1996. Unisys was shipping Clearpath 2200 HMP servers containing three distinct operating systems – a proprietary Unisys operating system, an operating system based on SVR 4.0 MP under the license Unisys had obtained from USL in 1991, and an operating system based on UnixWare 2.1 under the license Unisys had obtained from Santa Cruz in 1996. (SCO-EX-371; SCO-EX-390; SCO-EX-409.) Given that Unisys was shipping "two UNIX systems" in the same machine, Santa Cruz contacted Novell to make sure it agreed with Santa Cruz's calculation of SVRX royalties payable to Novell under the SVR4.0 MP license. (SCO-EX-409.)

68. Santa Cruz explained that it had arrived at "the amount of SVRX value" due to Novell by deducting the $100,000 "UnixWare portion" in its entirety from the calculation of payments it received from Unisys. (SCO-EX-409; see also SCO-EX-386 at SCO1040450.) Santa Cruz also explained that it had taken only "fifty percent of the remaining value and deemed that to be SVRX value" due to Novell under the SVR4.0 MP license. (SCO-EX-409 (emphasis added).)

69. In response to the foregoing communications, Novell accepted Santa Cruz's calculation of the royalties payable to Novell under Unisys's SVR4.0 MP license. Novell did not state that Santa Cruz needed to make an allocation of fees for "the UnixWare portion" itself – between UnixWare and the SVRX prior products. Before 2003, Novell did not request or audit any fees attributable to the SVRX prior products licensed in UnixWare licenses.

VIII. ROYALTIES FROM UNIXWARE LICENSES

70. The APA requires SCO to remit to Novell "SVRX Royalties" for "SVRX Licenses" as defined in the APA, less a 5% administrative fee of such Royalties. (Id. § 1.2(b).) The APA gave Novell the right to conduct audits of Santa Cruz and SCO regarding the payment of such Royalties. (Id.)

71. Schedule 1.2(b) of the APA specified the circumstances in which any royalties would be paid to Novell for the distribution of UnixWare products:

> (b)(i) Royalties on UnixWare, Eiger, MXU and derivatives ("UW Products")
>
> (a) No royalties shall be payable in connection with any of the UW Products until Buyer shall have shipped or licensed, in any year, 40% of the units contemplated by the Plan for such year;
>
> (b) Buyer shall pay royalties equal to $30.00 net per unit in connection with each and every net unit of UW Products shipped or licensed by Buyer over and above 40% and less than 70% of the total units contemplated by the Plan for such year;
>
> (c) Buyer shall pay royalties equal to $60.00 per net unit in connection with each and every net unit of UW Products shipped or licensed by Buyer over and above 70% of the total units contemplated by the Plan for such year.
> . . . .
>
> (c) Termination of Royalty Obligation. The royalty obligations set forth in subsection (b) above will terminate (i) after

> Buyer shall have made aggregate cumulative payments to Seller equal to such amount which has a total net present value of $84,000,000 (determined as of the Closing) or (ii) December 31, 2002, whichever is sooner.

The requirements for subsection (b)(i) to apply were never met. Pursuant to these terms, any royalty obligation that Santa Cruz could have had to Novell with respect to UnixWare products (in fact Santa Cruz owed no such obligation) terminated on December 31, 2002. Novell acknowledges that it is not entitled to any royalties from any UnixWare licenses. With respect to the stand-alone UnixWare license in Section 3 of the Microsoft Agreement, for example, Novell did not seek any payments for that license at trial.

72. Under the amended APA, SCO is entitled to keep source code right to use fees under existing SVRX Licenses from the licensing of additional CPUs and from the distribution by SCO of additional source code copies. (SCO-EX-71 at SCO1186002.) In 1996, Novell agreed that Santa Cruz could keep as "additional CPU" fees the payments that Santa Cruz received from Cray Computers for its sublicensing of System V source code. (SCO-EX 98; SCO-EX 126.) Under the Amended APA, SCO is also entitled to keep source code right to use fees attributable to new SVRX licenses approved by Novell. (SCO-EX-71 at SCO1186002.) In its Order of August 10, 2007, the Court acknowledged SCO's right to keep 100% of the source code right to use fees identified in Section 1.2(e) of the APA as amended. (Order at 95-97.)

IX. NEW SVRX LICENSES "INCIDENTALLY" TO UNIXWARE

73. 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." (SCO-EX-38 § 4.16(b); SCO-EX-71 § J.)

74. The word "incidentally" is not defined in either the APA or its Amendments. On whether the word incorporates the practice whereby the owner of Unix or UnixWare technology granted rights to the System V prior products, Novell, as expressed in deposition of its corporate representative, took no view one way or another. In training sessions that followed the closing of the APA, however, Novell communicated to members of the UNIX licensing group that the inclusion of System V prior products in UnixWare licenses was permitted as incidental to UnixWare licensing.

