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Attorneys for Plaintiff, The SCO Group, Inc.

**IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF UTAH**

<p>THE SCO GROUP, INC., a Delaware corporation,</p> <p style="text-align: center;">Plaintiff/Counterclaim-Defendant,</p> <p>vs.</p> <p>NOVELL, INC., a Delaware corporation,</p> <p style="text-align: center;">Defendant/Counterclaim-Plaintiff.</p>	<p>SCO'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR ENTRY OF FINAL JUDGMENT</p> <p>Civil No. 2:04 CV-00139 Judge Dale A. Kimball Magistrate Brooke C. Wells</p>
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Plaintiff/Counterclaim-Defendant, The SCO Group, Inc. (“SCO”), respectfully submits this Memorandum in Support of its Motion for Entry of Final Judgment.

PRELIMINARY STATEMENT

Notwithstanding the Court’s clear order that Novell file a Final Judgment consistent with the Court’s Orders and the parties’ stipulations, Novell still has not complied with the order. Instead, though SCO agreed to dismiss its stayed claims as Novell had earlier dismissed unresolved counterclaims, Novell has filed a Submission Regarding the Entry of Final Judgment in which Novell reiterates that entry of final judgment is “inappropriate” given the pendency of stayed claims.

In order to foreclose such arguments by Novell and get a final judgment entered as the Court has ordered, SCO requests permission to dismiss its stayed claims with prejudice on the basis of the Court’s summary judgment ruling that Novell owns UNIX and UnixWare copyrights. By Novell’s own lights, the stayed claims are the only matters now blocking the entry of Final Judgment. The proposed dismissal echoes Novell’s dismissal of counterclaims on terms which Novell and the Court have deemed sufficient to have perfected finality for those counterclaims, and terms which the Tenth Circuit has ruled achieve finality.

With the proposed dismissal, there is simply nothing else for the Court to do and the case is ready for appeal. Accordingly, on the basis of the proposed dismissal, SCO also moves the Court to enter Final Judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure. In addition, whether or not the Court grants the dismissal, SCO moves the Court to enter an order certifying the Court-resolved claims pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, in the event the Tenth Circuit views the Final Judgment as lacking finality.

BACKGROUND

In its order of July 16, 2008 (the “Trial Order”), the Court directed Novell “to file within ten days from the date of this order a Final Judgment consistent with these Findings of Fact, Conclusions of Law, and Order, the court’s August 10, 2007 Memorandum Decision and Order, and the parties’ stipulations with respect to the disposition of certain causes of action.” Docket No. 542 at 43.

In the August 10, 2007 Memorandum Decision and Order (the “Summary Judgment Order”), the Court ruled that Novell owns the pre-APA UNIX and UnixWare copyrights and that SCO owns all other UNIX and UnixWare technology, including post-APA copyrights and other ownership rights in multiple versions of the technology. In the Summary Judgment Order, the Court also directed the parties to “submit a joint statement identifying the remaining claims in the case that are proceeding to trial and the anticipated length of trial.” On August 17, 2007, the parties submitted a Joint Statement in which they agreed that the Summary Judgment Order had dismissed certain stayed claims based on pre-APA copyrights but not certain stayed claims based on other UNIX or UnixWare technology. Docket No. 379 at 2-3.

In the same Joint Statement and the Supplemental Joint Statement the parties filed on August 24, 2007, the parties agreed that Novell will dismiss several of its claims with the right to renew them should there be a subsequent adjudication or trial in this action. *Id.* at 3, 6; Docket No. 383. Subsequently, in conjunction with its motion to strike SCO’s jury demand, Novell requested permission to dismiss its Third Claim for Relief on the same terms. Docket No. 388. Novell explained that it was not seeking “a general dismissal without prejudice, only a narrow

right to renew the claim” and that “[a]bsent such subsequent adjudication or enlargement, Novell would have no right to renew this Claim.” Id. at 2.

