

EXHIBIT D

No. 08-4217

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

THE SCO GROUP, INC.,

Plaintiff-Appellant,

v.

NOVELL, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Utah
Hon. Dale A. Kimball, Presiding
No. 2:04-CV-00139-DAK

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LEGAL STANDARDS

Novell does not dispute the legal standards governing review of the district court's summary judgment decisions.

NOVELL'S "STATEMENT OF FACTS"

Novell treats the record as if it had prevailed on a trial and were asking this Court to construe the evidence in the light most favorable to the verdict. The opposite standard controls on summary judgment. This appeal almost exclusively addresses the district court's summary judgment determinations.¹ By discussing the facts based only on evidence it has submitted, Novell constructs for this Court an essentially irrelevant factual record.

Novell repeatedly contends, for example, that it retained ownership of "all copyrights." The record shows that the APA was amended and expressly replaced the language concerning the retention of "all copyrights," and that Novell's most senior executives, including its CEO and chief negotiator, intended that the UNIX and UnixWare copyrights be transferred to Santa Cruz. (08563;08661-63¶¶9-11;08674-75;05646;05663-65;05631-32;05616;05715; 05712;08914-15;10719;10764-65;07827-28¶¶9-11;05727-29;10721;03938¶¶9-16.)

The factual record contains testimony from numerous material witnesses, drawn from both sides of the transaction, who agree that (1) the parties intended to transfer the copyrights,² (2) Novell retained an interest only in the royalty stream

¹ The only material issue decided at trial was the amount of revenues from the Sun Agreement that Novell was to be awarded based on the district court's summary judgment decision regarding the scope of "SVRX Licenses."

² (08563;08661-63¶¶9-11;08674-75;05646;05663-65;05631-32;05616;05715; 05712;08914-15;10719;10764-65;07827-28¶¶9-11;05727-29;10721;03938¶¶9-16.)

from existing licenses to SVRX products,³ and (3) Novell’s “waiver rights” were limited to protecting that royalty interest and did not give Novell the right to countermand virtually any business decision that SCO might make.⁴ These witnesses are not “unfamiliar” with the APA. They include Novell’s own CEO, who authorized and approved the deal, its lead negotiator, and other parties directly involved in the deal. (08531-32;08659-60;08620;08610-11;08736;08744;08747; 08771;08582;08584-85;08461;08494;08921-22¶7;08882; 08952;08956;10717-19;10738.)

³ (08537-38;08518;02472¶7;08760;08588;02431¶4;02438¶4;08888-89;10729;02483¶12; see also 02488.)

⁴ (08540-41;05653¶13;03553-54¶7;08592;03929-30¶4;03677-78¶10;03561¶9;03858-59¶¶4-5;03937¶13.)

SUMMARY OF ARGUMENT

This is the rare case where the principals on both sides of the contract agree on the parties' intent. There is such agreement on each of the three main issues before the Court. The language of the amended APA is reasonably susceptible to that consensus interpretation, and the extrinsic evidence of that intent is overwhelming in SCO's favor. The district court erred by failing to acknowledge numerous material issues of disputed fact and by deciding against SCO as a matter of law on each of those issues.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING, AS A MATTER OF LAW, THAT THE APA AS AMENDED DID NOT TRANSFER THE EXISTING UNIX AND UNIXWARE COPYRIGHTS TO SANTA CRUZ.

A. The District Court Erred in Interpreting the APA and Amendment No. 2 As Separate and Independent.

Novell stresses (at 24) that Amendment No. 2 was executed “as of the 16th day of October 1996” – as if the Amendment somehow could have been executed on no particular date at all. The date of execution does not change the fact that on its face the Amendment referred back to and expressly amended the APA by changing the schedule of assets excluded from the sale or that the Bill of Sale thereafter pertains to that amended contract.

The APA unambiguously transfers “All rights and ownership” of UNIX and UnixWare, including the copyrights “required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies.” (00313;00374.) If these provisions are to have any meaning, they must mean that copyrights were transferred under the APA. The parties clarified the transfer by eliminating the language excluding all copyrights from the sale and thus resolved the ambiguity between the “All rights and ownership” language in the Asset Schedule and the former exclusion of copyrights.

The TLA provides a license back to Novell of the Licensed Technology, which includes the core asset of the business – the UNIX and UnixWare source code and products. (00268;03690;00313;00361.) Had the parties intended for Novell to retain the copyrights, Novell would not have needed any license back to those assets, much less the restricted license that the TLA provides. Novell says (at 30) that the TLA must have licensed back to Novell “other aspects of the technology sold to Santa Cruz.” Novell’s interpretation is no more reasonable than SCO’s, and Novell’s own Board resolution approving the APA states that Novell was transferring “its UNIX and UnixWare technology assets” (05192), which even under Novell’s definition of “technology” would include copyrights.

In addition, Santa Cruz indisputably acquired all claims “relating to any right, property or asset” in the UNIX business, including the UNIX and UnixWare source code. (00313-14.) Under any reasonable interpretation of the provision, the transferred claims included copyright infringement claims for unauthorized use of the source code. But if Santa Cruz had received only an “implied license,” Santa Cruz could not bring any such claims. I.A.E., Inc. v. Shaver, 74 F3d 768, 775 (7th Cir. 1996). In this plain sense the copyrights were “required.”