75. The record reflects that Novell never asked or suggested to Santa Cruz that it should remit any portion of the fees or royalties that Santa Cruz received under any UnixWare license even where System V prior products were listed as part of those licenses. Novell never asked or suggested to Santa Cruz that it should undertake to allocate to the System V prior products any value of the fees or royalties that Santa Cruz received under any UnixWare license granting rights to such older versions.

76. In 1998, Novell conducted an audit of Santa Cruz to ensure that Santa Cruz was remitting to Novell all of the royalties to which Novell was entitled under the APA and that Santa Cruz was keeping royalties that Santa Cruz was entitled to under the APA. Novell knew at that time that SCO was licensing UnixWare with System V prior products listed just as Novell had done, because that was discussed and agreed pursuant to the implementation of Santa Cruz licensing at the time of the transfer. In the 1998 audit, Novell did not ask Santa Cruz to produce any information regarding the fees and royalties that Santa Cruz received under its UnixWare licensing business. In the 1998 audit, Novell did not ask or suggest to Santa Cruz that it should

undertake to allocate to the older versions of System V any value of the fees and royalties that Santa Cruz received under any UnixWare license granting rights to such older versions.

77. Santa Cruz did not believe that it was under any obligation to remit to Novell any portion of the fees or royalties from any UnixWare licenses, because the thresholds for any such payments pursuant to Schedule 1.2 of the APA had not been satisfied (and, after 2002, because the term under which the thresholds applied had expired). SCO did not remit to Novell any of the royalties that SCO received from any of the UnixWare licenses that Santa Cruz had acquired from Novell in 1995 or into which Santa Cruz or SCO entered after 1995, whether or not those licenses included a list of System V prior products.

78. Including the audit of SCO that Novell conducted in 2003, Novell never asked or suggested to SCO that it should undertake to allocate to the older versions of System V any value of the fees or royalties that Santa Cruz received under any UnixWare license granting rights to such older versions.

79. UNIX licensees often distributed and used binary products that included code from multiple releases of System V, including UnixWare. Novell and its successors required (and allowed) such licensees to pay only one set of royalties for the use or distribution of such a product. To identify the proper license under which such a product could be used or distributed and to calculate the appropriate royalty payments required for using or distributing such a product, Novell and it successors employed the "one line of code" rule.

80. Under that rule, Novell and its successors determined if there was as little as one line of code from the latest release of System V code (including UnixWare) contained in a binary product and calculated royalty payments for that entire product under only that latest license.

Novell and its successors prohibited licensees from parsing out the relative amounts of code from different releases of System V and paying portions of the requisite royalties under multiple System V licenses.

81. Accordingly, licensees that distributed a UNIX binary product that contained code from SVR3.0, SVR4.0, and SVR4.2 did not pay any SVR3.0 or SVR4.0 royalties for distributing that product, but instead paid only SVR4.2 royalties (under the terms and prices of an SVR4.2 license) for distributing that product. Similarly, licensees that used a product that contained SVR3.0, SVR4.0, and UnixWare 2.0 did not pay any SVR3.0 or SVR4.0 royalties for distributing that product, but instead paid only "UnixWare Royalties."

X. OPENSERVER

82. OpenServer is the brand name for the release of UNIX System V, Release 3 that Santa Cruz developed in the 1980s. Novell has never owned, or had any license to, OpenServer.

83. OpenServer was Santa Cruz's flagship product through the 1990s. OpenServer customers included and include large corporations such as McDonald's.

84. OpenServer is a well-established operating system in the market for small- to medium-sized businesses, and is known for its excellent stability, quality, and security. OpenServer has an installed base of thousands of customers and produces approximately two-thirds of SCO's UNIX revenue.

XI. AMENDMENT NO. 2

85. On October 16, 1996, Novell and Santa Cruz entered into Amendment No. 2. (SCO-EX-131.) The Amendment resulted from discussions between the companies regarding the issue of future buyout transactions. (SCO-EX-119; SCO-EX-107.) Paragraph B of Amendment No. 2

provides in relevant part that "any potential transaction with an SVRX licensee which concerns a buy-out of any such licensee's royalty obligations shall be managed" as detailed in the sub-paragraphs that follow. (Id.) Paragraph B.5 provides that "Novell may not prevent SCO from exercising its rights with respect to SVRX source code in accordance with the Agreement." (Id.) In its Order dated August 10, 2007, this Court concluded (at 85) that "all of the subparagraphs of paragraph B are limited to buy-out transactions."

86. Novell does not contend that the Sun or Microsoft Agreements granted any buyouts of any binary-royalty obligations, and in fact Sun and Microsoft were under no obligation to pay binary royalties as of the execution of the Agreements.

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

87. Novell transferred to Santa Cruz the following assets (among others): "All of Seller's claims arising after the Closing Date against any parties relating to any right, property or asset included in the Business." (SCO-EX-38 Schedule 1.1(a), Section II.)

