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

	_____)	
THE SCO GROUP, INC.)	
)	
Plaintiff/Counterclaim-Defendant,)	
)	
vs.)	Case No.
)	2:04-CV-139 DAK
NOVELL, INC.,)	
)	
Defendant/Counterclaim-Plaintiff.)	

BEFORE THE HONORABLE DALE A. KIMBALL
DATE: JANUARY 23, 2007
REPORTER'S TRANSCRIPT OF PROCEEDINGS
MOTION HEARING

Reporter: REBECCA JANKE, CSR, RMR

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A P P E A R A N C E S

FOR SCO GROUP: HATCH, JAMES & DODGE
BY: BRENT HATCH, ESQ.
10 WEST BROADWAY, SUITE 400
SALT LAKE CITY, UTAH 84101

BOIES, SCHILLER & FLEXNER
BY: STUART H. SINGER, ESQ.
401 EAST LAS OLAS BOULEVARD
FORT LAUDERDALE, FLORIDA 33301

FOR NOVELL: MORRISON & FOERSTER
BY: MICHAEL JACOBS, ESQ.
425 MARKET STREET
SAN FRANCISCO, CALIFORNIA 94105

ANDERSON & KARRENBERG
BY: THOMAS KARRENBERG, ESQ.
HEATHER SNEDDON, ESQ.
50 WEST BROADWAY, SUITE 700
SALT LAKE CITY, UTAH 84101

1 JANUARY 23, 2007

SALT LAKE CITY, UTAH

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P R O C E E D I N G S

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THE COURT: We're here this afternoon in the
5 matter of SCO Group vs. Novell, Inc., 2:04-CV-139. For
6 plaintiff, Mr. Brent Hatch, Mr. Stuart Singer.

7

MR. HATCH: Good afternoon.

8

THE COURT: Good afternoon.

9

And Mr. Edward Normand.

10

MR. NORMAND: Good afternoon.

11

THE COURT: For defendant, Mr. Michael Jacobs.

12

MR. JACOBS: Good afternoon, Your Honor.

13

THE COURT: Mr. Thomas Karrenberg, and
14 Ms. Heather Sneddon, correct?

15

MS. SNEDDON: Yes, Your Honor.

16

THE COURT: All right. We have Novell's motion
17 for partial summary judgment on the sixth, seventh,
18 eighth and ninth claims for relief or, in the
19 alternative, a motion for preliminary injunction, and
20 SCO's cross motion for partial summary judgment.

21

Who is arguing?

22

MR. JACOBS: I will for Novell, Your Honor.

23

THE COURT: Okay. Mr. Jacobs?

24

MR. JACOBS: That's correct.

25

THE COURT: You're going to argue everything

1 for defendant.

2 And, Mr. Singer?

3 MR. SINGER: I'll be arguing for SCO, Your
4 Honor.

5 THE COURT: Well, since you're not splitting
6 arguments, can you argue the motions together; in other
7 words, you can argue -- while you're arguing, Mr. Jacobs,
8 about your motions, you can tell me why I shouldn't grant
9 the cross motion. And, Mr. Singer, while you're arguing
10 against Novell's motions, you can tell me why I ought to
11 grant this cross motion. All right. How much time do
12 you need?

13 MR. JACOBS: Ten or 15 minutes, Your Honor,
14 would be fine.

15 THE COURT: Mr. Singer?

16 MR. SINGER: Your Honor, I would ask for 30
17 minutes.

18 THE COURT: Okay. And then I'll give you each
19 a few minutes on rebuttal.

20 Go ahead, Mr. Jacobs.

21 MR. JACOBS: Your Honor, I apologize. I seem
22 to have gotten a little gravel in my throat, so if you
23 have any trouble hearing me, please let me know. On this
24 motion for --

25 THE COURT: It doesn't sound like it's going to

1 make it any harder to hear you. It might make it easier.

2 Go ahead.

3 MR. JACOBS: I'm reminded of Demosthenes, Your
4 Honor.

5 THE COURT: Take the rocks out of your mouth.

6 MR. JACOBS: On this motion for summary
7 judgment and preliminary injunction, Your Honor, we have
8 two powerful things going for us. The first is SCO's
9 acknowledgement that they're a fiduciary for Novell when
10 it comes to the administration, collection and remittance
11 of SVRX royalties. I say "acknowledgement" advisedly.
12 We made quite an issue out of this in our opening papers.
13 They did not contest it in their opposition, and we
14 brought the issue home in our reply brief.

15 It's really a very important aspect of the
16 motion because it changes what might be seen as two
17 contesting versions of the situation into --

18 THE COURT: But it would still leave open,
19 wouldn't it, the question of what SCO might be a
20 fiduciary of?

21 MR. JACOBS: Exactly. And the contract defines
22 the scope of its fiduciary obligations. But because they
23 are a fiduciary, they have certain duties not to play
24 around the edges of those obligations, and they have a
25 duty to act in the utmost good faith. We know these

1 doctrines well. Most importantly, they have a duty to
2 put Novell's interests above their own when it comes to
3 the SVRX license royalty fiduciary duty that they
4 undertook through their predecessor in the Asset Purchase
5 Agreement.

6 So then that does bring us to the question of:
7 What is the scope of the duty? And that is defined by
8 the contract. And that's the second thing we think
9 powerfully argues in our direction. We were joking among
10 ourselves preparing for this argument. This is an
11 argument about the three alls. And the alls are: The
12 all royalty fees and other amounts due in 4.16A; all SVRX
13 licenses, also in 4.16A; and then in the annex that lists
14 the SVRX releases, the all contracts relating to the SVRX
15 licenses listed below.

16 THE COURT: So it's a-l-l-s, not a-w-l-s?

17 MR. JACOBS: That's right, Your Honor.

18 THE COURT: Think about this question, and you
19 don't need to get to it now.

20 MR. JACOBS: Sure.

21 THE COURT: But if you have here -- part of the
22 relief you seek here is equitable.

23 MR. JACOBS: Yes.

24 THE COURT: And yet you're relying on a
25 contract. Does that make any difference? And, if so,

1 what difference does it make, if you have a breach of
2 contract but you still seek this equitable relief based
3 on breach of contract? Anyway. Have that rolling around
4 in your mind.

