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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

THE SCO GROUP, INC., a Delaware corporation, Plaintiff/Counterclaim-Defendant, vs. NOVELL, INC., a Delaware corporation, Defendant/Counterclaim-Plaintiff.	**MEMORANDUM IN SUPPORT OF SCO'S MOTION FOR JUDGMENT ON THE PLEADINGS ON NOVELL'S CLAIMS FOR MONEY OR CLAIM FOR DECLARATORY RELIEF** **FILED IN REDACTED FORM [ORIGINALLY FILED UNDER SEAL]** Civil No. 2:04 CV-00139 Judge Dale A. Kimball Magistrate Brooke C. Wells

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Plaintiff/Counterclaim-Defendant, The SCO Group, Inc. ("SCO"), respectfully submits this Memorandum in Support of its Motion for Judgment on the Pleadings on Novell's Claims for Money or Claim for Declaratory Relief.

PRELIMINARY STATEMENT

Under Novell's version of the facts, as Novell has recently clarified them, the trial scheduled in this matter concerns claims for money to which Novell is not entitled. Novell claims a principal-agent relationship between itself and SCO with respect to "SVRX Licenses" as defined in the Asset Purchase Agreement ("APA"). In its Sixth, Seventh, and Eighth Claims, Novell seeks to recover as alleged "SVRX Royalties" the payments SCO received under agreements it executed in 2003 or 2004 with Sun Microsystems, Inc., Microsoft Corporation, and several other counterparties (collectively, the "SCOsource Agreements").

At the same time, Novell alleges that SCO lacked the authority to execute the SCOsource Agreements in the first place, and Novell has recently emphasized that it has never assented to or approved those Agreements – asserting with respect to SCO's prior understanding to the contrary that "nothing could be further from the truth." Novell thus presses for summary judgment on its Fourth Claim, asking that as a matter of law the Court enter a declaration that SCO "had no authority to enter into" the SCOsource Agreements.

Under Novell's version of the facts, the Court should conclude as a matter of law that Novell cannot recover any SVRX Royalties. Under the law of contracts and agency, if SCO lacked the authority to execute the SCOsource Agreements and Novell has not approved them, the Agreements are invalid and Novell has no right to any proceeds from the Agreements.

In the alternative, if Novell has approved the SCOsource Agreements, which is a necessary predicate for Novell to receive a share of the payments, then the Court must dismiss Novell's claim for declaratory relief as a matter of law. If Novell has approved the Agreements, Novell's request for a declaration regarding SCO's alleged lack of authority to execute them is moot. The law of agency precludes a principal from accepting the benefits of its agent's actions while simultaneously disclaiming the agent's authority to act.

Accordingly, the Court must either dismiss Novell's claims for money, to the extent that Novell asserts that SCO lacked the authority to execute the SCOsource Agreements and that Novell has never approved the Agreements, or dismiss Novell's claim for declaratory relief.

STATEMENT OF FACTS

Novell alleges that "Section 1.2(b) and 4.16(a) of the APA create an agency relationship between SCO and Novell, obliging SCO to remit 100% of 'all royalties, fees and other amounts due under all SVRX Licenses' to Novell." (Novell's Amended Counterclaims ¶ 74.) Novell further alleges that the "APA creates an agency relationship between Novell and SCO whereby Santa Cruz assumed fiduciary duties to diligently collect, administer, and deliver to Novell all SVRX Royalties, which was defined to include 'all royalties, fees and other amounts due under all SVRX Licenses.'" (Id. ¶ 74.) Novell says SCO is "Novell's agent." (Id.) The Court has concluded: "The APA expressly created an agency relationship between the parties with respect to SVRX Royalties." (Order dated Aug. 10, 2007, at 89.) The Court has also concluded with respect to Novell's claim of breach of fiduciary duty and conversion: "Novell's claim arises from the agency relationship created by the APA." (Id.)

In January 2003, SCO formally announced its "SCOsource" program to license intellectual property SCO claimed to own. (Novell's Amended Counterclaims ¶¶ 45-47.) Under the SCOsource program, SCO and Sun entered into a "Software Licensing Agreement" (the "Sun Agreement"), and SCO and Microsoft entered into a "Release, License and Option Agreement" (the "Microsoft Agreement"). (Id. ¶ 50.) In addition to the Sun and Microsoft Agreements, SCO entered into SCOsource agreements (or "Intellectual Property Licenses with Linux end users and UNIX vendors") with several other counterparties in 2003 and 2004. (Id. ¶¶ 59, 123.)