88. The rights, property, and assets included in the Business included "all versions of UNIX and UnixWare and all copies of UNIX and UnixWare (including revisions and updates in progress" (id., Section I), "all technical, design, development, installation, operation and maintenance information concerning UNIX and UnixWare, including source code" (id.), and "All copies of UNIX and UnixWare, wherever located, owned by Seller" (id., Section III). Santa Cruz, in turn, transferred all such claims to SCO. (SCO-EX-175 § 1 (vi)-(vii).)

89. In its Order dated August 10, 2007, this Court also concluded (at 55) that SCO received such "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).)

XIII. THE SCOSOURCE PROGRAM

90. In late 2002 and early 2003, SCO formally created a new division, SCOsource, to protect its intellectual property and expand the licensing of its UNIX technology to authorize use in connection with the Linux operating system. (SCO-EX-181.) SCO's initial concern in late 2002 and early 2003, was that libraries had been taken from UnixWare and OpenServer and improperly used in Linux. (SCO-EX-181; SCO-EX-402 at 2, 4, 8, 12, 14; SCO-EX-401 at SCO1275739.) SCO mentioned both UnixWare and OpenServer as implicated. (SCO-EX-396.)

91. SCO entered into SCOsource agreements with twenty-two companies or individuals, for a total revenue of $1,115,110.

92. During the program, SCO made public statements about it. (SCO-EX-181; SCO-EX-240; SCO-EX-396.) In describing its proposed agreements and the SCOsource program, SCO generally referred to the "UNIX" or "UNIX System V" technology it believed was in Linux. (Id.) In making its statements, SCO conveyed that both "UnixWare" and "OpenServer" technology might have been improperly included in Linux. (SCO-EX-181; SCO-EX-396.)

93. In January 2003, when it formally announced the SCOsource program, SCO was still focused on both UnixWare and OpenServer technology in delineating its concern for "UNIX" technology in Linux. (SCO-EX-181.)

94. In February 2003, SCO created a "SCO System V for Linux Sales Guide." The document repeatedly refers to SCO's concern that "UnixWare" and "OpenServer" technology had been improperly used in Linux. (See, e.g., SCO-EX-402 at 2, 4, 8, 12, 14.) It shows that in

referring generally to "SCO System V," SCO was including both OpenServer and UnixWare, because both are in fact System V technology.

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

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

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

96. Other SCO documents further confirm that in referring to System V and/or UNIX in a variety of contexts, SCO included UnixWare and OpenServer. In a December 2002 press release discussing SCOsource, SCO stated: "SCO's shared libraries are frequently used by customers to allow UNIX applications to run on the Linux OS. In the past, SCO's UnixWare and OpenServer license agreements never allowed these UNIX libraries to be separated from the operating systems." (SCO-EX-396 at SCO1270121 (emphasis added).) In a December 2002 slide presentation, in describing the proposed "SCO System V for Linux" deliverable, SCO identified

"SCO's shared UNIX Libraries from OpenServer and UnixWare for use with Linux." (SCO-EX-401 at SCO1275739 (emphasis added).)

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

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

(NOV-EX-57 (emphasis added).)

98. Other contemporaneous documents demonstrate that the "SCOsource Linux Licensing Program" was designed and executed to be a UnixWare binary license. (See, e.g., SCO-EX-379 at NOV 000012749 (emphasis added).)

99. The evidence also showed that SCO charged licensees the same per-CPU prices for a SCOsource Agreement as it did for a UnixWare business edition binary license. (Compare SCO-EX-381 with SCO-EX-380 at SCO 1551873.)

XIV. NOVELL AND THE SCOSOURCE PROGRAM

100. In late 2002, SCO and Novell engaged in several telephone conversations concerning SCO's plans to protect its intellectual property in Linux through agreements for Linux users. (SCO-EX-397; SCO-EX-398; SCO-EX-399.) SCO asked Novell, whom SCO of course knew was a predecessor-in-interest in the UNIX business, to "perform due diligence on UNIX

intellectual property" before SCO launched the SCOsource program. (SCO-EX-399.) Specifically, SCO asked for documents "to understand its IP rights" for purposes of "IP tracking" and for "documents that help give the history of SCO's rights to UNIX." (SCO-EX-397; SCO-Ex-398.)

101. SCO did not ask Novell for permission to enter into the contemplated agreements for Linux users, explaining that it was going to license its UNIX intellectual property to those who were using Linux. (SCO-EX-397; SCO-EX-399.) Novell did not tell or suggest to SCO that such agreements were SVRX Licenses under the APA, that Novell needed to approve them, or that SCO needed to remit revenues from those agreements to Novell. (SCO-EX-397; SCO-EX-398; SCO-EX-399; SCO-EX-400.) Novell internal emails enumerate Novell's responses to SCO's requests for "documents" or "due diligence" without any reference to or discussion of any asserted rights to approve or dictate the terms of the contemplated agreements or to receive any payments thereunder. (SCO-EX-397; SCO-ex-398.) Novell said it was not interested in providing the requested information to SCO and that it had no "interest" in participating whatsoever in SCO's proposed program. (SCO-EX-399; SCO-EX-400.)

