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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP, INC., a Delaware corporation, Plaintiff and Counterclaim-Defendant, v. NOVELL, INC., a Delaware corporation, Defendant and Counterclaim-Plaintiff.	**NOVELL'S RESPONSE TO SCO'S NOTICE OF VOLUNTARY DISMISSAL** Case No. 2:04CV00139 Judge Dale A. Kimball

After equivocating for months before both this Court and the Bankruptcy Court, SCO now concedes it has no claims against Novell based on post-APA UNIX or UnixWare. SCO therefore proposes to dismiss that portion of its breach of contract, copyright infringement, and unfair competition claims with prejudice, relinquishing any supposed right it might have had to re-assert such claims following appeal. As that result is the *very result* Novell proposed to SCO during the meet and confer process that lead up to these motions, Novell has no objection to such a dismissal.

Novell does have several objections to the SCO's Proposed Final Judgment. Novell and SCO met and conferred regarding these changes, but SCO was not able to respond to Novell in a timely fashion. Novell therefore submits its own Proposed Final Judgment, the differences in which are detailed below and reflected on an attached redline.

A. Paragraph 3: Clarifying Nature of Dismissal

Novell proposes to add the text "without the possibility of renewal following appeal" to the description of SCO's dismissal of the post-APA portions of its claims. As SCO does not contest that is the effect of the dismissal, this change should not be controversial.

B. Paragraph 4: Reporting the Court's True Holding as to 2003 Sun Agreement

Having reviewed the Court's Findings of Fact, Conclusions of Law, and Order (Docket No. 542, "Order"), the parties propose different text for Paragraph 4 of the final judgment. The division concerns the Court's holding as to the 2003 Sun Agreement.

The relevant text proposed is as follows:

Novell Text	SCO Text
... In addition, pursuant to the Court's Findings of Fact, Conclusions of Law, and Order dated July 16, 2008, SCO was not authorized under the APA to amend, in the 2003 Sun Agreement, Sun's 1994 SVRX buyout agreement with Novell, and SCO needed to obtain Novell's approval before entering into the amendment; but SCO was fully authorized under the APA to enter into the 2003 Microsoft Agreement and the SCOsource Agreements with Linux end-users without any approval by Novell.	... In addition, pursuant to the Court's Findings of Fact, Conclusions of Law, and Order dated July 16, 2008, SCO was not authorized under the APA to amend, in the 2003 Sun Agreement, the confidentiality provisions of Sun's 1994 SVRX buyout agreement with Novell, and SCO needed to obtain Novell's approval before entering into the amendment; but SCO was fully authorized under the APA to enter into other parts of the 2003 Sun Agreement without any approval by Novell, and was also fully authorized under the APA to enter into the 2003 Microsoft Agreement and the SCOsource Agreements with Linux end-users without any approval by Novell.

This text arises from the Court's holding on Novell's Fourth Claim, seeking declaratory relief. That count presents a binary choice: did SCO have authority to enter into the 2003 Sun Agreement or not? (Docket No. 142, ¶ 123.) The Court's answer is straightforward:

1. Section B of Amendment 2 prohibits unilateral agreements "concerning" buyouts.
2. "There are no exceptions to this provision." (Order at 35.)
3. The 2003 Sun Agreement "concerns" a buy-out.
4. SCO was therefore without authority to enter into the 2003 Sun Agreement.

On that basis, the Court found:

> There is no dispute that Sun's 1994 Agreement with Novell was a "buy-out" of Sun's SVRX royalty obligations as that term is used in Amendment No. 2. Sun's 2003 Agreement explicitly acknowledges that it is intended to "amend and restate" the 1994 buy-out agreement, including expansion of Sun's existing license rights to permit opensource licensing of SVRX code. The Court concludes that Sun's 2003 Agreement License, therefore, "concerns" a buy-out, and SCO was required to follow the additional restrictions imposed by Amendment No. 2 on transactions that concern buy-outs. SCO did not comply with these terms. **The Court thus concludes and declares that SCO was without authority to enter into the 2003 Sun Agreement under Amendment 2, Section B, of the APA.**

(Order at 36 (emphasis added).)