5 MR. JACOBS: I think that's -- so, the Supreme
6 Court I think has helped us out on this issue recently
7 and, to some degree, trumped some of the case law that
8 might have preexisted on this question. I think I'm not
9 going argue that, on that breach of contract claim, where
10 our remedy is at law, that we have a constructive trust
11 remedy. I don't think I need to reach that point because
12 we are defined in the agreement as the equitable owner of
13 the SVRX royalties because they are a fiduciary
14 collecting for our benefit.

15 That set of predicate relationships, if you
16 will, sets up the claim for a constructive trust. It's
17 our property that they are holding in trust for us, and
18 it's defined that way in two ways: One. The strict
19 letter of the agreement, which allocates to us this
20 ownership interest; and, secondly, the fiduciary
21 arrangement that arises out of the contract.

22 So I think maybe the harder question is: Can a
23 contract establish a fiduciary relationship? Can a
24 contract allocate ownership in the way it does and not
25 convert the remedy that we would have, because it's in a

1 contract, to a legal remedy?

2 And I think the answer to that clearly, under
3 California law, is that the contract doesn't change the
4 essence of the claim. The fact that the relationship or
5 the ownership interests arise out of the contract doesn't
6 change this from a legal to an equitable -- doesn't
7 change this from an equitable to a legal claim, and,
8 therefore, we have a claim to a constructive trust, and
9 we have a claim to a preliminary injunction establishing
10 a constructive trust.

11 I think, concededly, we have a much harder row
12 to hoe if we are making strictly a claim at law as a
13 breach of contract action. That's why that first
14 doctrine, that fact that this is a fiduciary
15 relationship, is so important to the ultimate relief we
16 seek, as well as the way it, if you will, biases the
17 analysis of the provisions of the contract.

18 So, on the scope of the fiduciary relationship,
19 it's worth pausing on the specific language for a minute.
20 I don't know if you have the Asset Purchase Agreement
21 handy.

22 THE COURT: I do.

23 MR. JACOBS: So if you would turn to page 24.

24 THE COURT: Twenty-four. I'm there.

25 MR. JACOBS: And 4.16A.

1 THE COURT: Okay.

2 MR. JACOBS: So the language, "All royalties
3 fees and other amounts due," is dispositive here of one
4 of the issues in SCO's opposition. Is it really just
5 royalties due under the binary aspects of the SVRX
6 relationships? Well, it doesn't say "royalties only."
7 It says, "royalties, fees and other amounts due." So,
8 any category of revenue under an SVRX license, regardless
9 of what it is attributed to and regardless of how it's
10 labeled, again, all royalties, fees and other amounts
11 due.

12 Now let me pause here because there is
13 something very interesting going on in the debate between
14 the parties. Their cross motion and their opposition
15 rests heavily on these declarations from business people
16 who have had some varying degree of association with the
17 actual transaction. And I think there is a basic
18 misapprehension about the role of contracts and the role
19 of lawyers that divides the parties on this motion.

20 Business people form -- I'm not telling you
21 anything new, but I thought it's worth articulating
22 what's going on here. Business people come up with an
23 idea for a deal. They model the deal. They model the
24 transaction based on aspects of the transaction that they
25 understand. One of the aspects of this transaction that

1 they apparently modeled was the continuation of the
2 existing SVRX revenues because they could understand
3 that.

4 Lawyers then sat down and drafted an agreement.
5 And lawyers, they are not computer engineers, but they
6 are transactions engineers, and they try to draft
7 language that anticipates not only what the business
8 people might have specifically contemplated by way of the
9 business purpose of the transaction, lawyers try and
10 draft language that covers all contingencies.

11 That doesn't make that any less of the intent
12 of the parties simply because it's the result of the
13 lawyers doing drafting of an agreement. The lawyers are
14 the party at that stage of a relationship and then, of
15 course, the parties ratify what the lawyers do when they
16 sign the agreement. So there's -- what's basically going
17 on here is SCO would have us ignore what the lawyers did.

18 Now, there are ways to do that. They could ask
19 for the contract to be reformed if, in some way, the
20 contract didn't reflect the underlying intent of the
21 parties. But they haven't asked for reformation. They
22 could make an argument for mutual mistake, but they
23 haven't made an argument for mutual mistake. They
24 haven't said the lawyers were incompetent, although there
25 is a theme running through their papers that somehow

1 their lawyers didn't capture their intent or, to be more
2 precise, the predecessor's intent in the agreement.

3 It may be that, as the Asset Purchase Agreement
4 was being drafted, people were working quickly. It
5 may be that Novell had all sorts of leverage over old SCO
6 during the time of drafting the Asset Purchase Agreement.
7 That doesn't change the outcome. We look at what the
8 contract says, not what the business people might have
9 thought was the essence of the deal.

10 Now, here, we have one additional important
11 fact, if you will, that reinforces this basic point I'm
12 driving at. There were three months between the signing
13 of the Asset Purchase Agreement and the signing of
14 Amendment Number 1. This provision was heavily focused
15 on. 4.16 is a major focus of Amendment Number 1. There
16 was a lot of opportunity to tweak the language if
17 tweaking would have better conformed the agreement to
18 some different notion of what the transaction was all
19 about.

20 But, in particular, the language, "all
21 royalties, fees and other amounts due, under all SVRX
22 licenses" didn't change. SVRX royalties in Amendment
23 Number 1 was used as a category. There are various carve
24 outs from the category, but those carve outs confirm that
25 the set SVRX royalty is a very large set because certain

1 things were exempted from the set explicitly. They
2 weren't said -- it wasn't not said that these things are
3 not SVRX royalties. It was said that these things which
4 are not SVRX royalties are not part of the payment
5 remittance obligation that SCO incurs.

6 So, these elements of the set help define the
7 set, and that was done three months after the Asset
8 Purchase Agreement was signed. So that's the first
9 "all," all royalties fees and other amounts due.

10 Then the second "all," all SVRX licenses as
11 listed in detail under Item 6 of Schedule 1.1A hereof and
12 referred to herein as SVRX royalties.

13 Now, this part has provoked all sorts of
14 consternation and argumentation on the other side. What
15 is an SVRX license, they ask. The list of programs that
16 is identified under Section 1.1A makes this a non-issue
17 as far as this motion is concerned because what we
18 demonstrated in our papers is that if you take the SUN
19 and Microsoft agreements and lay them against the list of
20 programs in Schedule 1.1A, it's almost a -- it's a lay
21 down. It's a perfect match up. It's almost as if they
22 took Schedule 1.1A, added and subtracted a little bit
23 from it, but used the exact formulations for the names of
24 the programs in the SUN and Microsoft agreements.