102. During his conversations with Novell in late 2002, in asking for documents to confirm and clarify transfer of copyrights to SCO, Mr. McBride pointed out to Mr. Jones that SCO's efforts to enforce its intellectual property in Linux would indirectly help the sale of the various UNIX flavors that compete with Linux in the marketplace. Mr. McBride explained that a boost in the sale of such UNIX products would potentially increase the declining SVRX Royalty stream that SCO remitted to Novell from contracts that licensed out the older products. (SCO-EX-399.)

103. Novell clearly considered the nature and scope of the program SCO had described – as reported in a Novell internal email of December 4, 2002, for example, Mr. Jones and Mr. Wright responded to Mr. McBride by explaining that "any increase" in revenues to Novell "would not necessarily occur and the amount would likely not be significant to Novell." (SCO-EX-399.)

104. Novell concedes that it knew from its contacts with SCO in 2002 that SCO's intention was to collect license revenue from vendors for licenses associated with SVRX code. During this time, moreover, Novell had an active interest in becoming directly involved in Linux. (SCO-EX-399.)

105. At no time in the conversations did Novell tell SCO that it needed Novell's authority to proceed with the SCOsource program or that any revenue obtained by SCO from the program must be remitted to Novell.

PROPOSED CONCLUSIONS OF LAW

I. BURDEN OF PROOF

1. The trial concerned Novell's counterclaims. California law applies under the APA. The general rule is that a counterclaim-plaintiff bears the burden of proving the elements of its counterclaims. Section 500 of the California Evidence Code states: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." Cal. Evid. Code § 500.

2. As to the specific counterclaims Novell pursue at trial, the plaintiff has the burden of proving the amount of the defendant's unjust enrichment, see Foerstel v. Jeffrey, No. B154638, 2003 WL 170418, at *2 n.2 (Cal. App. Jan. 27, 2003) (Ex. A); the fact and amount of damages on a claim for breach of fiduciary duty or conversion, see In re Marriage of Kapczynski, No. H025433, 2004 WL 1119735, at *7 (Cal. App. May 20, 2004) (Ex. B) (breach of fiduciary duty); In re Cruz, 198 B.R. 330 (Bkrtcy. S.D. Cal. 1996) (conversion); and the propriety of a requested declaratory judgment, see Benitec Australia, Ltd. v. Nucleonics, Inc., 2007 WL 2069646, at *2 (Fed. Cir. July 20, 2007) (Ex. C). In addition, Novell took the opportunity to put on its case first, 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).

3. Novell nevertheless argues that SCO had the burden of proof, alleging that SCO is Novell's agent and fiduciary. "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.

4. 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 and on the meaning of Paragraph B of Amendment No. 2 to the APA. 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).

5. On whether any "SVRX License" in the Agreements has any distinct value, Novell also 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." The burden may 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. Amendment No. 1 (through its use of the "incidentally" language) shows that the parties to the APA contemplated SCO's authority to enter into agreements that "commingle" incidental SVRX licenses and UnixWare licenses.

6. 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 has taken the position that the Court can make all of its findings solely by examining the text of the Agreements at issue. Novell was also free to seek in discovery whatever input it thought relevant from SCO, Sun, and Microsoft. 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.)

7. The "fiduciary" cases Novell cites are inapposite. The California precedent holding that the burden of proof shifts to the defendant when there is a fiduciary relationship between the plaintiff and defendant arises out of former Section 2235 of the California Civil Code. See Delos v. Farmers Ins. Group, Inc., 93 Cal. App. 3d 642, 656 (1979) (citing Section 2235 and cases which also cite Section 2235). Section 2235 stated: "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence." Id. The shift in the burden of proof thus applies to transactions between the fiduciaries in which the trustee has gained some advantage from the beneficiary, in which case the court will presume that the beneficiary did not receive even-handed treatment. That exception has no application here, where the transactions at issue are not between SCO and Novell.

8. In contrast to the conduct of the defendants in the cases Novell cites, SCO has not destroyed or obfuscated any records that Novell needs to establish its damages, has not failed to keep or provide records it was required to maintain, and did not breach any duty when it structured the agreements in the way it did. The circumstances of this case are unlike the facts in the cases Novell cites that forbid commingling and thus allow a court to shift the burden of apportionment to the commingler.

II. SCO DOES NOT OWE NOVELL ANY SIGNIFICANT AMOUNT OF ALLEGED "SVRX ROYALTIES."

9. In determining any "SVRX Royalties" paid for any "SVRX Licenses" here, the basic question is whether any such rights have any significant value relative to those other rights.