Former Santa Cruz General Counsel Steve Sabbath testified, for example, that “if you didn’t own the copyrights, how could you even go after somebody that’s pirating your software?” (10722.) “We didn’t want somebody to be able to

go off and pirate it, for example, so we needed the copyrights in order to defend the property.” (10762.) Santa Cruz senior executive Doug Michels explained that software products “are governed by copyrights. That’s what – that’s what you own. That’s the intellectual property of a source code product. It would be meaningless to own it if you didn’t own the copyrights.” (08906-07.) It is incongruous for Novell to argue (as at 45) that courts should consider evidence of how other companies supposedly operate without owning the underlying rights, but that courts cannot consider how the very businesses at issue operated.⁵

As for the period prior to Amendment No. 2, no one has suggested that Santa Cruz was physically unable to make copies of the UNIX and UnixWare source code. That hardly means that SCO did not need or obtain the copyrights to run the UNIX licensing business.

B. The District Court Erred in Finding an “Implied License” From the Text of the APA and Amendment No. 2.

The district court’s reconciliation of the APA depends on Santa Cruz having received an “implied license” to the UNIX copyrights. “Courts have found implied licenses only in narrow circumstances where one party created a work at the other’s request and handed it over, intending that the other copy and distribute it.”

⁵ Novell cites only the off-hand testimony of Chris Stone, a Novell executive who was not with Santa Cruz or Novell at the time of the APA and who was not offered as an expert on industry practice.

SmithKline Beecham Consumer Healthcare, L.P. v. Watson Pharms, Inc., 211 F.3d 21, 25 (2d Cir. 2000) (brackets and quotations omitted) (quoting Effects Assocs., Inc. v. Cohen, 908 F.2d 555, 558 (9th Cir. 1990)). Other Circuits agree that the doctrine applies only in such “narrow circumstances.”⁶ The APA does not involve those circumstances, and Novell does not suggest otherwise.

Novell also does not dispute that the finding of an implied license presents a classic question of fact. In Novell’s own cases, the courts equate the standards for finding an implied license with the standards for interpreting a contract using extrinsic evidence of the parties’ conduct to resolve ambiguities.⁷

Novell’s “implied license” argument also runs up against the scope of the claims Santa Cruz had acquired. The assets Santa Cruz indisputably acquired under the APA, as shown above, included all claims relating to the source code. (00313-14.) If SCO had received only an “implied license” under the APA, it would not be permitted to bring such claims.

⁶ John G. Danielson, Inc. v. Winchester-Conant Props., Inc., 322 F.3d 26, 40-41 (1st Cir. 2003); Nelson-Salabes, Inc. v. Morningside Dev., LLC, 284 F.3d 505, 514-15 (4th Cir. 2002). This Court does not appear to have addressed the issue.

⁷ See Foad Consulting Group v. Musil Govan Azzalino, 270 F.3d 821, 827-31 (9th Cir. 2001); Effects Assocs., Inc. v. Cohen, 908 F.2d 555, 559 (9th Cir. 1990); Keane Dealer Servs. v. Harts, 968 F. Supp. 944, 946-47 (S.D.N.Y. 1997); see also Pamfiloff v. Giant Records, Inc., 794 F. Supp. 933, 938-39 (N.D. Cal. 1992).

When Novell acknowledges (at 44) that a “central purpose” of the APA was to enable Santa Cruz “to modify and distribute the copyrighted code in Novell’s UnixWare,” it should follow that this “central purpose” was not implicitly recognized through an implied “license” in an “asset purchase agreement.”⁸ Novell also cannot square the concept of an implied license with the parties’ subsequent amendment of the schedules of assets sold to remove the exclusion of all copyrights.

The parties knew how to refer to and provide for a “license” for technology. Schedule 1.1(b) identifies “Licensed technology” being “licensed” to Santa Cruz – the list does not include the UNIX technology. (00317.) The APA also provides that “Seller and Buyer shall enter into a license agreement with respect to the NetWare Portion.” (00288.)⁹

Novell also misses the point in suggesting (at 46) that SCO must believe, absent an implied license, that its predecessor was “acting illegally” during the time between the Bill of Sale and Amendment No. 2, because Santa Cruz

⁸ Former Novell and Santa Cruz in-house attorney Burt Levine testified that it was neither his recollection nor his “understanding” that during the drafting process Novell had undertaken to retain the copyrights. (5663-65.) Mr. Levine’s legal opinion in response to hypothetical questions is irrelevant.

⁹ In the January 1996 “Tuxedo” transaction with BEA Systems, Inc. that Novell cites (at 6 n.2), the agreement was titled “TUXEDO License and Distribution Agreement,” and Novell admits that the deal with Tuxedo was “described as a license” in the transaction documents. (11455.)

“indisputably did not own the copyrights” during that time. Amendment No. 2 clarified the APA to confirm that the copyrights had been transferred thereunder. (08563;08661-63¶¶9-11;08674-75;05646;05663-65;05631-32;05616;05715; 05712;08914-15;10719;10764-65;07827-28¶¶9-11;05727-29;10721;03938¶¶9-16.)

C. The District Court Erred in Its Limited Consideration of the Extrinsic Evidence of the Parties’ Intent to Sell the UNIX Copyrights to Santa Cruz Under the Amended APA.