In meet and confer, SCO cited a variety of text from elsewhere in the Order that SCO claims supports the language of its proposed final judgment. SCO's arguments confuse *a basis* of the Court's holding with the holding itself. SCO would have the Court declare that, in some respects SCO was authorized to enter into the 2003 Sun Agreement while in other respects it was not. That would, in effect, have the Court to split the 2003 Sun Agreement into two agreements — the Sun agreement SCO was authorized to enter into, and the Sun agreement SCO wasn't. The Court has repeatedly rejected such "agreement splitting" in the past. (*See, e.g.*, Order, Docket No. 453, at 16 (rejecting argument that license could be simultaneously both an SVRX License and not-an-SVRX-License).) Put another way, what SCO hopes for is essentially an advisory opinion: if the 2003 Sun Agreement had not excised the 1994 Sun buy-out's confidentiality requirements, would SCO have been authorized to enter into it? That is not the question posed by Novell's Fourth Claim, is not a question posed by any actual agreement before the Court, and is therefore not a question appropriate to address on final judgment.

C. Paragraph 10: Punitive Damages are not "Dismissed"

SCO proposes to "dismiss" Novell's claim for punitive damages. Those damages are a remedy, the entitlement to which derives from Novell's actual claims, which are addressed in Paragraphs 4-9 of the Proposed Final Judgment. This is simply a technical change, however. Novell does not dispute that, under the terms of the parties' stipulation, it could not (and did not) seek punitive damages at the bench trial. As that event has passed, the stipulation is no longer relevant and need not be repeated in the Court's Final Judgment.

D. Paragraph 11: Case not "Closed"

Novell's Proposed Final Judgment excises "this case is closed." It is Novell's understanding that the clerk closes a case and that it is not necessary to do so by way of final

judgment. Novell intends to seek its costs, and does not want any claim that the "closure" of this case prevents Novell from pursing its rights as the prevailing party.

E. Paragraph 11: Execution not "Stayed"

In meet and confer, SCO was unable to explain what it means by the last sentence of its proposed Paragraph 11, "Execution shall be stayed until relief from the automatic stay is obtained from the United States Bankruptcy Court for the District of Delaware in the case entitled In re: The SCO Group, Inc, Case No. 07-11337(KG)."

The text might be surplusage, simply restating the fact that, under bankruptcy law, Novell cannot collect its judgment except by way of those methods permitted by the bankruptcy code. If the language is surplusage, it can be excised without incident.

What Novell suspects is that SCO included this text in the hope it might influence a dispute due to be resolved in the Bankruptcy Court. Novell and SCO dispute whether Novell is entitled to the return of its money held in trust by SCO now or after appeal. As that is a matter the parties agree is reserved to the Bankruptcy Court, it is inappropriate to address it here, especially in Final Judgment.

What *is* clear from meet and confer with SCO is that SCO believes the "stay" of the "execution" of Final Judgment does not stand in the way of its appeal. Given the vague nature of this text, its effect on appeal in not obvious — SCO may find itself having advocated language that prevents the very result it has told the world it is pursing with all possible vigor.

F. Typographical Changes

As the redline reflects, Novell also makes certain typographical changes to Paragraphs 2, 3, 7, and 9. These are not intended to affect the meaning of the judgment and should not be controversial.

DATED: October 31, 2008

ANDERSON & KARRENBERG

By: */s/ Heather M. Sneddon*

Thomas R. Karrenberg
Heather M. Sneddon

-and-

MORRISON & FOERSTER LLP
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of October, 2008, I caused a true and correct copy of the foregoing **NOVELL'S RESPONSE TO SCO'S NOTICE OF VOLUNTARY DISMISSAL** to be served to the following:

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