The claims for money that Novell intends to pursue at trial – its Sixth, Seventh, and Eighth Claims for Relief – all arise out of SCO's alleged failure to remit SVRX Royalties to Novell, and thus all arise out of the foregoing "agency relationship" between the parties. Novell's Sixth Claim is for "Constructive Trust/Restitution/Unjust Enrichment," its Seventh Claim is for "Breach of Fiduciary Duty," and its Eighth Claim is for "Conversion."

In its Sixth Claim for Relief, Novell alleges that "Novell holds 'all right, title and interest,' including equitable interest, to the SVRX Royalties as defined in the APA," that "SCO has wrongfully retained in part or in full portions of all SVRX Royalties to which Novell was entitled under the APA," and that "Novell seeks restitution of all monies constituting SCO's unjust enrichment." (Id. ¶¶ 132-33, 135.) In its Seventh Claim for Relief, Novell alleges that the "APA creates an agency relationship between Novell and SCO whereby Santa Cruz assumed fiduciary duties to diligently collect, administer, and deliver to Novell all SVRX Royalties, which was defined to include 'all royalties, fees and other amounts due under all SVRX Licenses,'" that "[a]s Novell's agent, SCO has a fiduciary duty to Novell," and that "SCO breached its fiduciary duties to Novell by failing to account for and pass through all royalties,

fees and other amounts received from the 2003 Sun and Microsoft Licenses, SCO's Intellectual Property Licenses, and any additional past or future SVRX Licenses as defined in the APA." (Id. ¶¶ 138, 140.) In its Eighth Claim for Relief, Novell alleges that "Novell holds 'all right, title and interest' to the SVRX Royalties, as set forth in §§ 1.2 and 4.16 of the APA," and that "SCO converted Novell's property by intentionally and maliciously failing to remit any monies flowing from the 2003 Sun and Microsoft Agreements to Novell and other SVRX Licenses as defined by the APA." (Id. ¶¶ 145, 147.)

In addition to its claims for money, Novell is pursuing that part of its Fourth Claim for Relief in which Novell requests a declaration "that SCO had no authority to enter into the Sun and Microsoft SVRX Licenses, as well as the Intellectual Property Licenses with Linux end users and UNIX vendors." (Id. ¶ 123.) The parties' August 2007 Joint Statement states that "Novell will seek a declaration that SCO was also obligated to seek Novell's approval prior to entering into new SVRX licenses or amendments to SVRX licenses and that therefore SCO had no authority to enter into the Microsoft, Sun, and other SCOsource licenses." (Joint Statement dated Aug. 17, 2007, at 4.) The part of Novell's Fourth Claim that Novell is pursuing is based on the allegation that "SCO also had no authority to enter into the Sun and Microsoft SVRX Licenses, or the Intellectual Property Licenses with Linux end users and UNIX vendors." (Novell's Amended Counterclaims ¶ 98.)

Under Amendment No. 1 to the APA, SCO has the right to enter into amendments of SVRX Licenses and to enter into new SVRX licenses "as may be incidentally involved through its rights to sell and license UnixWare software." (Id. ¶ 96.) In its September 2007 Trial Brief, Novell asserts that "it cannot be that SVRX played only an 'incidental' role in SCOsource

licenses. Novell is therefore entitled to a declaration that SCO was without authority to enter into the SCOsource licenses." (Novell's Trial Brief dated Sept. 14, 2007, at 2.) Novell also repeatedly asserts that SCO had no authority to enter into the Sun, Microsoft, and other SCOsource licenses. (Id. at 2, 14-16.)

In its recent Memorandum in Support of Its Motion for Summary Judgment on Its Fourth Claim, Novell asserted: "The APA prohibits SCO from modifying existing SVRX Licenses and from entering into new SVRX Licenses. That prohibition is subject only to limited exceptions, and those exceptions do not apply here. SCO thus was without authority to enter into or amend those licenses." (Mem. in Supp. of Novell's Mot. for Summ. J. on Its Fourth Claim for Relief dated Dec. 21, 2007, at 1; accord id. at 1, 3, 6-8, 10.) Novell asked the Court to conclude as a matter of law that "Novell is entitled to a declaration that SCO was without authority to enter into the SCOsource licenses." (Id. at 10.)