25 So, we don't need to know the ultimate scope of

1 SVRX licenses. We don't need to know how far it could
2 possibly reach in order to decide this motion. What we
3 know is: If you take that list of programs and you lay
4 it down against the exhibits in SUN and Microsoft,
5 particularly NXB of the Microsoft agreement, the second
6 payment provoking annex of the Microsoft agreement, it's
7 a nearly perfect match up.

8 THE COURT: What does "nearly perfect" mean?

9 MR. JACOBS: Well, there are a few additions.
10 I didn't notice any important subtractions. There are a
11 few additions to the list. In annex B, it's two
12 additions at the top, I think, and everything else lines
13 up perfectly. So are these -- is there -- there are two
14 questions to ask, I suppose. Are the SUN and Microsoft
15 agreements SVRX licenses, or do they represent at least,
16 in part, SVRX licenses? We think the answer to both is
17 yes. The second. They are at least in part an SVRX
18 license. We think they are also SVRX licenses.

19 And this is where I think the fiduciary
20 obligation starts to kick in. One of the obligations of
21 a fiduciary is to make it possible for the principal to
22 know whether you have collected on behalf of the
23 principal or on behalf of yourself. And you have a duty
24 to prevent the kind of commingling here that's gone on;
25 not commingling only in the sense of the pot of money but

1 commingling in the agreements. So this is where I think
2 the fiduciary duty aspect of this should tilt the -- any
3 concerns that one might have about this lineup of
4 programs against SCO.

5 They had a duty to do this in a way that would
6 not provoke this kind of self-serving, "no, no we are not
7 your fiduciary for this" sort of declaration that they
8 have introduced.

9 Now, if you look, then, at Amendment 1, just to
10 underline the point about the scope of the obligation, I
11 think it's worth walking through that briefly. So the
12 first thing to note is that on page 9 of Amendment 1,
13 which is Exhibit 2 to my declaration.

14 THE COURT: Uh-huh.

15 MR. JACOBS: It's in item four. The first line
16 is amended in its entirety to read as follows: All
17 contracts relating to the SVRX licenses and auxillary
18 product licenses collectively SVRX licenses listed below.
19 So what's going on here three months after the asset
20 purchase agreement is signed, are the parties cutting
21 back on the definition of SVRX license? No. They are
22 actually making sure that it's sufficiently inclusive and
23 so, with three months -- with the benefit of three
24 months, if it was rushed at the initial negotiation, it's
25 being cleaned up but, in this respect, not in a way that

1 helps SCO.

2 And in the other provisions, the elements of
3 the set that I was referring to here, are really quite
4 telling here because I think they answer all of SCO'S
5 arguments. So really this is a question about the
6 importance of the language of the contract as against
7 the declarations of the business people that SCO
8 submitted.

9 If you look at page 3, revenues to be retained
10 by buyer, it says: Buyer shall be entitled to retain 100
11 percent of the following categories of SVRX royalties
12 collected by buyer.

13 So what this amendment is doing is making clear
14 that the following categories are SVRX royalties. They
15 would, therefore, fall under the scope of the fiduciary
16 obligation of the payment and remittance obligations of
17 4.16A, but we are going to exempt them explicitly. We
18 are not going to define them away. We are not going to
19 define SVRX more narrowly. We are going to take a few
20 elements of the set and pull it out. And one of them is
21 source code right-to-use fees under existing SVRX
22 licenses from the licensing of additional CPU's, proving,
23 we submit, that source code right-to-use fees in all
24 other circumstances are SVRX royalties and are not
25 exempted by the language of the agreement.

1 They are not exempted by this Section E of
2 Amendment Number 1 from SVRX royalties. A specific
3 category of SVRX royalties is taken out of the pool of
4 money that has to be remitted to Novell.

5 And then, similarly, in the next little bullet.
6 Source code right-to-use fees attributable to new SVRX
7 licenses approved by seller pursuant to Section 4.16B.
8 So, had SCO obtained approval for source code
9 right-to-use fees under these SUN and Microsoft
10 agreements from Novell, then SCO could have retained
11 those fees.

12 Now plainly, had they -- what the agreement
13 contemplates, then, is some kind of a discussion and
14 negotiation between SCO and Novell under those
15 circumstances. Novell has no obligation to approve a
16 proposed agreement that SCO might enter into. But here,
17 of course, there was no such opportunity to negotiate,
18 and Novell might very well have -- if asked, might very
19 well have declined to approve it, in which case SCO would
20 have been entering into the agreements at its own peril
21 under this provision.

22 So I think that Section E and little Section E
23 on page 3 make it very clear that SVRX royalties is not
24 limited temporally. It's not limited to existing, as
25 against future, and it's not limited as to source code or

1 that source code or binary dimension that SCO proposes as
2 a limitation.

3 Now, it is worth pausing for a minute on the
4 actual agreements themselves, and I want to observe that
5 the agreements are under -- I'm talking about the SUN and
6 Microsoft agreements are under seal. It's not our
7 confidential information, so if you want to stop me at
8 some point and propose to Judge Kimball -- however you
9 wish to proceed with this, Your Honor.

10 THE COURT: Do we need to clear the courtroom
11 before you proceed?

12 MR. JACOBS: I think what I will try to do is
13 keep away from something that might be sensitive.

14 THE COURT: That would be better, if you can.

15 MR. JACOBS: Okay. So, first of all, with
16 respect to the SUN agreement -- part of SCO's argument is
17 that we should have filed this three years ago, this
18 motion three years ago before we saw the agreement, but
19 it isn't until you see the agreement, for example, that
20 you see that in the whereas clauses, SUN and SCO are
21 specifically referring to a 1994 agreement that is being
22 amended and restated, and that is an SVRX agreement. So,
23 if there is any question about whether the SUN agreement
24 is an SVRX agreement, as opposed to something else, that
25 statement, that this is part of a desire to amend and

1 restate the original agreement dating back to 1994,
2 pretty much answers what the intent of these parties was.