Novell argues (at 26-28) that all extrinsic evidence must be rejected because it allegedly contradicts the language of the APA. But the language that SCO’s evidence allegedly contradicts was excised by Amendment No. 2 and replaced with operative language consistent with that evidence. (00374.) Extrinsic evidence of the operative APA goes to the meaning and intent of the language.¹⁰

Unlike EPA Real Estate Partnership v. Kang, 12 Cal. App. 4th 171, 175 (1992), the evidence the district court rejected does not concern any “collateral agreement,” let alone one that “contradicted” the amended APA. In each of Gerdlund v. Electrical Dispensers International, 190 Cal. App. 3d 263, 270 (1987),

¹⁰ Novell has cited a 9/15/95 draft of the APA which eliminated Section I from the “Assets” identified in the 9/8/95 draft, left the paragraph identifying Santa Cruz’s acquisition of “All rights and ownership of Unix and UnixWare,” and added to the end of that paragraph the language “such assets to include without limitation the following.” (06383.) The “without limitation” phrase was taken from the first paragraph of the 9/8/95 Assets Schedule, which paragraph addressed “intellectual property.” The confirmation that Santa Cruz was receiving “All rights and ownership of Unix and UnixWare . . . without limitation” thus clearly meant the inclusion of the copyrights.

and Blumenfeld v. R.H. Macy & Co., 92 Cal. App. 3d 38, 45 (1979), the court declined to admit extrinsic evidence because it supported an interpretation limiting “all inclusive” language in the contract. There is no “all inclusive” language in the amended APA.

Novell tries to explain away (at 32 n.6) its transfer of UNIX copyright registrations to Santa Cruz, but no copyright owner would transfer registrations to a party from whom it was supposedly withholding copyrights. In the lone case Novell cites, the court did not even consider whether possession of copyright registrations could evidence a separate copyright transfer accomplished by contract. Kingsrow Enters. v. Metromedia, 397 F. Supp. 879, 881 (S.D.N.Y. 1975). That issue is not subject to dispute, as overwhelming precedent – including Kingsrow – makes clear that copyright registrations constitute prima facie evidence of ownership of valid copyrights.¹¹

Contrary to Novell’s allegations, Santa Cruz “did not add any Novell copyright notices to,” or “remove any copyright notices” from, the source code it acquired from Novell. (10666¶¶6-7.) In fact, it was Novell that changed the notices to add the Santa Cruz notice. (Id.) In addition, the date range of the Novell

¹¹ See, e.g., Novell, Inc. v. Network Trade Ctr., Inc., 25 F. Supp. 2d 1218, 1229 (D. Utah 1997); Motorola, Inc. v. Pick, No. CV 04-2655 ABC (SHx), 2005 WL 5918849, at *3 (C.D. Cal. May 26, 2005); Scanlon v. Kessler, 11 F. Supp. 2d 444, 447 (S.D.N.Y. 1998); Metromedia, 397 F. Supp. at 881.

notices from 1984-95 could not pertain to UnixWare source code, because Novell did not acquire the UNIX and UnixWare source code from AT&T until 1993.

(10666¶8.) Instead, since Netware code was “contained in UnixWare,” the notices pertained to Netware, which Novell had owned since “the mid-1980s.”

(00317;10666¶8.)

In November 1995, Novell engineers “changed” the copyright notices on the “pre-existing UNIX and UnixWare source code” that “was transferred to The Santa Cruz Operation by Novell in 1995.” (10303-04¶¶3-9.) Novell requested its engineers to make that change “to reflect the change in ownership of the copyrights from Novell to SCO.” (10303¶6.) In December 1995, Novell admitted that “the following changes have been made at the request of SCO: SCO copyright notices added to documentation and software.” (10320.) In addition, Novell admitted in October 1995 that “SCO will replace Novell as the Copyright owner” on existing UnixWare online books by changing “the notice that appears when each book is opened.” (11176.) SCO also submitted photographs of the Santa Cruz copyright notices on the compact discs of distributed versions of the code acquired from Novell, reflecting Santa Cruz’s ownership of the copyrights for the products as a whole. (05749;05751;05747¶3.) Novell addresses none of this evidence.

The testimony of the ten witnesses who confirmed the transfer of the copyrights under the APA is plainly relevant to the issue of the parties’ intent, and

SCO has shown that neither of the two main witnesses on whom Novell relies in opposition (Messrs. Bradford and Braham) had anything to do with Amendment No. 2. In addition, SCO cited a litany of other highly probative evidence, including the parties' course of performance and Novell's admissions contemporaneous with the transaction.¹² Novell does not even address most of this evidence, and thus admits that all the evidence that it seeks to exclude and that the district court discounted or ignored supports SCO's interpretation.

Novell's conspicuous failure to confront its own conduct following the discovery of Amendment No. 2 is telling. On June 6, 2003, after SCO had sent Novell a copy of the Amendment, Novell issued an immediate press release

¹² Steve Sabbath never understood Amendment No. 2 to retain copyrights for Novell. IBM counsel had pressured him to sign his prior declaration just "a few days before the Christmas holidays, within a few weeks of [his] retiring"; IBM counsel drafted that declaration with language that "could be read in at least a couple of different ways" and he "did not understand the implications of every word" when the declaration was put in front of him; IBM "was twisting" the words and "reading more" into the declaration than he intended; and, as a result, he would "never sign another declaration" for IBM again. (04738-39;04748-49;04775;10719;10721;10764-65;04774-75.)

