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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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1 JANUARY 23, 2007

SALT LAKE CITY, UTAH

2 P R O C E E D I N G S

3 \* \* \*

4 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 UnixWear  
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