3 And then, if you go to the exhibit on the SUN
4 agreement, the list of technology, you will see a list of
5 System V release after System V release. Is it all
6 System V technology? No. There are some other things
7 that are included. But, are the bulk of the listed
8 programs System V releases? Absolutely. Is it possible
9 that one could allocate the value between the various
10 components? Conceivably. Does a fiduciary get to make
11 that kind of carve up under these circumstances? I
12 submit not. Only with the heaviest of presumptions
13 against them, if they can somehow demonstrate that there
14 is something to be excepted, but demonstrate as a
15 fiduciary has to demonstrate, then perhaps in the
16 accounting that we see, some portion of the SUN money
17 gets retained by SCO.

18 But looking at the purpose of the agreement,
19 and looking at the list of materials that are licensed in
20 the agreement, it's quite plain, we submit, that this is
21 an SVRX license within the meaning of the Asset Purchase
22 Agreement or that, at the the very least, it is, in
23 substantial part, an SVRX license.

24 Now, the only other thing that SCO tries to
25 argue, really, on this point is that it's incidental and

1 this falls under the incidental language of 4.16. But I
2 don't think this is something on which there can be a
3 fact dispute when you look at the list of technology and
4 System V release after System V release is listed there.
5 To say that it's incidental, I think turns incidental
6 into something that it is not.

7 Incidental means by happenstance or by chance
8 or it might, in some minor way be related to, in my
9 dictionary. And I don't see how they can concoct an
10 incidental argument out of this agreement.

11 Now, that brings us to the Microsoft agreement,
12 and it had an interesting aspect to it which we think
13 also answers the question: Is it, in substantial part,
14 an SVRX license? And that is the structure of the
15 agreement and the fact that, pursuant to an option, there
16 were -- there was a purchase of rights to additional
17 code. And if you compare the two lists -- I won't go
18 into it in detail because of the confidentiality, but if
19 you look at Exhibit A, it starts out with SCO UnixWare
20 and then lists a lot of technologies under it, including
21 the System V kernel in the first bullet.

22 Are you looking -- I'm on page 8 of the
23 Microsoft agreement.

24 THE COURT: All right.

25 MR. JACOBS: So if that was what this agreement

1 was all about, you might say: Well, gee, this is just
2 incidental because Exhibit A looks like a license to
3 UnixWear with a Unix component included. But then, if
4 you look at Exhibit C. -- I think I misspoke before.
5 Exhibit C, well, it, too, starts out with references to
6 UnixWear. Pretty soon we're in that body of the
7 additional assets that are listed there that lines up
8 letter perfect with releases on the Asset Purchase
9 Agreement's definition of an SVRX license, so in no way,
10 with Exhibit C, can this aspect of the Microsoft
11 agreement be thought to be an incidental licensing of
12 SVRX associated with UnixWear. The contrast between C
13 and A, we believe, makes that very, very plain.

14 To say it again, Exhibit A is how you would
15 document it if you were going to make an argument from
16 incidentalness, and Exhibit C is an SVRX license with
17 some additional licensing of UnixWear.

18 So we think that basically is the beginning and
19 the end of it. Now, we don't need to get into the
20 extrinsic evidence, but what we thought the extrinsic
21 evidence gave us an opportunity to do was to show Your
22 Honor how, in fact, in the wake of the agreement, the
23 parties' conduct was consistent with the interpretation
24 we offer.

25 And to the extent that gives the Court some

1 additional comfort, that we are not twisting the language
2 ten years later, the way it wasn't contemplated, we
3 thought actually their cross motion gave us an
4 opportunity to not get into the facts on the lead motion
5 which rests -- which really, as a matter of law, under
6 the contract, we win.

7 But if you look at the factual material we
8 submitted in opposition to their motion, to their cross
9 motion, you will see that, in fact, in the wake of the
10 Asset Purchase Agreement, the word "source code" was used
11 repeatedly to describe the rights that Novell retained.
12 There was no source binary distinction, in particular.
13 When there were various buyouts, such as the IBM buyout,
14 source code was -- revenues were paid 95 percent to
15 Novell, as well as binary code revenues.

16 So that's only five months after Amendment
17 Number 1 is signed. The Asset Purchase Agreement
18 actually closes. So that's very close in time. I think
19 I'll stop there and see what important points SCO
20 advances in their motion.

21 THE COURT: Thank you, Mr. Jacobs.

22 MR. JACOBS: Thank you.

23 THE COURT: Mr. Singer.

24 MR. SINGER: Thank you, Your Honor. Your
25 Honor, if I may approach, we have some argument

1 exhibits.

2 THE COURT: Sure. Have you given Mr. Jacobs a
3 copy?

4 MR. SINGER: I have, Your Honor.

5 THE COURT: Thank you.

6 MR. SINGER: Your Honor, I would submit that it
7 is an extraordinary motion for summary judgment when a
8 party asks the Court to interpret a contract in direct
9 opposition to what all of the witnesses who were directly
10 involved in the negotiation of the agreement, in setting
11 the business deal, in directing the lawyers, testify was
12 the intent and the effect of that agreement. Yet that is
13 the situation we have here. We have submitted nine
14 declarations. Not just from individuals on the Santa
15 Cruz side, but numerous individuals who, at the time,
16 worked at Novell; from the senior executive, such as Doug
17 Thompson to Ed Chatlos, the chief Novell negotiator, to
18 Mr. Maciaszek, who worked throughout this period on these
19 products, and on and on, as well as witnesses on the
20 Santa Cruz side.

21 And they tell a very consistent story, that the
22 intent of this agreement was for Novell to retain 95
23 percent of the royalties on existing SVRX licenses. And
24 by SVRX licenses, they meant binary licenses that went to
25 end users.

1 Now, Mr. Jacobs suggests that, well, the
2 business people must not have understood what the lawyers
3 were drafting. First of all, I would submit that
4 position turns on its head the practice of contractual
5 interpretation followed by Courts throughout the country
6 that look at evidence reflecting the intent of the
7 business people, of the parties, and don't assume that
8 somehow the lawyers took it upon themselves to run amuck
9 and recut a different deal.

10 THE COURT: Hypothetically, could a contract
11 provide A, B and C, hypothetically, in the clearest
12 terms, and you could have a situation, then,
13 hypothetically, where most of or many of the people
14 involved say: Well, what we meant was X, Y and Z.

15 What is a Judge to do, then, hypothetically?
16 I'm not saying that's this case. Hypothetically, what is
17 the Judge supposed to do then?