Following the Court’s order that Novell file a Final Judgment, Novell informed SCO and the Court that “entry of Final Judgment is inappropriate given the pendency of claims subject an arbitration-related stay and given the Bankruptcy Court’s reservation of issues pertaining to the entry of a constructive trust.” Docket No. 543 at 1. SCO then proposed, as Novell put it, “a resolution to Novell’s objections to the entry of Final Judgment.” Id. With respect to the trust, SCO produced to Novell a spreadsheet accounting for thousands of transactions tracing the Sun payments through SCO’s bank accounts. SCO also produced supporting bank statements, and conferred with Novell for several hours to explain and substantiate the data. Though less labor-intensive, SCO’s efforts to address the second of Novell’s two “objections to Final Judgment” were no less diligent. SCO explained that there was no sound reason why SCO’s claims could not be dismissed, but Novell refused to reach an agreement. Instead, in its Submission Regarding the Entry of Final Judgment, Novell took a wait-and-see approach, stating that it “understands that SCO may elect to file a motion advocating a particular disposition of [the stayed] claims,” and that “Novell will evaluate and respond to any such motion once filed.” Docket No. 551 at 3. This is that motion.

ARGUMENT

After more than four years of litigation, including a trial, summary judgment proceedings, and stipulations disposing claims, the only claims that remain unresolved are claims that the Court stayed pending arbitration. In meeting and conferring with Novell for weeks regarding its obligation to submit a Final Judgment to the Court, SCO has sought, and Novell

declined, an agreement to dismiss those claims on terms resemble those by which Novell dismissed several of its counterclaims. Accordingly, pursuant to Rule 41 of the Federal Rules of Civil Procedure, SCO requests permission from the Court to dismiss the stayed claims, in order to remove any last impediment to finality they may represent. Specifically, SCO requests permission to dismiss those claims with prejudice on the basis of the Court's summary judgment ruling that Novell retained ownership of UNIX and UnixWare copyrights under the APA. Should the Court grant this request, SCO moves the Court to enter Final Judgment, and whether or not the Court grants the dismissal, SCO moves the Court also to enter an order certifying the Court-resolved claims in this case, pursuant to Rule 54(b).

ARGUMENT

I. DISMISSAL OF THE REMAINING CLAIMS IS PROPER BECAUSE NOVELL CANNOT SHOW LEGAL PREJUDICE.

At the request of the claimant, the Court has authority to dismiss claims “upon such terms and conditions as the court deems proper.” Fed. R. Civ. Proc. 41(a)(2). “Absent legal prejudice” to the other party, “a district court should normally grant [a Rule 41 dismissal].” Ohlander v. Larson, 114 F.3d 1531 1537 (10th Cir. 1997).

The parties here previously litigated this very issue when Novell moved to dismiss its third counterclaim on terms similar to SCO's present request. In litigating that motion, the parties agreed that the motion turned on the presence or absence of legal prejudice, and for its part, Novell argued that no legal prejudice existed because SCO would not have prepared differently for trial absent the third counterclaim. Docket No. 439 at 3. In addition, Novell suggested that the dismissal actually benefited both parties because “dismissal will serve the goal of simplifying this matter, making it more appropriate for a streamlined bench trial.” Id. at 2.

After Novell agreed to modify the terms of the dismissal to address SCO's concerns, the Court granted Novell's request. Id. at 6.

Given the current posture of the case, Novell's arguments concerning the absence of legal prejudice apply with greater force in support of SCO's request. As the stayed claims arise from the same contractual provisions in the APA and TLA that give rise to other claims and counterclaims, Novell cannot possibly show that it has incurred any greater costs than it would have absent the unresolved stayed claims. On the contrary, and again consistent with Novell's prior arguments, SCO's proposed dismissal of its stayed claims would benefit both parties. Should the Tenth Circuit affirm the Court's summary judgment ruling, for example, the litigation with Novell would end, and Novell would avoid a potential trial and exposure on any portion of the stayed claims. Accordingly, for the foregoing reasons, the Court should grant SCO's request to dismiss the stayed claims.