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

10. It has been many years, in some cases decades, since SCO or its predecessors-in-interest entered into stand-alone licenses for prior releases of System V. The evidence showed that as separate operating systems, the older versions of UNIX are not marketable to consumers because those earlier versions do not take advantage of hardware enhancements made to new processors adopted by computer manufacturers, which are critical to any company's practical use for an operating system. The evidence also showed that Santa Cruz and SCO never attributed any independent value or price for the licensing of SVRX prior products. All of the licensees who entered into System V prior product licenses with Santa Cruz and SCO paid the same price as those who did not receive such licenses.

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

1. The Microsoft Agreement.

11. Section 2. Section 2 makes no reference to any particular technology. 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 technology.

12. In addition, if a release for any System V technology in any Microsoft product were a "license" for such technology, as Novell argues, Novell has made no showing of any System V technology in any Microsoft product. Paragraph B of Amendment No. 3 to the Microsoft Agreement in fact reflects Microsoft's concern that (in the language of Exhibit A) it was "components or features" in "SCO UnixWare 7, Release 7.1.3" 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.

13. Section 3. Section 3 is an option, which Microsoft exercised, to license UnixWare and certain components or features thereof (Exhibit A) and components for use with UnixWare (Exhibit B). The UnixWare license is not an SVRX License under any interpretation of the APA, and in fact Novell did not seek any of the payments made for this license. Novell, in its Amended Trial Brief, withdrew any claim to Section 3 revenue.

14. Section 4. Section 4 is an option, which Microsoft exercised, to license UnixWare, OpenServer, and System V prior products. A minor part of Section 4 is an "SVRX License."

2. The Sun Agreement.

15. Section 4. Section 4 is a license to UnixWare and previous releases of System V, as well as to the drivers for UnixWare and OpenServer. Only a minor part of Section 4 constitutes an "SVRX License."

16. 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. There is no evidence that Sun has faced any such lawsuits (let alone ones that concerned any prior System V technology). This is not a license.

17. 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.

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

C. The Minor SVRX License in the Microsoft Agreement Has De Minimis Value.

19. Only a minor part of Section 4 of the Microsoft Agreement is an "SVRX License." Once Microsoft had taken its Section 3 license to UnixWare, it had the right to take the expanded Section 4 license to UnixWare, and a license to OpenServer, and System V prior products. Novell is correct in saying that more half of the total payments under the Agreement were

attributed to Section 4, but that says nothing about whether "SVRX" has any significant value in relation to the other rights provided under Section 4.

20. The additional UnixWare rights afforded under Section 4 are valuable: Microsoft can now distribute UnixWare in binary form as a stand-alone product, rather than solely as part of Microsoft's hardware or services. The license to OpenServer also is very valuable: There is a large installed base of OpenServer users for whom Microsoft can use the OpenServer code to create applications and services to market. SCO presented convincing evidence that the value of the OpenServer license in this Agreement is at least as much as the price of the Section 3 UnixWare license – over $5 million. The UnixWare and OpenServer licenses, taken together, allow Microsoft to ensure that the company's software is compatible with the latest releases of UnixWare and OpenServer that hardware manufacturers are actually using (in contrast to older UNIX operating systems that such manufacturers no longer use).

21. In contrast to the foregoing, the formal license to System V prior products does not have any significant value: Having acquired the full UnixWare license, Microsoft already had the right to use these products. In addition, there is no evidence of any "SVRX" technology in any Microsoft product. If the delivery of the older System V code was for some other purpose, it did not have an significant value: The Agreement itself made clear that SCO might not even be able to send Microsoft any source code for SVR4.0 or all versions of SVRX preceding SVR2.0. None of the $8.25 million paid for the foregoing rights are "SVRX Royalties."

D. The Minor SVRX License in the Sun Agreement Has De Minimis Value.

22. Only a minor part of Section 4 of the Sun Agreement is an "SVRX License." The license to UnixWare is very valuable: The license permits Sun to develop Intel-compatibility for

Solaris, which is something that by definition Sun had not succeeded in doing, where it had never taken a UnixWare license. 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.

23. In contrast, the formal license to some System V prior products does not have any significant value, for several reasons:

24. First, among such System V products identified in the Sun Agreement and not identified in Schedule 1.1(a) of the APA are three of the five latest releases of System V to which Sun did not already have rights under its 1994 agreement with Novell – namely, 4.1 ES/3B2, 4.1 C2/3B2, and 4.1 ES. Accordingly, most of the System V releases to which Sun gained rights for the first time under the 2003 agreement are not even part of any "SVRX License" because they are not listed in Schedule 1.1(a) of the APA (or Amendment No. 1).