18 MR. SINGER: Hypothetically -- and it's not
19 this case -- if the language is not at all open to the
20 interpretation that the witnesses say, then absent issues
21 of reformation and mistake and issues like that, which
22 one would need to go into, you look at the language. If,
23 for example, this was a case of a contract which said the
24 2003 Microsoft agreement and 2003 SUN agreement and the
25 fees related to those agreements should go to Novell,

1 that would be a clear statement, and one, then, doesn't
2 have to worry as much about these types of statements.

3 Or, if you had a statement which said that all
4 existing and future licenses for source code and binary
5 or object code are ones on which Novell keeps the
6 royalties, then you might get closer to your hypothetical
7 situation. That is, of course, not the case here.

8 But, not only does one not assume that the
9 lawyers run amuck in interpreting and writing the
10 agreement that is counter to what the business purpose
11 is, one would assume, then, that that would only be
12 counter to what the Santa Cruz witnesses said was the
13 business purpose and that, without negotiating with Santa
14 Cruz, they effectuated the intent of their client on the
15 Novell side.

16 But here we find that the declarations
17 indicate, from Novell as well as Santa Cruz, that they
18 very well understood the intent, that the intent was the
19 same and that the intent was a limited right with respect
20 to existing licenses, with respect to binary and not
21 source code and, as we'll see later, by operation of the
22 amendments, did not apply when you had a distribution or
23 license of SVRX that was incidental to, that accompanied
24 the sale of UnixWear, which was a new product being sold.

25 Now, not only is there this uncontroverted

1 testimony from the witnesses most directly involved in
2 the transaction, but it is reflected, as well, in formal
3 public statements by SCO -- by Novell to the public, to
4 the Securities & Exchange Commission.

5 If Your Honor would turn to tab 1 of the book
6 of exhibits, one finds an excerpt, and that excerpt is
7 taken from, at the time, the '95 annual report, the '96
8 annual report, the '96 quarterly reports that Novell
9 filed. And they describe the transaction because the
10 purpose of this transaction was the sale of the business,
11 the Unix business, and it was compensation which Novell
12 received, which was 17 percent of the SCO common stock.
13 It was a future revenue stream based on UnixWear that
14 Novell doesn't discuss that I'll get to later, but, most
15 importantly, they described the issue here by
16 specifically saying that Novell will continue to receive
17 revenue from existing licenses for older versions of Unix
18 System source code, which, again, is consistent with what
19 all the witnesses on both sides say.

20 Now, Your Honor, we would submit that the plain
21 language of the agreement is consistent with and
22 effectuates this intent when one looks at Amendment 1, as
23 well as when one looks exactly at what was put into those
24 agreements. But there is no controversy over the fact
25 that the purpose there was to transfer the entire

1 business to SCO and to provide this as a mechanism of
2 paying for that business. And, in fact, the evidence in
3 the record shows that Novell has received from SCO over
4 \$200 million in royalties relating to the binary product
5 sales.

6 And the evidence shows that SCO has
7 consistently taken that interpretation in terms of what
8 was paid and also contrary to what Mr. Jacobs says, that
9 Novell, until 2003, never even asked about source code
10 focused on binary license revenue when they audited the
11 revenue stream that these licenses were generating.

12 Now, I'm going to only very briefly talk about
13 the legal standard that California law applies here. We
14 insert two cases at tabs 4 and 5. California law says
15 one uses extrinsic evidence to expose ambiguities and to
16 see if a contract is reasonably susceptible to the
17 parties' interpretation. And here we think whether this
18 was under California law or otherwise, the language goes
19 beyond reasonably susceptible but, in three critical
20 respects, fully supports the arguments SCO is making:
21 One, on the argument of existing-versus-future contracts;
22 two, on the issue of source code in light of Amendment 1;
23 and, third, on the issue of incidental licensing of SVRX
24 in the context of a new UnixWear license.

25 And I'd like to spend some time talking about

1 each of those points. First of all, the fact that we
2 were talking about licenses existing at the time. And if
3 one looks at 1.2B, one immediately sees how the language
4 supports that position because what is being defined here
5 is the transfer of SVRX licenses, is only legal title and
6 not an equitable interest. Those are licenses that have
7 to be existing at that time. How else could they appear
8 on the schedule of assets, which is schedule 1, which is
9 being sold? How else can you say that buyer has legal
10 title, if these contracts have not yet come into
11 existence? At the same time, when the drafters of this
12 contract wanted to deal with future sales, they knew how
13 to do so expressly.

14 Later, in the same provision of 1.2B, it talks
15 about future sales. That's the UnixWear. And it says
16 that on account of buyer's future sale of UnixWear
17 products, there will be a payment to the seller. That
18 provision is totally ignored by everything Novell has
19 said in its papers. If they had earned a royalty on
20 UnixWear, they would have received it. That was a
21 limited royalty. It had to meet certain threshold
22 amounts of sales based on a Novell business plan that did
23 not occur, and it expired in December of 2002 before the
24 contracts at issue here were entered into.

25 But what it reflects is that the drafting of

1 this agreement was talking about a transfer of
2 licenses -- and we submit you can't transfer something
3 that doesn't exist at that time -- and specifically dealt
4 with future sales with express language. You do not see,
5 Your Honor, any language in this agreement which says
6 future SVRX licenses entered by SCO or the buyer, the
7 revenue from those flow to Novell. That is not found
8 anywhere in the document. If one follows 1.2 to the
9 reference in 4.16 where the issue is: What does SVRX
10 licenses mean? that refers, in turn, to a schedule.

11 Item 6 of Schedule 1.1A. It says these are
12 listed in detail. Of course the licenses aren't listed
13 in detail. If one turns to that provision, one sees just
14 a product listing. One finds, in other provisions of
15 this list of assets being sold -- because that's what
16 this was. This was a schedule of the assets being
17 sold -- references to UnixWear generally, references to
18 software and sublicensing agreement, including source
19 code and sublicensing agreements that the seller has, and
20 those agreements are under a different section here.

21 There is no specific listing of licenses
22 here in detail. There is no reason to believe that this
23 listing was intended to be more than the product
24 supplements which are the actual licenses by which a
25 royalty is generated.

1 Now, there is an additional reason, looking at
2 4.16B why the parties didn't contemplate any need to deal
3 with future SVRX licenses, and that's found in Subsection
4 B because the expectation here was that the future sale
5 would be of the UnixWare, the new product. And it said:
6 Buyer shall not, and shall have no right to enter into
7 future licenses or amendments of the SVRX licenses except
8 as may be incidentally involved through its rights to
9 sell and license the assets for the merged product or
10 future versions.