Novell cites two cases (at 42) to support its argument that a "conclusory affidavit that contradicts prior testimony does not defeat summary judgment," but SCO properly relies on Mr. Sabbath's deposition testimony – not an affidavit – which does defeat summary judgment.

Mr. Sabbath's deposition testimony is corroborated by the deposition testimony of Kim Madsen, who participated in the negotiations of both the APA and Amendment No. 2. (03935-38¶¶6-16.) Novell does not even address her testimony.

admitting that Amendment No. 2 “appears to support SCO’s claims that ownership of certain copyrights for UNIX did transfer to SCO in 1996.” (04395.) On June 26, 2003, Novell tried to un-ring the bell. “We acknowledge,” explained Novell General Counsel Joseph LaSala, “as noted in our June 6 public statement, that Amendment No. 2 to the Asset Purchase Agreement appears to support a claim that Santa Cruz Operation had the right to acquire some copyrights from Novell.” (07895.) But that is not what Novell said in its “June 6 public statement,” in which Novell candidly admitted that copyrights “did transfer to SCO” – not that Amendment No. 2 merely set up a prospective process for a potential transfer.

Novell cites part of a sentence from a Novell Board resolution approving the APA, which states in full: “Novell will retain all of its patents, copyrights and trademarks (except for the trademarks UNIX and UnixWare), a royalty-free, perpetual, worldwide license back to UNIX and UnixWare for internal use and resale in bundled products, Tuxedo and other miscellaneous, unrelated technology.” (05192.) Mr. Frankenberg, who “chaired the meeting” (05191), testified that he understood the reference to “its copyrights” to mean Novell’s copyrights to Netware, the network technology Novell had long pioneered before its two-year stint as owner of the UNIX business and on which it was now refocusing. (08542-43;08548;08550;08572.)

Novell stresses (at 13) that the Santa Cruz-SCO assignment stated in a parenthetical that Santa Cruz “may not be able to establish a chain of title from Novell.” (07424§8(v).) But Santa Cruz transferred to SCO “all copyrights” to UNIX and UnixWare (07422-23;07443), and Novell never controverts the evidence that counsel for Santa Cruz and SCO concluded that the APA had transferred those copyrights and that the parenthetical referred only to “a question about the location and transfer of copyright registrations.” (10553-54.)

Novell cites (at 14) an email from SCO consultant Michael Anderer regarding his views on January 4, 2003 – before SCO even discovered Amendment No. 2 – on the copyrights issue. The evidence showed that Mr. Anderer “never saw” and “didn’t know of” Amendment No. 2, and further showed that his testimony was legally irrelevant. (07537-38.)

Novell also claims (at 14) that SCO contacted Novell in 2002 “seeking a transfer of copyrights.” But Novell’s own in-house counsel admitted that SCO never sought such a transfer, and the testimony of three SCO witnesses showed that SCO witnesses did not ever make such request.¹³ (11488;11434¶¶2-4;04698-04700¶¶7-14;07562-64¶¶3-12.)

¹³ Novell claims SCO has a litigation-oriented business model, but since SCO first asserted its contract and intellectual property rights, it has released several major upgrades to its two UNIX product lines, UnixWare and OpenServer. SCO also has formed a business partnership with The Franklin Covey Company to

D. The Amended APA and Bill of Sale Exceed The Requirements of the Copyright Act.

Novell does not dispute that the fundamental purpose of the Copyright Act is to “effectuate the intent of the parties.” Nimmer on Copyrights § 10.03[2] (2006) (collecting cases). The cases (including those that Novell cites) consistently liken the Copyright Act to a classic statute of frauds, which requires only that parties reduce their agreement to writing and not rely on oral understandings. See Pamfiloff v. Giant Records, Inc., 794 F. Supp. 933, 936 (N.D. Cal. 1992). Novell and Santa Cruz indisputably reduced their agreements to writing. And the district court below did precisely what the court in Playboy Enterprises v. Dumas, 53 F.3d 549 (2d Cir. 1995), was unwilling to do – reject the transfer agreement as a matter of law without allowing a factfinder to make factual determinations after trial. The writing at issue in that case did not even mention “copyrights.” Id. at 564.

Contrary to Novell’s suggestion, moreover, the requirements of Section 204 are not divorced from the general standards for determining the intent of the parties

develop and launch a new line of systems and applications for smart handheld devices such as Blackberries and iPhones.

By way of comparison, at last count, at least five times Novell has asserted or promoted claims against Microsoft Corporation, both directly and indirectly, here and abroad, in federal courts and before regulatory agencies, on the grounds that Microsoft’s actions have destroyed all of Novell’s major business lines going back nearly two decades. (See e.g., <http://www.novell.com/news/press/archive/2004/11/pr04076.html>.)

under any contract. The federal courts agree that, applying Section 204, a court is to consider extrinsic evidence to resolve ambiguities.¹⁴

The parties agreed to identify the transferred copyrights as “All rights and ownership” of UNIX and UnixWare specifically including “the copyrights and trademarks owned by Novell as of the date of the Agreement required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies.” (00313;00374.) Novell does not and cannot cite a single case that invalidates a written agreement merely because the parties chose to refer to a group of copyrights instead of listing by name each copyright being transferred. The law clearly rejects any such magic formula, Radio Television Espanola S.A. v. New World Entm’t Ltd., 183 F.3d 922, 927 (9th Cir. 1999), and even approves instruments of conveyance, notes, or memoranda that do not mention the term “copyright,” Kenbrooke Fabrics, Inc. v. Soho Fashions, Inc., 690 F. Supp. 298, 301 (S.D.N.Y. 1988).¹⁵