In opposition, among other arguments on the merits, SCO argued that the declaratory relief on which Novell sought summary judgment was incongruous and moot based on SCO's understanding that "Novell claims the right to approve and ratify the Agreements, and Novell has exercised that supposed right – in the years of this litigation, Novell has never claimed to disavow the Agreements or described any intent to do so." (SCO's Mem. in Opp'n to Novell's Mot. for Summ. J. on Its Fourth Claim for Relief dated Jan. 25, 2008, at 65.)

In response, Novell stated that SCO lacked the authority to execute the SCOsource Agreements, that Novell does not "assent to such arrangements," and that "Novell has objected to these licenses at every step." (Novell's Reply Mem. in Supp. of Its Mot. for Summ. J. on Its

Fourth Claim for Relief (Feb. 7, 2007) at 3, 4, 12, 13.[1]) As to SCO's understanding that "Novell had supposedly 'approved' the SCOsource licenses" after their execution, Novell states: "Nothing could be further from the truth." (Id. at 13 (emphasis added).)

LEGAL STANDARD

In applying Federal Rule of Civil Procedure 12(c), the Court applies the standards under Rule 12(b)(6). See Roberts v. Bradshaw, No. 2:04-CV-1113 DAK, 2006 WL 722226, at *1 (D. Utah Mar. 22, 2006) (Ex. G). The Court determines whether the plaintiff is entitled to the relief it seeks under its own "version of the facts." Harvey v. Stinson, No. 96 CIV. 0469 (SAS), 1997 WL 250480, at *1 (S.D.N.Y. May 9, 1997) (Ex. C). The court cannot infer facts that are "the opposite" of what the plaintiff has alleged. Treadway v. Gateway Chevrolet Oldsmobile Inc., 362 F.3d 971, 983 n.10 (7th Cir. 2004).[2] Under Rule 12(c), in addition to the pleadings, the Court may take account of "[f]acts that are subject to judicial notice." Hickock v. U.S. Postal Serv., No. 2:04CV573 DAK, 2006 WL 3760137, at *4 & n.50 (D. Utah Dec. 18, 2006) (Ex. D); accord 5C C. Wright & A. Miller, supra, § 1367.

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[1] **REDACTED**

[2] The admissions of the opposing side's version of the facts for purposes of the moving party's Rule 12(c) motion "are effective only for purposes of the motion and do not in any way bind the moving party in other contexts of the litigation or constitute a waiver of any of the material facts that will be in issue if the motion addressed to the pleadings is denied." 5C C. Wright & A. Miller, Federal Practice and Procedure § 1370 (2007).

ARGUMENT

I. IF THE SCOSOURCE AGREEMENTS WERE EXECUTED WITHOUT AUTHORITY AND NOVELL HAS NOT APPROVED THEM, AS NOVELL ASSERTS, THEN NOVELL IS NOT ENTITLED TO ANY "SVRX ROYALTIES".

Novell alleges that SCO lacked the authority to enter into the SCOsource Agreements. Novell alleges that it has a principal-agent relationship with SCO under the APA with respect to SVRX Licenses. The Court may take judicial notice that Novell has clarified that it has not in any way approved or ratified any of the SCOsource Agreements before or after their execution.

In the context of a principal-agent relationship, "[w]ithout the authority for the agent to bind its principal in a contract with a third party, or without the principal's subsequent ratification, the contract must be set aside."[3] Indeed, "[i]f a licensing contract requires the licensee to obtain the licensor's written approval prior to entering into a sublicensing agreement, the failure to obtain the licensor's written approval makes the sublicense invalid since it was entered into outside of the scope of the authority granted in the licensing contract."[4]

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[3] Sarkes Tarzian, Inc. v. U.S. Trust Co. of Fla. Sav. Bank, 397 F.3d 577, 582 (7th Cir. 2005); accord Summit Props., Inc. v. New Tech. Elec. Contractors, Inc., No. CV-03-748-ST, CV-03-6394-ST, 2004 WL 1490327, at *17-19 (D. Or. July 2, 2004) (Ex. H); C. States Indus. Supply, Inc. v. McCullough, 279 F. Supp. 2d 1005, 1029-30 (N.D. Iowa 2003) (explaining authority); Nash v. Y and T Distribs., 616 N.Y.S.2d 402, 403 (N.Y. App. Div. 1994); De La Cerda v. Hutchison, No. 93-1743, 1994 WL 255873, at *6-7 (Tex. Co. Ct. Mar. 8, 1994) (Ex. B); Restatement (Second) Agency § 82 ("Ratification operates upon the act ratified precisely as though authority to do the act had been previously given; and, when the principal has ratified the unauthorized agreement of an agent, an action may be brought upon the agreement as though originally made by due authority."). The law has always been thus. See, e.g., Poudre Valley Furniture Co. v. Craw, 251 P. 543, 543 (Colo. 1926) ("A principal may ratify an unauthorized act of his agent, and thus make good a contract claimed not to have been valid in its incipiency.").