11 And later, after the amendment, that was also
12 expanded to where there was an approval from Novell. But
13 the contemplation of the parties was that you weren't
14 going to have future SVRX licenses, which is perfectly
15 consistent with this being understood as meaning the
16 licenses in place which, in turn, is consistent with what
17 every person who has touched this transaction, nine
18 separate declarations, reflect was the intent.

19 Now, if the Court agrees on the issue of this
20 reaching only existing licenses either as a result of the
21 plain operation of the language or if it's reasonably
22 susceptible to that language, that's the end of the issue
23 because the 2003 agreements in question here did not
24 exist back at the time of the APA in 1995, and the result
25 of that should be denying the summary judgment motion

1 brought by Novell and granting the cross motion.

2 But there is a separate, second issue which
3 also leads on to that result. And that is the question
4 of whether source code license fees would ever go to
5 Novell. Now, Mr. Jacobs suggests that Amendment 1, which
6 was entered into later, in the end of 1995, supports his
7 position. I submit it does not. One should look at what
8 these provisions meant rather than just the terms that
9 they use. Focus not on the fact that somewhere in here
10 there's a reference to source code, but what do these
11 provisions say?

12 They say, under Section 2, that the buyer,
13 that's SCO, shall keep 100 percent of SVRX royalties that
14 consist of source code right-to-use fees under existing
15 licenses from the licensing of additional CPU's or from
16 the distribution by the buyer of additional source code
17 copies. And then, if you have totally new licenses that
18 are approved by the seller, all of those fees also go to
19 SCO, go to the buyer.

20 There is no way, we submit, that you can
21 reconcile this amendment with the idea that some part of
22 source code fees go to Novell. I mean, first of all, it
23 doesn't say any of the source code fees goes to Novell.
24 There is nothing in Amendment 1 which says that. We
25 submit that they have covered the relevant universe in

1 these two provisions when one considers where source code
2 fees can arise from. And if Your Honor turns to tab 11
3 in our binder, it indicates the four different categories
4 one could conceivably have of these source code fees.

5 One category are the paid-up source code
6 agreements. Sun's agreement in 1994 is one of them.
7 Novell received \$84 million with respect to those rights.
8 They kept it all before the transaction. No need for the
9 agreement to treat the paid-up source code agreements
10 because they already have the revenue. If those
11 agreements are being expanded in terms of additional
12 units or distribution, that's the second clause here.
13 That goes to the buyer. If there are new licenses that
14 are approved by the seller, that also goes to SCO. If
15 there was an intent that source code licenses generated
16 revenue that went to Novell, that provision would say
17 Novell has to approve them, but then the revenue goes to
18 Novell. It makes no sense to suggest that there was an
19 intent that the revenue go to Novell when it says that
20 the revenue shall go to the buyer.

21 But then there's the question of: What happens
22 if there is something that is a new source code license
23 but it isn't approved by Novell? And we agree the
24 Microsoft and SUN agreements were not approved by Novell.
25 There is nothing in the APA or Amendment 1 that says that

1 those fees in that circumstance would go to the seller.
2 We submit that those are properly treated under the
3 incidental language because what was contemplated was
4 that any licensing of source code of SVRX, along with
5 UnixWare, fell within the separate provision of Amendment
6 1 that dealt with that, and that is Section E.

7 Section E said: Notwithstanding the foregoing,
8 buyer shall have the right to enter into amendments of
9 the SVRX licenses, as may be incidentally involved to its
10 rights to sell and license UnixWare software or the
11 merged product or future versions of the merged product.

12 And it also provides that a licensee, such as
13 SUN, under a particular SVRX license, can be allowed to
14 use the source code on additional CPU's or to receive an
15 additional distribution from the buyer of such source
16 code.

17 So, through these provisions, which do not
18 require the approval of Novell, SCO was able to conduct
19 its business, sell UnixWare and, as I believe five
20 different witnesses have testified in their declarations,
21 it was a customary and ordinary part of that business
22 when you licensed a new product, when you licensed
23 UnixWare, to provide a license to the Legacy product as
24 well to go along with it. That is what is meant by
25 incidental.

1 Now Mr. Jacobs suggests, without anything in
2 the record to support him, that this Court should
3 determine, as a matter of law, what's incidental by
4 counting up the lines on a product license or the number
5 of times that certain products on .6 appear on that list.
6 There is no basis in law or in fact for that. One looks
7 either at the agreement -- and this agreement does not
8 define what incidental means -- or one looks to what the
9 business people say was meant by incidental.

10 Here five witnesses, again both on the Novell
11 and the SCO side, say this is what was meant when you
12 license older Legacy products along with the UnixWare
13 current product. And that was specifically authorized,
14 and that is where the Microsoft and SUN agreements fall
15 within their treatment of the agreement.

16 So those agreements mean, first of all, that
17 because these are not existing SVRX licenses, they are
18 not subject to Novell's royalty rights. Number 2,
19 because they deal with source code, not binary rights,
20 the revenue certainly does not flow to Novell. And,
21 number 3, they fall squarely within this provision both
22 on the language here and as interpreted by the extrinsic
23 evidence of what was intended.

24 Now, Mr. Jacobs also says that his position on
25 source code is supported by Amendment X, which was an

1 amendment that was entered into with IBM, and he suggests
2 that's because 95 percent of the revenue in that
3 Amendment X actually went to Novell. But, as we point
4 out at tab 12, it made perfect sense for that revenue to
5 go to Novell because that revenue related to expanded
6 binary rights. And Amendment X expressly provided that
7 when you are dealing with future source code rights, that
8 would be dealt with differently.

9 Section 1 of Amendment X said that upon payment
10 to SCO, they would have these rights. And then -- this
11 is the third bullet point under tab 12 -- however if IBM
12 requests deliveries of additional copies of source code,
13 IBM will pay certain fees that were then listed under a
14 separate topic. That would be in addition to the money
15 that was paid when Amendment X was entered into. That
16 money properly went -- at least 95 percent of it properly
17 went to Novell completely consistent with the
18 interpretation of the agreement that we, and the
19 witnesses who were there and operated these agreements,
20 testified to in their sworn declarations was the intent.

21 If one turns to tab 13, Your Honor, one sees
22 references to the declarations of Ms. Acheson,
23 Mrs. Broderick, Mr. Maciaszek, Mr. Chatlos, and Madsen,
24 all of which support the view that these products
25 commonly included -- or these licenses of UnixWare

1 commonly included licenses of SVRX. Incidentally,
2 because the licensee wanted to have those rights and it
3 was authorized, it's exactly what was intended by the
4 language of Amendment 1.