25. Second, with respect to binary rights, Sun had already bought out (in 1994) its rights to distribute Solaris with the System V technology therein. The two "SVRX" releases to which Sun obtained rights for the first time in 2003 are SVR4.2 and SVR4.2 MP. SCO showed that the technology in those releases is incorporated virtually wholesale into UnixWare. The very language referring to those releases in Attachment 1 to the Sun Agreement confirms that point: "System V Release 4.2 & Products (UnixWare 1.0, UnixWare 1.1, UnixWare 1.1.1)" and "System V Release 4.2 MP & Products (UnixWare 2.0, UnixWare 2.1), UnixWare 2.1.2)."

UnixWare therefore encompasses whatever incremental value these two System V releases represented with respect to Sun's rights to make binary distributions. In addition, since OpenSolaris is based on SVR4.0 and any SVR4.0 code that had not been included in UnixWare has no commercial value (and Novell presents no evidence that OpenSolaris contains any technology unique to SVR4.2 or SVR4.2 MP), the very limited new SVRX rights do not provide Sun with any significant incremental value.

26. Third, with respect to source code rights, under its 1994 agreement with Novell, Sun already had significant rights with respect to System V prior products. Sun had the right to distribute such prior products in its operating system, Solaris, in source and binary form through multiple tiers of sublicensees, with no limit on the number. To the extent the 2003 Agreement expanded rights to disclose such source code, there is no delineation of greater value over and above the rights Sun already held from the 1994 Agreement. Moreover, the 2003 Agreement still required such disclosure to be in a license "for value."

27. In addition, Sun's UnixWare license alone in the 2003 agreement gives Sun the right to distribute any additional SVRX technology in Solaris, and Novell presented no evidence of any such technology. As noted, the licensed UnixWare source code encompasses the most recent new System V releases (SVR4.2 and SVR4.2 MP) provided to Sun in 2003; the System V code on which OpenSolaris is based is SVR4.0; any SVR4.2 or SVR4.2 MP code that is not included in UnixWare has no commercial value; and Novell presented no evidence of any SVR4.2 or SVR4.2 MP code in OpenSolaris.

28. Fourth, with respect to the two "SVRX" releases to which Sun obtained rights for the first time in 2003, Sun cannot use those releases as stand-alone products, where Sun did not obtain

any license to any SVRX drivers. SCO and Sun subsequently executed a clarification agreement that detailed the specific drivers that Sun had received under the Agreement, identifying more than 500 individual source and object code drivers, exclusively relating to UnixWare and OpenServer, that SCO was obligated to provide Sun under the Agreement. The clarification agreement thus further evidences Sun's central focus on UnixWare, and not on the old SVRX products included in the Agreement's list of prior products.

E. The SCOSource Agreements Are Not Royalty-Bearing "SVRX Licenses."

29. The Court concludes that the SCOsource Agreements are not royalty-bearing "SVRX Licenses." The Agreements are principally releases of claims that SCO was entitled to bring. 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. 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).)

30. SCO therefore was entitled to release 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 had to pay Novell any money SCO might receive for pursuing and prevailing on the claims it could bring; there is no more reason for concluding that SCO would have to pay Novell for releasing 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 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.

31. In addition, contrary to Novell's main argument, SCO clearly was concerned that technology had been taken from OpenServer and UnixWare and improperly used in Linux. The contemporaneous documents show that to be true. It is not accurate to say that the SCOsource program concerned only older System V technology.

32. Novell's argument that the SCOsource Agreements constitute "SVRX Licenses" for which royalties had to be paid also contradicts both parties' licensing practices as the owner of the UNIX business. UNIX licensees often distributed and used products based on code from multiple releases of System V, including UnixWare. Novell and its successors required such licensees to pay only one set of royalties for the use or distribution of such a product. Under the "one line of code" rule, Novell and its successors required licensees to identify code from the latest release of System V (including UnixWare) contained in a product – even if there was as little as one line of code contained in that release – and calculate royalty payments for that entire product under only that latest license. Accordingly, licensees that used a product that contained SVR3.0, SVR4.0, and UnixWare 2.0 did not pay any SVR3.0 or SVR4.0 royalties for distributing that product, but instead paid only "UnixWare Royalties" (under the terms and prices of a UnixWare 2.0 license) for use of such a product.

33. The UNIX technology allegedly improperly included in Linux is contained in UnixWare. Accordingly, payments for the use of Linux were and are to be calculated as UnixWare royalties (and UnixWare royalties only) under the "one line of code" rule. The contemporaneous documents demonstrate that the "SCOsource Linux Licensing Program" was a UnixWare license, and the pricing of the SCOsource Agreements was exactly the same as the per-CPU pricing for SCO's UnixWare binary licenses.