[4] Major League Baseball Promotion Corp. v. Colour-Tex, Inc., 729 F. Supp. 1035, 1042 (D.N.J. 1990) (citing authority); see also Gardner v. Nike, Inc., 279 F.3d 774, 777-81 (9th Cir. 2002) (affirming district court decision that purported sublicensee of exclusive licensee's rights lacked standing as against licensor, because licensee did not have the right to enter into the sublicense, and therefore the sublicensee lacked any rights); Gilliam v. Am. Broad. Cos., 538 F.2d 14, 21 (2d Cir. 1976) ("Since a grantor may not convey

In the case of an invalid contract, a counterparty who made payments under the purported agreement is entitled to the restitution of those payments.[5] In the context of a principal-agent relationship, if the principal "decides not to ratify he must return the fruits of the unauthorized act."[6] The Tenth Circuit has long held that "[i]f the principal disclaims the agent's acts as unauthorized, he has no grounds to retain the fruits thereof."[7] Under its facts, Novell therefore would not be entitled to any alleged "SVRX Royalties." Accordingly, because such Royalties are the sole basis for Novell's claims for money, the Court should dismiss Novell's claims for money as a matter of law.[8]

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greater rights than it owns, BBC's permission to allow Time-Life, and hence ABC, to edit appears to have been a nullity."); Accusoft Corp. v. Mattel, Inc., 117 F. Supp. 2d 99, 101-02 (D. Mass. 2000) (entering preliminary injunction on the theory that where licensee of ImageGear software lacked the authority to enter into sublicense with Mattel, "there is a substantial likelihood that Mattel never had, and does not now have, any right to use ImageGear in its products").

[5] See Restatement (First) of Restitution § 47 ("Payment Upon A Void Agreement") (1937) (reviewing authority) & Comment b (explaining that "if a person transfers things to another in the belief that he has a valid contract with him, he is entitled to restitution if there is no contract"); see also Restatement (Third) of Restitution and Unjust Enrichment (T.D. No. 3, 2004) § 33 ("Incapacity of Recipient") (reviewing authority) & Comment b (explaining that the section "extends to any legal person or entity, regardless of form, whose capacity to contract is legally restricted").

[6] QAD Investors, Inc. v. Kelly, 776 A.2d 1244, 1250 (Me. 2001) (quotations omitted, citing authority); accord Perkins v. Philbrick, 443 A.2d 73, 75 (Me. 1982) (citing authority); Newco Land Co. v. Martin, 213 S.W.2d 504, 511 (Mo. 1984) (if the principal "decides not to ratify he should return the fruits of the unauthorized act") (citing authority); 3 Am. Jur. 2d Agency § 192 (2008) (if the principal "decides not to ratify an unauthorized act by the retention of the benefits thereof, he or she should return anything he or she have received as a result of the unauthorized act"); cf. Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co., 300 F. Supp. 2d 606, 627 (N.D. Ill. 2003) (ratification occurs if, "within a reasonable period of time after obtaining full knowledge" of the contract at issue, "the principal fails to return prior payments") (citing authority); Martin v. Fed. Life Ins. Co. (Mut.), 644 N.E.2d 42, 47 (Ill. Ct. App. 1994) ("When a party accepts the benefits of an agreement with knowledge of the agreement, it ratified the agent's actions.").

[7] Md. Cas. Co. v. Queenan, 89 F.2d 155 (10th Cir. 1937); accord In re Maxwell Newspapers, Inc. v. Mirror Group Newspapers, PLC, 164 B.R. 858, 867 (Bankr. S.D.N.Y. 1994).

[8] If necessary, the Court may treat this as a request for reconsideration of any part of its Order dated August 10, 2007, which would be required to effectuate such dismissal. The Court "always has the inherent power to reconsider its interlocutory rulings." Warren v. Am. Bankers Ins. of Fla., 507 F.3d

II. IN THE ALTERNATIVE, IF NOVELL HAS APPROVED THE SCOSOURCE AGREEMENTS, THEN ITS CLAIM FOR DECLARATORY RELIEF IS MOOT UNDER THAT VERSION OF THE FACTS.