5 Now, beyond the language of the agreements
6 which we've been talking about and beyond the intent of
7 the witnesses, the course of conduct on both Novell's
8 side and SCO's side is completely consistent with our
9 interpretation.

10 If Your Honor turns to tab 14, we indicate
11 that, in 1998, Novell conducted an audit of SCO's royalty
12 payments. That was in accordance with their rights. The
13 representatives at that time did not ask for anything
14 other than their reports of binary royalties from the
15 SVRX licenses that existed at the time of the APA, and
16 they never asked about the licensing of the source code.
17 That is powerful evidence that supports the other
18 evidence as to how the parties understood these
19 agreements.

20 It is only in 2003, after litigation
21 developed -- and this is now many years after the 1995
22 APA, eight years later -- that Novell starts asking about
23 source code. We submit, the relevant course of conduct
24 evidence is how, in the immediate aftermath of the
25 agreement, they, by their actions, interpreted those

1 provisions.

2 How about on the Santa Cruz side? If one turns
3 to tab 15, you see, based on this record, that Santa
4 Cruz's conduct is also consistent with SCO's position.
5 There's an April 23, 1996 letter which talks specifically
6 about the APA providing for Novell to receive the
7 residual royalties from the in-place SVRX license stream.
8 There was the fact that that is what Santa Cruz paid and
9 reported to Novell. They didn't pay anything else. So
10 this is not some new interpretation that SCO has moved to
11 in the last year or just with respect to the Microsoft
12 and SUN agreement. This is consistent with how SCO and
13 its predecessors have operated under these agreements
14 going all the way back.

15 There was a particular instance involving Craig
16 Computers where Santa Cruz reminded Novell it had no
17 right to negotiate source code right and fees, and Novell
18 agreed. And, of course, Santa Cruz and SCO has paid over
19 \$200 million in SVRX binary royalties based on this
20 interpretation.

21 Now, if Your Honor turns to tab 16, we go a
22 step beyond opposing Novell's motion for summary judgment
23 and deal with our cross motion. And it's been an
24 interesting evolution in the language with which Novell's
25 attorneys in this case have used to describe the issue.

1 When they initially filed their motion for summary
2 judgment, they said: Well, this is clear.

3 In opposing our summary judgment motion, they
4 say: Well, we think the language is reasonably
5 susceptible to their interpretation.

6 We don't think that's true for the reasons that
7 I've outlined regarding the agreement, but even if that's
8 true, they have not come forth with any competent
9 evidence to counter the nine declarations of people who
10 were there on both sides of the transaction with personal
11 knowledge, explaining that only existing SVRX licenses
12 were covered and that source code license fees were not
13 covered. The only reference that they make is to a
14 testimony from Mr. DeFazio who provided a declaration in
15 the IBM case, and that declaration, while it talks about
16 source code, does not in any way dispute the fact that
17 the only licenses which Novell retained revenue on were
18 the existing licenses. So even if one looked at
19 Mr. DeFazio's declaration, that does not create a factual
20 dispute there.

21 Simply put, Novell has no witness directly
22 involved in the negotiations who supports their position,
23 and both sides' witnesses support ours..

24 Now, what is the impact, then, on the SUN and
25 the Microsoft agreements? If one looks at tab 17 as a

1 matter, then, of undisputed fact, the SUN agreement was
2 not a license in existence at the time of the APA. It
3 was, therefore, not transferred by Schedule 1. Secondly,
4 it's a license for UnixWare as to which, based on this
5 record, the SVRX licenses, five different witnesses
6 support is incidental, and therefore it was authorized by
7 the buyer to enter into it, and none of the revenue flows
8 to Novell.

9 I don't even think we get to the third bullet
10 point which is an issue of: If Novell did have rights,
11 one would have to allocate how that fell within the
12 agreement.

13 If one turns to the next tab, tab 18, the same
14 is true with respect to the Microsoft agreement. The
15 Microsoft agreement did not exist at the time of the APA.
16 It was not subject to schedule 1. It was not subject to
17 Section 1.1 B. Neither legal title or any other title
18 transferred at that time. Number 2, any licensing of
19 SVRX was incidental to the UnixWare license for the same
20 reason. And, third, if you looked at an allocation of
21 what was being treated there, contrary to Novell, the
22 Microsoft agreement does not provide for \$8 million going
23 to the licenses that -- for SVRX.

24 Mr. Sontag, in his declaration, directly
25 explains, at length, that that section of the agreement

1 provided Microsoft with broader distribution rights for
2 UnixWare, and there is no counter to Mr. Sontag's
3 testimony on that point.

4 The UnixWare license basically was expanded by
5 this section of the Microsoft license that Novell
6 suggests only brought these other products, these Legacy
7 products, into play.

8 Now, I'm not going to take the Court's time
9 with all the other issues that we have briefed that one
10 only reaches in the event one were to find against us and
11 be prepared to either conclude it as a summary judgment
12 matter or as a likelihood-of-success matter on a
13 preliminary injunction. We have briefed those. We have
14 undisputed evidence that we have larger claims for
15 copyright infringement against Novell than these claims.

16 We show that, as a matter of law, the risk of
17 uncollectibility of a judgment is not a basis for an
18 injunction and that, if they wanted to pursue something
19 like that, they had to do it under Utah's Pre-judgment
20 Attachment Statute; that a constructive trust requires
21 proof that there is in existence today proceeds traceable
22 to these funds received in 2003, which Novell has no
23 evidence on; and that, in any balancing of the equities,
24 one does not have the effect -- I mean, Novell likes to
25 say that SCO is on the point of bankruptcy. It has no

1 proof of that. SCO obviously has been managing tight
2 cash situations for some years, and it is planned to be
3 in a position to continue through to conclusion of this
4 litigation doing that.

5 The only thing that's clear is that if this
6 injunction issued, it would greatly complicate and
7 undermine SCO's ability to do so and that there is a
8 public interest, particularly given the intellectual
9 property rights here being involved in SCO being allowed
10 to fully vindicate in litigation those rights.

11 So, for all of those reasons, even if one got
12 through the merits issues that I have devoted most of my
13 time discussing because I think that's the key here, one
14 should not, under any circumstances, consider the relief
15 which is being suggested here.