F. In the SCOsource Agreements, the UnixWare Licenses Alone Give the Licensees the Right to Use Linux.

34. Although the Court is of the view that the SCOsource Agreements are not "SVRX Licenses," the evidence showed that there is no value to "SVRX" component of these Agreements even if they were "SVRX Licenses." A company with a license to UnixWare had the right to use all System V prior products, which is one reason that the owners of the UNIX technology regularly listed the System V prior products in the license to the most recent release.

35. Novell's argument, and reliance on SCO's claims regarding Linux in its pending litigation against IBM, are also beside the point. As to the material that SCO says IBM contributed to Linux from the AIX (derived from SVR3) and Dynix/ptx (derived from SVR4) operating systems, under the software agreements, 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 contributed to Linux 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. Accordingly, even if the SCOsource Agreements are considered "SVRX Licenses," the Court finds that the SVRX aspect of the licenses is of only de minimis value.

III. NOVELL IS NOT ENTITLED TO ANY DECLARATION.

36. Novell is not entitled to its requested declaration as it pertains to 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.

37. In addition, the parties agree that under Amendment No. 1 to the APA, SCO was entitled to enter into new SVRX licenses "as may be incidentally involved through its rights to sell and license UnixWare software." Based on the Court's review of the Agreements at issue and the other evidence at trial, the Court concludes that SCO did have the authority to enter into any "new SVRX license" in the Agreements. The Court further concludes that SCO had the authority to execute the Sun Agreement.

A. The Microsoft and Sun Agreements License SVRX Products "Incidentally" to UnixWare.

38. The word "incidentally" is not defined in either the APA or its Amendments. On whether the word incorporates the practice of licensing older releases of System V with the most recent release, Novell said it has no view one way or the other on that issue.

39. The undefined word "incidentally" has two principal meanings here. 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).

40. Second, the Court finds that 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." The 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.

41. SCO 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 few 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 Agreements lay in UnixWare.

B. SCO Had the Authority to Execute the SCOsource Agreements.

42. The Court has concluded that the SCOsource Agreements are not "SVRX Licenses," so it follows that SCO had the authority to execute them. In addition, even if they were SVRX Licenses, the Court finds that any "SVRX" component of the Agreements were licensed incidentally to UnixWare. The claims SCO released in the "release" portion of the Agreements were only those claims SCO was entitled to bring in the first place, so that the Agreement do not encompass "SVRX" copyright claims. As to the "license" portion of the Agreements, the

evidence shows that the UnixWare license gives the licensee the right to use any UNIX technology that SCO alleges has been improperly contributed to Linux.

C. SCO Has Complied with Amendment No. 2.

43. 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 within the meaning of Amendment No. 2. The Court disagrees, for several reasons.

44. First, under Paragraph B.5 of Amendment No. 2, "Novell may not prevent SCO from exercising its rights with respect to SVRX source code in accordance with the Agreement." It follows that where SCO has the right to license SVRX source incidentally to a UnixWare license, as it did here, Novell cannot prevent SCO from doing so.

45. Second, the Sun Agreement did not "concern" the 1994 buyout within the meaning of Amendment No. 2. The language at issue in the Amendment applies to an agreement that itself grants a royalty buyout. 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. Indeed, in its Order dated August 10, 2007, this Court concluded (at 85) that "all of the subparagraphs of paragraph B are limited to buy-out transactions."

46. At a minimum, Amendment No. 2 is ambiguous as to its application beyond actual buyouts. The extrinsic evidence supports SCO's, and this Court's prior, interpretation. In the summer of 1996, Santa Cruz repeatedly addressed with Novell "this issue of future buyout transactions." Santa Cruz stated its position as follows: "Any future discussion with a third party of a buyout would be handled solely by SCO, with help from Novell Corporate Development if required by SCO. The Novell Sales organization would play no role. If Novell and SCO mutually agreed, SCO would take action to conclude the transaction." Santa Cruz explained that its position "pertains to any future buyout concerning binaries." (SCO-EX-119.) Indeed, Santa Cruz and Novell entered into an Agreement dated May 20, 1996, with the following, specific provision: "Novell agrees that it will not enter into any royalty buy-out agreement involving UNIX System V until such time as the parties have resolved this dispute or this Agreement is otherwise terminated as provided hereon." (SCO-EX-107 (emphasis added).)

47. Novell's main response is to say that it would not make sense for SCO or Novell to be able unilaterally to renegotiate the terms of an existing buyout. The 1994 buyout was not renegotiated or modified in any way. It was left untouched. The 2003 Agreement did not require Novell to relinquish any of the $84 million it had received from Sun for the buy-out.

48. Third, Novell does not argue that the Sun Agreement is a "buyout," and in fact Sun was paying no royalties at the time of the deal. The only arguable "buyout" at issue (where Sun was not paying any royalties at the time of the 2003 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. The evidence showed that 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 had to have paid a UnixWare royalty for that distribution. UnixWare incorporates the vast bulk of the technology in the new releases to which Sun had gained rights for the first time, and all of the technology with commercial value. Accordingly, to the extent any significant value in the Agreement can be attributed to the any "buyout," it pertained to royalties that SCO had the right to buy-out on its own.