II. THE PROPOSED DISMISSAL OF THE STAYED CLAIMS PERFECTS FINALITY OF THOSE CLAIMS UNDER CONTROLLING LAW.

Consistent with controlling law, the Court and even Novell have already acknowledged that the terms of SCO's proposed dismissal achieves finality. The Court ordered Novell to file a Final Judgment consistent with the Summary Judgment and Trial Orders and the parties' Joint Statements. The Final Judgment must thus conform to the Joint Statements, meaning that the Joint Statements achieved finality for the counterclaims Novell agreed to dismiss therein. Indeed, in the original Joint Statement, even before the Court ordered Novell to do so, Novell already agreed to include the agreed-upon dismissal of its counterclaims in the Final Judgment. Thus, Novell too acknowledged that the terms by which it had dismissed its counterclaims were

sufficient to perfect finality as to those claims. There is no reason why SCO's proposed dismissal cannot also perfect finality for the stayed claims.

The Tenth Circuit has held that the dismissal of claims that SCO proposes and that Novell secured perfects finality for the dismissed claims and the litigation. In Stearns v. McGuire, after the district court had ruled on summary judgment that Stearns did not owe McGuire a fiduciary duty, McGuire agreed to dismiss his claim for breach of fiduciary duty with prejudice, but McGuire reserved the right to pursue the claim. No. 04-1459, 2005 WL 3036538, at *3 (10th Cir. Nov. 14, 2005). (Ex. B.) Understanding the reservation to be limited to the right to pursue the claim if the summary judgment ruling was reversed, the Tenth Circuit panel concluded that there was no finality problem and that the Court had jurisdiction over the appeal. Id. The Court then held that “[i]n cases such as this, when an affirmance will terminate the litigation in its entirety, appellate jurisdiction is present.” Id.; accord 15A C. Wright & A. Miller, Federal Practice and Procedure § 3914.8 (2008) (“It might well be thought a sufficient deterrent to trifling with the final-judgment rule to make it difficult to reinstate the voluntarily dismissed claim if the district court's dismissal of the other claims is affirmed.”)

Here, SCO proposes, and Novell has secured, dismissal of claims that will be resurrected only if the Tenth Circuit reverses this Court's summary judgment rulings; otherwise, here too “affirmance will terminate the litigation in its entirety.” Under controlling Tenth Circuit precedent, therefore, the dismissal SCO proposes completes finality for the whole litigation and gives rise to appellate jurisdiction over the entire case. Accordingly, if the Court here grants SCO's request to dismiss the stayed claims, the Court may properly enter Final Judgment.

Other district courts have entered or recognized precisely such final judgment. In United States v. Duke Energy Corp., for example, the district court entered an "Order and Final Judgment" based expressly on a joint stipulation wherein Duke agreed to "the dismissal of its counterclaims in this action, without prejudice to revive such counterclaims in the event of a remand of this case as a result of an appeal." No. Civ.A. 1:00 CV 1262, 2004 WL 1118582, at *1-2 (M.D.N.C. April 14, 2004). (Ex. C.) In Yankee Candle Co. v. Bridgewater Candle Co., the Court denied defendant's motion for entry of final judgment or certification. 107 F. Supp.2d 82, 89 (D. Mass. 2000). The Court prompted counsel to consider precisely the type of dismissal that SCO proposes and Novell has secured, in order "to permit an immediate appeal" of the summary judgment rulings. Yankee Candle, 107 F. Supp. 2d at 90 n.4. The Court explained that, "[t]o the extent that the appeal is successful, Count IV might be resurrected. If the appeal is unsuccessful, the dismissal of Count IV would of course be permanent." Id.

III. CONSISTENT WITH TENTH CIRCUIT PRACTICE, THE COURT SHOULD ALSO CERTIFY THE RESOLVED CLAIMS PURSUANT TO RULE 54(b).

The Tenth Circuit has adopted a practice permitting appellants whose appeals fail for lack of finality to return to the district court and seek Rule 54 certification. See Lewis v. B.F. Goodrich, 850 F.2d 641, 645-46 (10th Cir. 1988). Two Tenth Circuit cases subsequent to Lewis have followed this practice where the purported final judgment rested in part on unresolved claims dismissed without *any* prejudice to pursue those claims, even in a subsequent lawsuit. See Heimann v. Snead, 133 F.3d 767 (10th Cir. 1998); Hennigh v. City of Shawnee, 155 F.3d 1249 (10th Cir. 1998). While the Tenth Circuit's decision in Stearns makes clear that the