¹⁴ See, e.g., Liu v. Price Waterhouse, 302 F.3d 749, 755 (7th Cir. 2002); Schiller v. Schmidt, Inc., 969 F.2d 410, 413 (7th Cir. 1992); Spectrum Creations, L.P. v. Carolyn Kinder Int’l, LLC, No. SA-05-CV-750-XR, 2008 WL 416264, at *85 (W.D. Tex. Feb. 13, 2008); Rico Records Distributors, Inc. v. Ithier, No. 04 Civ. 9782 (JSR), 2006 WL 846488, at *1 (S.D.N.Y. Mar. 30, 2006); Dick Corp. v. SNC-Lavalin Constructors, Inc., No. 04 C 1043, 2004 WL 2967556, at *5 n.5 (N.D. Ill. Nov. 24, 2004).

¹⁵ Novell (at 37-38) fails to distinguish Kenbrooke in any meaningful way.

The amended APA and Bill of Sale exceed the only specific standards that Novell cites (at 34). The Bill of Sale more than reasonably identifies “all of the Assets” on the operative asset schedules as the subject matter of the agreement, and states with certainty that Novell agreed to “transfer, convey, sell, assign, and deliver to Buyer . . . all of the Assets.” (05602.) As reflected in Attachment A hereto, there is a specific four-page schedule of the products that comprised the UNIX and UnixWare software being transferred (00313-16), and the copyrights to those products were transferred as part of the all “right, title and interest” and “All rights and ownership” in each product. (00264;00313.) Amendment No. 2 states with reasonable certainty that the defined term “Assets” includes all of the UNIX and UnixWare copyrights Santa Cruz needed to operate the UNIX business.

Amendment No. 2 also satisfies the Copyright Act as a memorandum ratifying the agreement between the principals who negotiated the transaction to transfer “All rights and ownership” of UNIX and UnixWare, including copyrights, as of the Closing Date. Copyrights can be transferred – not only by “an instrument of conveyance” – but also by “a note or memorandum of the transfer,” and “the chief purpose of Section 204(a)” is “to resolve disputes between copyright owners and transferees.” Imperial Residential Design, Inc. v. Palms Dev. Group, Inc., 70

F.3d 96, 99 (11th Cir. 1995). Novell does not even address, let alone contest, SCO's claim that Amendment No. 2 satisfies the statute.¹⁶

II. THE DISTRICT COURT ERRED IN CONCLUDING, AS A MATTER OF LAW, THAT IF THE APA DID NOT TRANSFER THE EXISTING UNIX AND UNIXWARE COPYRIGHTS, THEN SCO IS NOT ENTITLED TO SPECIFIC PERFORMANCE REQUIRING THE TRANSFER OF THOSE COPYRIGHTS NOW.

The specific performance count was an alternative count, relevant only if the copyrights had not already transferred. It is not based on “circular” reasoning, any more than any suit for specific performance of an agreement. SCO requires ownership of the copyrights because otherwise it would not have the right to pursue the claims indisputably assigned to it under the APA. (Part I.A, above.) Amendment No. 2 does not compel SCO to show that it was unable to operate its business without suing IBM in particular, but even if it did, SCO easily meets the standard. If SCO were unable to pursue or recover on those claims against IBM, SCO would be unable to exercise the rights in the entire UNIX business, which includes the right to pursue claims to protect misuse of the UNIX and UnixWare source code.

¹⁶ Novell also cites In re Napster, 191 F. Supp. 2d 1087, 1099 (N.D. Cal. 2002), but that case is inapposite, as there the alleged copyright owners claimed they had obtained the copyrights “as authors, not owners by assignment.” Id. In Lyrick Studios v. Big Idea Products, 420 F.3d 388, 393-94 (5th Cir. 2005), the court acknowledged that a note or memorandum can ratify a transfer even where the transferor challenges the ratifying document. Here, the ratifying memorandum is an amendment negotiated and signed by both parties precisely to confirm the agreement to transfer all UNIX and UnixWare copyrights to Santa Cruz.

Novell goes on to suggest (at 50) that it would receive 95% of any revenues arising from the claims SCO has asserted against IBM. That is baseless. (02433-35;08538;08563-64;08669;08626-27;08611-12.) There is no language in the APA even suggesting that SCO had to pay Novell any money SCO might receive for pursuing and prevailing on the claims it was authorized to bring.

III. THE DISTRICT COURT ERRED IN CONCLUDING, AS A MATTER OF LAW, THAT NOVELL HAS THE RIGHT TO “WAIVE” SCO’S RIGHTS UNDER ALL CONTRACTS RELATING TO SVRX INCLUDING THE SOFTWARE AND SUBLICENSING AGREEMENTS.

A. The Term “SVRX Licenses” Is Ambiguous.

The issue is whether Software and Sublicensing Agreements with IBM so clearly fall within the meaning of “SVRX Licenses” that the courts may ignore the express intent of Novell’s and Santa Cruz’s executives and negotiators. The parties agree that no language in the APA expressly says that the IBM Software and Sublicensing Agreements, or any such Agreements, are subject to Novell’s retained waiver rights. That alone should mean that the parol evidence is admissible to clarify what the parties intended.