16 One last point. The issue is not fiduciary
17 relationships. We have not contested a fiduciary
18 relationship with respect to collecting money, but a
19 fiduciary relationship doesn't extend beyond what the
20 contract establishes here is the proper scope of that.
21 It only kicks in once the Court were to conclude that an
22 SVRX license is implicated by the Microsoft and the SUN
23 agreements. Other than that, there is no case law or
24 anything else that says that the Court interprets the
25 contract any differently, just because, the way the

1 parties set this up, we would collect and hold the money
2 for them and then transmit it to them.

3 This is an issue of contract interpretation,
4 and it's an issue on which all of the evidence, the
5 language, nine declarations, the course of conduct,
6 everything, points in favor of SCO. Thank you.

7 THE COURT: Thank you, Mr. Singer.

8 Mr. Jacobs.

9 MR. JACOBS: I would like to lever off of SCO's
10 reliance on a provision of the Asset Purchase Agreement
11 that helps explain why there are no declarations that
12 deal with this circumstance. As SCO knows, under Section
13 4.16, it wasn't supposed to enter into new SVRX licenses.
14 It was barred from doing so. I offer -- for purposes of
15 this motion, let's assume that no business person present
16 at the negotiation of the Asset Purchase Agreement or on
17 the periphery of those negotiations contemplated that, in
18 2003, old SCO would have sold its business to new SCO,
19 that new SCO would have decided that there's not much
20 profit in UnixWare and instead it's going to launch the
21 SCO Source intellectual licensing campaign.

22 Let's assume that for a minute because I
23 suspect it may well be true that no one, in 1995,
24 contemplated what SCO has wrought over the last three or
25 four years. But that doesn't answer the question: Did

1 the lawyers draft language covering that exigency?
2 Studiously missing from SCO's argument is any explanation
3 of how "all" doesn't mean "all." "All" does mean "all."
4 "All" can only mean "all." "All" can't mean less than
5 "all." The lawyers drafted language that covers the
6 situation. What if SCO takes this set of rights in SVRX
7 and in violation of the agreement, goes out and gets more
8 SVRX revenue? Who gets that money? The fiduciary
9 relationship established by Section 4.16 answers that
10 question. I imagine it's a little bit like the situation
11 where a client hires a lawyer and the lawyer sues, with
12 the client's permission, A, B and C based on some
13 fundamental right. And then the lawyer, without the
14 client's permission, goes off and sues D. Does the
15 client get the recovery? Of course the client gets the
16 recovery.

17 And that's, in essence, what has happened here.
18 SCO, without authority from Novell, went out and got more
19 SVRX money, a lot of it. And the contract tells us that
20 that money is within the scope of SCO's fiduciary
21 obligation to Novell and that it must remit it and that
22 failing to remit it, we are entitled to an accounting and
23 a constructive trust.

24 That answers all these questions that SCO
25 raises about course of conduct, about the declarants

1 because I offer to stipulate for purposes of this motion;
2 in fact, I offer to stipulate it for purposes of society
3 at large, no one really contemplated what SCO has done
4 with SCO Source.

5 THE COURT: Stipulate it for society at large?

6 MR. JACOBS: That was a pretty broad
7 stipulation.

8 THE COURT: It might exceed your authority.

9 MR. JACOBS: The authority of all of us is a
10 little limited. I think, just to clarify, what I meant
11 was: This change of business strategy by SCO, by new
12 SCO, by Caldera renaming itself as SCO was, as we all
13 know because of the attention this case has gotten, an
14 extraordinary event in the life of the computer industry,
15 and I dare say few, if anybody, contemplated that the
16 1995 asset purchase agreement would, by virtue of the
17 chain that we have seen, lead to this campaign that SCO
18 launched.

19 That doesn't -- the fact that that set of
20 circumstances may not have been contemplated by the
21 business people doesn't negate the legal effect of the
22 language the lawyers drafted.

23 THE COURT: Thank you, Mr. Jacobs.

24 Mr. Singer.

25 MR. SINGER: Your Honor, I'll be very brief. I

1 don't see how SCO Source has really anything to do with
2 this. To the extent SCO entered into certain SCO Source
3 licenses, those clearly are not covered by anything in
4 the relevant agreements here from which Novell would
5 receive any share of revenue. The focus on "all," by
6 Novell, does not answer this case. "All" modifies SVRX
7 licenses. The SVRX licenses have to be the SVRX licenses
8 in existence at that time. Otherwise you can't transfer
9 the title. Otherwise, it doesn't make any sense in the
10 context of the agreement.

11 Similarly, "all" does not mean "all" after
12 Amendment 1 because, at that point, indisputably, source
13 code fees for both amended licenses and new licenses with
14 approval go to SCO, not to Novell. So, clearly, that
15 changed "all" in that respect.

16 And, thirdly, "all" does not mean "all" when
17 you have language in the agreement, Section J of
18 Amendment 1, that makes clear that incidental
19 distributions and licenses of SVRX are okay as long as
20 it's in the context of the selling of the new or merged
21 products. And that's what we have here.

22 I would suggest to the Court, if it has any
23 question about that, it could look in Exhibit 3 to the
24 Microsoft agreement which specifies Open Unix products,
25 distribution rights for UnixWare and things which go well

1 beyond the listing of SVRX licenses. You have only one
2 side offering evidence in this record that what was done
3 there was incidental to the licensing of UnixWare. And,
4 therefore, the plain language of the agreement is carved
5 out of those provisions, those SVRX royalties on existing
6 licenses, which Novell enjoys and continues to enjoy
7 revenue that currently has generated more than \$200
8 million to Novell. They do not have a right to the
9 revenue from the Microsoft and SUN agreements

10 Thank you, Your Honor.

11 THE COURT: Thank you. Thank you both. I'll
12 take the matter under advisement and get a ruling out in
13 due course. We'll be in recess.

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25 (Whereupon the proceedings were concluded.)

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REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, REBECCA JANKE, do hereby certify that I am a Certified Court Reporter for the State of Utah;

That as such Reporter I attended the hearing of the foregoing matter on January 23, 2007, and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting, and the foregoing pages numbered 1 through 45 constitute a full, true and correct record of the proceedings transcribed.

That I am not of kin to any of the parties and have no interets in the outcome of the matter;

And hereby set my hand and seal this 3rd day of May, 2007.

REBECCA JANKE, CSR, RPR, RMR