If (directly contrary to its recent clarification) Novell were now to assert that it has approved the SCOsource Agreements, and if the Court were to accept that assertion, then the Court must dismiss Novell's claim for declaratory relief. The well-established law of agency "precludes the principal from accepting the benefits of an agent's actions while simultaneously disclaiming the agent's authority to act."[9] "It is repugnant to every sense of justice and fair dealing that a principal shall avail himself of the benefits of an agent's act and at the same time repudiate his authority." Yahola Sand & Gravel Co. v. Marx, 358 P.2d 366, 372 (Okla. 1960) (citing authority, quotations omitted). It is a waste of time for the Court and the parties to have a trial over a declaratory judgment count that is inconsistent with Novell's request for royalties.

Declaratory relief is unwarranted where "moot." Prier v. Steed, 456 F.3d 1209, 1212-13 (10th Cir. 2006) (citing cases). The Tenth Circuit has explained that declaratory actions "will be moot unless the effect of our decision settles some dispute which affects the behavior of the defendant toward the plaintiff." Id. at 1213 (quotations and citation omitted). The resolution of

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1239, 1243 (10th Cir. 2007); accord North v. Ford Motor Co., No. 2:00-CV-958 TS, 2007 WL 391578, at *1 (D. Utah Feb. 1, 2007) (Ex. F). The standards for reconsideration under either Rule 59(e) or Rule 60(b) do not apply; Trujillo v. Bd. of Educ. of the Albuquerque Pub. Schs., 212 Fed Appx. 760, 765 (10th Cir. 2007); accord North, 2007 WL 391578, at *1, and reconsideration is appropriate based on newly available facts or changed circumstances – including Novell's recent assertions that it has not approved the SCOsource Agreements even since their execution – or where "manifest injustice" would result, Trujillo, 212 Fed. Appx. at 765-66; Johnson v. Riddle, No. 298-CV-599 TS, 2007 WL 1732400, at *1 (D. Utah June 14, 2007) (Ex. E); Carbajal v. Lincoln Benefit Life Co., Civ. A. No. 06-cv-00884-EWN-KLM, 2007 WL 3407345, at *6 (D. Colo. Nov. 13, 2007) (Ex. A); North, 2007 WL 391578, at *1.

[9] United Chems., Inc. v. Welch, 460 So. 2d 540, 541 (Fla. App. 1984); accord Advance Mortgage Corp. v. Concordia Mut. Life Ass'n, 481 N.E.2d 1025, 1031 (Ill. Ct. App. 1985) ("A party cannot repudiate the acts of another done on his behalf and at the same time accept the fruits and benefits of those acts.").

the declaration must not ask the Court to render "an advisory opinion," but rather must "have some effect in the real world." Unified Sch. Dist. No. 259, Sedgwick County, Kan. v. Disability Rights Ctr. of Kan., 491 F.3d 1143, 1147 (10th Cir. 2007) (quotation and citation omitted).

Novell asks the Court to declare that SCO lacked the authority to execute the SCOsource Agreements. But if Novell has approved the Agreements, Novell's assertion that SCO lacked the authority to execute the Agreements would present an academic question whose resolution will have no effect in the real world. Similarly, if Novell somehow seeks to reserve the right to try to set aside the SCOsource Agreements if it has both prevailed on its claim of SCO's lack of authority and foregone any request for SCOsource Royalties (in contravention of its obligation as a principal timely to determine whether to accept or reject its agent's contracts), then Novell seeks an improper advisory opinion on a merely "hypothetical state of facts." Nat'l Adver. Co. v. City and County of Denver, 912 F.2d 405, 412 (10th Cir. 1990).

CONCLUSION

SCO therefore respectfully requests that prior to trial the Court dismiss Novell's Sixth, Seventh, and Eighth Claims for Relief or Novell's Fourth Claim for Relief.

DATED this 7th day of March, 2008.

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CERTIFICATE OF SERVICE

Plaintiff/Counterclaim-Defendant, The SCO Group, Inc., hereby certifies that a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF SCO'S MOTION FOR JUDGMENT ON THE PLEADINGS ON NOVELL'S CLAIMS FOR MONEY OR CLAIM FOR DECLARATORY RELIEF**, in redacted form, was served on this 12th day of March, 2008, via CM/ECF to the following:

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