Novell argues (at 51) that the “ordinary meaning of ‘any SVRX License’ is any agreement that licenses SVRX,” but cannot help but acknowledge (at 16) that the APA “defined ‘SVRX Licenses’ by referring to Item VI of Schedule 1.1(a).”

As the APA's efforts to define the term "SVRX Licenses" demonstrate, that term has no generally understood meaning.

The gap in the APA is the absence of the "SVRX Licenses" that are supposed to be "listed in detail" under Item VI as part of the circular definition of the term. (00287;00315;00363.) The court in Bay Cities Paving & Grading v. Lawyers' Mutual Insurance Co., 5 Cal. 4th 854 (1993), did not "reject" the view that the absence of a definition can support the finding of an ambiguity. The court in fact observed that "in an appropriate case, the absence of a policy definition, though perhaps not dispositive, might weigh, even strongly, in favor of finding an ambiguity, for example, when the term in question has no generally accepted meaning outside the context of the policy itself." Id. at 867 (emphasis added).

Moreover, SVRX Licenses are not defined as "all contracts" relating to the products listed in Item VI of the Schedule. The "all contracts" is what was transferred to Santa Cruz by Item VI; the SVRX Licenses are supposed to be listed within that item. The district court confused the introductory sentence of Item VI, which identifies assets being transferred to Santa Cruz, with the list under the sentence, which purports to identify the SVRX Licenses over which Novell has waiver rights.

Novell argues (at 51) that the Product Schedule Licenses "did not grant any right to use SVRX" without being "combined" with the Software and Sublicensing

Agreements. But each licensee executed only a single umbrella Software Agreement and Sublicensing Agreement, with a separate Product Schedule to license each individual product over time. (04610¶¶14-15;04625¶¶11-12;01471§4;01492§4 .) If the SVRX Licenses included a licensee’s umbrella agreement, then Novell’s waiver rights would extend to all products a licensee licensed, including UnixWare and other non-SVRX products.

In addition, the Product Schedule Licenses did grant rights – access to and delivery of the product source code.¹⁷ (08849-50;04610¶¶15-16;04625¶¶12-13.) According to Novell’s interpretation, once a licensee executed an SVRX Product Schedule License, the licensee’s Software and Sublicensing Agreements were then somehow converted into “SVRX Licenses.” Yet it is at least equally arguable that the Product Schedule Licenses were the licenses intended to be covered by the waiver rights, because those rights were designed to protect Novell’s royalties, not to give Novell an unchecked veto over a business it had sold. Only the Product Schedule Licenses listed those royalties. (04610¶16; 06425¶13.) This is precisely the type of situation where relevant extrinsic evidence must be considered.

¹⁷ Novell omits (at 51) this key fact, which SCO set forth below: “Without executing the Supplement for the product it desired, a licensee did not obtain delivery of, let alone a license to, the product.” (03494.)

B. The APA Separately Transfers the Software and Sublicensing Agreements to Santa Cruz Without Any Reservation of Rights for Novell.

A reading of the term “SVRX Licenses” that redundantly – or in Novell’s language, as a “superfluity” – includes Software and Sublicensing Agreements violates basic rules of construction. Yet Novell (at 53-54) defends the redundancy. The cases Novell cites are inapposite,¹⁸ and Novell’s argument amounts to another red herring. While Item VI is ambiguous, Item III clearly transfers “all of Seller’s rights” under the “Software and Sublicensing Agreements.” (00314-15.) A reading of the Assets Schedule that avoids the redundant transfer of the Software and Sublicensing Agreements in Item VI thus does not contradict “what the contract clearly does” or “vitiates” any part of the Schedule.

In contrast, the contradiction that the district court’s interpretation creates is glaring and runs afoul of the authority SCO cited. On the one hand, Item III provides for the unqualified transfer of “all of Seller’s rights” under the Software and Sublicensing Agreements. (00314-15.) On the other hand, Item VI serves as a

¹⁸ Novell quotes Crow Irvine #2 v. Winthrop California Investors Ltd. Partnership, 104 Cal. App. 4th 996 (2002), an opinion that has been “Deleted at the direction of Supreme Court by order dated April 23, 2006,” id., and therefore may not be cited, Cal. Rules of Court 8.1115. In contrast to the facts of that case, Novell is the proponent of the superfluity at issue, and the superfluous meaning it proposes for Item VI runs counter to what the contract clearly does – transfer all rights in the Software and Sublicensing Agreements to Santa Cruz. Big Creek Lumber Co. v. County of Santa Cruz, 38 Cal. 4th 1139 (2006), and In re B.J.B., 185 Cal. App. 3d 1201 (1986), involve the interpretation of a statute, not a contract.

cross-reference to the Article 4.16(b) rights at issue, which the district court ruled give Novell unfettered control over the “SVRX Licenses” purportedly listed under Item VI. A reading of the term “SVRX Licenses” that includes the Software and Sublicensing Agreements therefore brings the Agreements under Novell’s unfettered control, and thus “vitiates” the rights indisputably transferred to Santa Cruz under Item III.