prejudicial dismissal SCO proposes perfects finality, SCO requests that Court also¹ certify the Court-resolved claims under Rule 54(b), in the event the Tenth Circuit declines jurisdiction for lack of finality in the claims voluntarily dismissed. In that event, consistent with Tenth Circuit practice, the parties would have to return to the district court anyway to litigate certification. Consistent with this practice, SCO's request for certification at this juncture will save time and judicial resources by securing the Court's decision about certification up front.

As the Court is well aware, on August 29, 2007, SCO moved for entry of final judgment and certification under Rule 54(b) with respect to claims adjudicated in the Summary Judgment Order. At the time, the Court denied the motion for two reasons. First, the Court found that the claims that SCO sought to certify "do not constitute individual claims for purposes of Rule 54(b)." Docket No. 453 at 4. Second, because the trial of then-unresolved claims was "set to begin in only ten days," the Court concluded that the summary judgment appeal could be consolidated with the trial appeal, and the potential delay of "two to three months" in bringing such a consolidated appeal presented "little, if any, inequities" to SCO. *Id.* at 4-5.

Neither basis for denying Rule 54(b) certification exists today. First, since the Court had ruled in the Summary Judgment Order that Section 4.16(b) of the APA gave Novell broad waiver rights, SCO sought to certify claims that turned on whether Novell had those rights. The Court concluded that such claims were not separable claims for purposes of Rule 54(b) because they were intertwined with questions left for trial about Novell's approval rights under Section 4.16(b). *Id.* at 3. Now that those questions have been fully tried and resolved, the claims that SCO sought to certify are cognizable claims for purposes Rule 54(b). As distinct from the

¹ If the Court decides to deny SCO's request for entry of Final Judgment, then SCO moves for Rule 54(b) certification alternatively.

defined scope of the stayed claims, which relate to SuSE, the claims that SCO sought and seeks to certify consist of “all factually and legally connected elements” that make up a cognizable claim. See, e.g., McKibben v. Chubb, 840 F.2d 1525, 1529 (10th Cir. 1988) (certification appropriate where appeal presents factually and legally distinct issues); Bd. of Country Comm’rs of Kane County v. Dep’t of the Interior of the U.S., No. 2:06-CV-209-TC, 2007 WL 2156613, at *1 (D. Utah July 26, 2007) (Ex. A) (same). In addition, the Court’s rulings on Section 4.16(b) rights represent “an ultimate disposition of a claim in the course of a multiple claim action.” See Curtiss-Wright Corp. v. Gen. Elec. Co., 446 U.S. 1, 7 (1980); McKibben, 840 F.2d at 1528-29.

Second, with respect to the Court’s interest in a consolidated appeal, that goal has been achieved, and more. Now that the trial has ended and the Court has issued its Trial Order, all the issues that the Court contemplated could be appealed together have been resolved and are ripe for appellate review. There is nothing for the Court to do with respect to those issues. In addition, if the Court grants SCO permission to dismiss its stayed claims, there will be no possibility of any other appeal in this matter if the Tenth Circuit affirms. Thus, the certification that SCO requests, coupled with the dismissal it proposes, serves efficiency and judicial economy beyond the Court’s own standards.

CONCLUSION

SCO therefore respectfully (1) requests permission to dismiss its stayed claims with prejudice on the basis of the Court’s rulings in its Summary Judgment Order, pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure; (2) moves the Court to enter Final Judgment; and (3) moves the Court to enter an order certifying all Court-resolved claims pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

DATED this 15th day of September, 2008.

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CERTIFICATE OF SERVICE

Plaintiff/Counterclaim-Defendant, The SCO Group, Inc., hereby certifies that on this 15th day of September, 2008, a true and correct copy of the foregoing Memorandum in Support of SCO's Motion for Entry of Final Judgment was electronically filed with the Clerk of Court and delivered by CM/ECF to:

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