IV. ESTOPPEL PRECLUDES RELIEF FOR NOVELL.

49. The Court has found otherwise, but if some value of the SCOsource Agreements could be attributable to any "SVRX License" in the SCOsource Agreements, Novell's prior conduct is an estoppel to Novell's efforts to obtain the value of such licenses now. 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.

50. SCO has produced extensive evidence to show that Novell by its words and deeds caused SCO to believe that it was entitled to proceed with the SCOsource program and agreements without having to seek Novell's permission or remit any "royalties" from those agreements to Novell. 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 was emphatic with SCO that Novell had "no interest" in participating in the program.

51. The evidence confirmed that any "SVRX" rights were not significant components of the Agreements in the first place, and could have been excised without jeopardizing the execution of the agreements. Under these circumstances, the Court concludes that SCO acted reasonably in including SVRX-related components in the agreement at issue in the reasonable belief, based on Novell's conduct, that SCO would not have to remit to Novell any such payments for such SVRX components.[1]

[1] "Under California law, money cannot be the subject of a conversion action unless a specific sum capable of identification is involved." Trustees of the S. Cal. Pipe Trades Health and Welfare Trust Fund v. Temecula Mech., Inc., 438 F. Supp. 2d 1156, 1171 (2006) (quotations, citation and brackets omitted); Vu v. Cal. Commerce Club, Inc., 58 Cal. App. 4th 229, 235 (1997). In a context such as presented at trial here, the plaintiff must show that "an agent is required to turn over to his principal a definite sum." Temecula, 438 F. Supp. 2d at 1171. Novell conceded at the outset of the trial that it would not argue it was entitled to any specific

52. Opposing SCO's arguments on estoppel, Novell has mistakenly proposed a standard akin to "waiver." Novell argued 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. "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"). The point here is that SCO acted reasonably in concluding that it could conduct its SCOsource program without any concern about having Novell claim a right to "SVRX Royalties" under the SCOsource agreements.

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amount of money, did not argue for any such amount, and presented no evidence that SCO was required to turn over to Novell any "specific" or "definite" sum. Under these facts, Novell is not entitled to the entry of any judgment on its claim for conversion. This Court's August 2007 Order refers to conversion on SCO's part, but Novell's subsequent concession that it was not seeking the recovery of any definite sum at trial is the determining fact.

CONCLUSION

The Court concludes, for all of the foregoing reasons, that Novell is not entitled to any declaration or to recover any but de minimis "SVRX Royalties."[2]

DATED this 29th day of April, 2008.

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[2] SCO respectfully reserves the right to propose additional findings of fact and law after trial, and in particular in the event that the Court finds that Novell is entitled to any "SVRX Royalties."

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

THE SCO GROUP, INC., a Delaware corporation, Plaintiff/Counterclaim-Defendant, vs. NOVELL, INC., a Delaware corporation, Defendant/Counterclaim-Plaintiff.	**FINAL JUDGMENT** Civil No. 2:04 CV-00139 Judge Dale A. Kimball Magistrate Brooke C. Wells

This matter came before the Court for non-jury trial on April 29 to May 2, 2008, on certain issues left unresolved by this Court's summary judgment ruling of August 10, 2007, which order is incorporated herein.

Based upon the Findings of Fact and Conclusions of Law entered by the Court this day, the Court enters the following final judgment:

1. On Novell's Sixth, Seventh and Eighth Claims for Unjust Enrichment, Breach of Fiduciary Duty and Conversion, the Court awards judgment in favor of Novell and against SCO in the amount of $_____.
2. On Novell's Fourth Claim for Relief, the Court, for the reasons stated in its Findings of Fact and Conclusions of Law, denies Novell's request for a declaratory judgment.
3. Based on the Court's order of August 10, 2007, judgment is entered in favor of Novell and against SCO on SCO's First Claim for Relief (Slander of Title) and said claim is dismissed with prejudice.
4. Based on stipulation of the parties, which the Court approves, Novell's First, Second, Third, Fifth and Ninth Claims are dismissed without prejudice on the terms of the stipulation.
5. For the reasons set forth in the Court's Order of September 7, 2007, Novell's Third Claim for Relief is dismissed without prejudice on the terms of the notice to dismiss.

Done and Ordered this ____ day of _____, 2008

_____

U.S. District Judge

CERTIFICATE OF SERVICE

Plaintiff/Counterclaim-Defendant, The SCO Group, Inc., hereby certifies that on this 29th day of April, 2008, a true and correct copy of the foregoing Proposed Findings of Fact and Conclusions of Law and Proposed Final Judgment of The SCO Group, Inc. was electronically filed with the Clerk of Court and delivered by CM/ECF to the following:

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