C. The District Court’s Interpretation of Article 4.16(b) Destroys The Value of the Assets Santa Cruz Purchased.

Novell primarily argues (at 54-55) that because it had the “sole discretion” to exercise authority under Article 4.16(b), SCO should not be heard to dispute the scope of the Article. This is a non sequitur. SCO principally argues that interpreting “SVRX Licenses” to be as broad as Novell contends would render the rights afforded under Article 4.16(b) unduly broad. (See Part IV, below.)

The Court need not conclude that the entire APA is “unconscionable” to agree with SCO. A court may not interpret one provision to render another provision “meaningless.” Ameripride Servs. v. Valley Indus. Serv., No. CIV. S-00-113 LKK/JFM, 2007 WL 656850, at *11 (E.D. Cal. Feb. 28, 2007). A provision giving Novell the unilateral right to waive all of SCO’s rights under the agreements it had just acquired would render meaningless the provision transferring those agreements. (00314-15.) In addition, if Novell had the right to make public all of the SVRX source code protected under the Software and

Sublicensing Agreements, Novell's conduct would extinguish the confidentiality of the base source code for UnixWare as well, and thereby destroy the economic value of that product.

Novell (at 56-57) makes the half-hearted contention that it has "never argued" that the TLA is an SVRX License, but that is irrelevant; the unavoidable result of its argument about the scope of the term is that Novell supposedly has the right to waive all of SCO's rights under the very agreement through which it sought to acquire protections from Novell. With respect to Santa Cruz's preexisting license, Novell tries to draw a distinction between Santa Cruz's rights as a "licensor" versus its rights in the "administration" of SVRX Licenses, but the text of the APA makes no such distinction, and it is the text of the APA on which Novell otherwise seeks to hang its hat.

D. Overwhelming Extrinsic Evidence Confirms that Novell Did Not Retain Any Rights Over Software and Sublicensing Agreements.

Novell barely addresses the overwhelming extrinsic evidence confirming that the parties did not intend for Novell to have rights over the Software and Sublicensing Agreements, or over subsequent claims based on those Agreements.

In 2000, for example, Novell and The Hewlett Packard Company ("HP") executed an "Addendum to HP's UNIX System Agreement," which Agreement is defined to include HP's Software and Sublicensing Agreements. (02384.) In the

Addendum, Novell warranted that, through the APA, it “retained or has acquired all rights to outstanding and future HP binary code royalty and license fee payments, but not source code royalties.” (Id. (emphasis added).) Novell also warranted that it “has full right and authority to modify the terms and conditions of the Agreement with respect to” those binary royalties. (Id.) Novell did not warrant that it had any other right to modify the Agreement. Other examples:

- Novell states (at 58-59) that Messrs. Maciaszek and Broderick, who worked for Novell at the time of the APA and had been in the UNIX licensing department for decades, did not testify that the term SVRX License refers exclusively to Product Schedule Licenses, but both witnesses unequivocally testified to the contrary: “We understood an SVRX license to be an SVRX product supplement.” (04625¶12;04610¶15.)
- Novell downplays the language in the Operating Agreement, claiming (at 61 n.13) that the Agreement “merely states that Novell should transfer contracts to Santa Cruz” – but that is not a fair account of the all-inclusive, unqualified language in the Agreement: “It is the intent of the Parties to transfer the agreements and associated rights and obligations which relate to Novell’s UNIX System business to SCO.” (01432§7 (emphasis added).)

- Novell claims that numerous letters it sent to customers disclaiming rights in UNIX agreements were intended only to inform them that they should send royalty payments to SCO. But that is not what the letters say: “Novell transferred to The Santa Cruz Operation, Inc. (‘SCO’) its existing ownership interest in UNIX System-based offerings and related products.” (10645 (emphasis added); see also 10652;10657;10710; 03838;13843;139845;1028486;02790;02972;02974.)

Novell simply cannot square its long, undisputed course of performance with its after-the-fact legal arguments.

As to the IBM Buyout, Novell and Santa Cruz had already resolved the dispute over whether Novell’s Article 4.16(b) rights extended to IBM’s Software and Sublicensing Agreements just months after the APA closed, after Santa Cruz warned that it had acquired “ownership and exclusive rights to license the UNIX source code.” (03890.) Less than one year after the APA had closed, IBM paid \$10.125 million for UNIX rights. (04380;04384;03915.) By Novell’s lights, it was entitled to 95% of the entire amount, and Santa Cruz should have received only 5%, or a little more than \$500,000. But Santa Cruz received \$2 million – nearly four times that amount. (04380;04384;03915.) As the witnesses involved in that event testified, that evidence confirms that Santa Cruz – and not Novell – had exclusive rights over the Software and Sublicensing Agreements and

associated source code rights and therefore received all of the money paid by IBM for source code rights. (03915;10724-25;09008-09;08516;02454-55.)

IV. THE DISTRICT COURT ERRED IN CONCLUDING THAT NOVELL DID NOT HAVE TO COMPLY WITH THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IN EXERCISING ITS ARTICLE 4.16(b) RIGHTS.

The facts of this case are directly analogous to April Enterprises, Inc. v. KTTV, 147 Cal. App. 3d 805, 816-817 (1983), which Novell declines even to address. Under one provision of the APA, SCO acquired and owns the UNIX and UnixWare businesses; under another provision of the Agreement, Novell has the supposed right to waive all of the rights underlying all of the agreements constituting those businesses. If the term “SVRX License” is to have the extremely broad scope Novell attributes to it in the face of all the evidence to the contrary, the application of the implied covenant is the way to reconcile the conflicting provisions.

Under even a generous reading to Novell, given Novell’s arguments and the district court’s interpretation of the overwhelming rights and core assets Novell supposedly retained, Santa Cruz and SCO paid more than \$250 million (06101;04637) for some unenumerated and redundant “ownership rights” concerning post-1995 technology, and for the office furniture of the Novell

employees switching over to Santa Cruz.¹⁹ Under California law, the foregoing construction of the APA requires the application of the implied covenant of good faith and fair dealing.

V. THE DISTRICT COURT ERRED IN CONCLUDING, AS A MATTER OF LAW, THAT NOVELL IS ENTITLED TO ROYALTIES FROM POST-APA CONTRACTS RELATED TO SVRX, INCLUDING THE 2003 SUN AGREEMENT.

The APA itself defines “SVRX Licenses” to refer only to licenses existing at the time (00264;00313), and certain language in Amendment No. 1 referring to “new SVRX licenses” (00357) thus creates ambiguity. Neither provision overrides the other, and the extrinsic evidence SCO presented wholly supports SCO’s interpretation. The witnesses on both sides of the transaction, including Messrs. Frankenberg and Chatlos, agree that Novell retained royalties only from licenses existing at the time of the APA. (08537-38;08518; 02472¶7;08760;08588; 02431¶4;02438¶4;08888-89;10729;02483¶12; see also 02488.)

The provision referring to “new SVRX licenses” provides, moreover, that SCO retains the source code right-to-use fees thereunder. (00357.) That provision is thus consistent with SCO’s reading of the primary references to “SVRX

¹⁹ In addition to what would have to be extremely expensive office furniture, the rights “related to” UnixWare were worthless where Novell retained the unfettered right to waive all of Santa Cruz’s rights in the core technology underlying UnixWare (that is, SVRX), and any customer lists and transferring of customers was similarly worthless where Novell retained the unfettered right to decimate the businesses for which there were customers in the first place.

Licenses” – namely, that the phrase refers to the then-existing SVRX Product Schedule Licenses under which source code right-to-use fees are not paid at all, and under which Novell would receive 95% of the royalties. (04612-13¶23;04627-28¶20.) Novell’s own publicly filed statements support the view that it retained only these existing royalty rights. (02182;02232;02302;02320;02341.)

Novell’s alternative argument that it is entitled to collect the \$2,547,817 award as a form of “unjust enrichment” is flawed because the Sun Agreement did not “concern” the 1994 buyout within the meaning of Amendment No. 2.

Paragraph B.4, for example, states that “Prior to either parties’ unilateral determination as to the suitability of any potential buyout transaction, the parties will meet face to face and analyze the potential merits and disadvantages of the transaction.” (00374 (emphasis added); see also Paragraph B.6.) Paragraph C provides as follows:

Novell may execute a buy-out with a licensee without any approval or involvement of SCO, and will no longer be bound by any of the requirements stated in Section B. above, if: (I) SCO ceases to actively and aggressively market SCO’s UNIX platforms; or (II) upon a change of control of SCO as stated in schedule 6.3(g) of the Agreement.

(Id.) All of the foregoing language shows that Section B does not apply when a licensee already has a buyout and now enters into a subsequent agreement that merely relates to the prior buyout agreement. Indeed, in its Order dated August 10,

2007, the district court had concluded (at 85) that “all of the subparagraphs of paragraph B are limited to buy-out transactions.”

Paragraph B.5 of Amendment No. 2 supports the foregoing interpretation of the scope of the rest of Paragraph B, providing in relevant part that “Novell may not prevent SCO from exercising its rights with respect to SVRX source code in accordance with the Agreement.” (00374.) The terms SCO negotiated with Sun in the 2003 Agreement were an exercise of SCO’s right to license source code and to determine the scope of the restrictions on the use of such code.

The extrinsic evidence also supports SCO’s interpretation. In the summer of 1996, Santa Cruz repeatedly addressed with Novell “this issue of future buyout transactions.” Santa Cruz explained that its position “pertains to any future buyout concerning binaries.” (13543 (emphasis added).) Santa Cruz and Novell entered into an Agreement dated May 20, 1996, stating: “Novell agrees that it will not enter into any royalty buy-out agreement involving UNIX System V until such time as the parties have resolved this dispute or this Agreement is otherwise terminated as provided herein.” (13503 (emphasis added).)

Novell’s main response has been to say that it would not make sense for SCO or Novell to be able unilaterally to renegotiate the terms of an existing buyout. As SCO asserted in its opening brief, however, the 1994 buyout was not modified in any way. It was left untouched. The 2003 Agreement did not require

Novell to relinquish any of the \$84 million it had received from Sun for the buy-out.

CONCLUSION

SCO respectfully submits, for the foregoing reasons, that the Court reverse the district court in each of the respects and on the grounds set forth in SCO's opening brief and herein.

Respectfully submitted on this 23rd day of April, 2009.

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Dated: April 23, 2009

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CERTIFICATE OF SERVICE

I, Edward Normand, hereby certify that on this 23rd day of April, 2009, a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT, THE SCO GROUP, INC.** was filed with the court and served via electronic mail to the following recipients:

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CERTIFICATE OF DIGITAL SUBMISSION

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