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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.
	NOTICE OF RELATED PROCEEDING
	
	Case No. 2:04-cv-00139
	
	Judge Ted Stewart

Defendant and Counterclaim-Plaintiff Novell, Inc. ("Novell"), by and through its undersigned counsel, hereby gives notice of a related proceeding pending before the U.S. District Court for the District of Utah entitled *The SCO Group, Inc. v. International Business Machines, Inc.*, Case No. 2:03-cv-000294 ("*SCO v. IBM*").

The *SCO v. IBM* case was filed in March 2003 by The SCO Group Inc. ("SCO"). Ten months later, SCO filed this lawsuit against Novell in January 2004 ("*SCO v. Novell*"). Both cases were filed in Utah state court, and then removed to this court and assigned to the Honorable Dale A. Kimball. The heart of both cases is SCO's claim that IBM and Novell have infringed SCO's alleged rights related to the UNIX computer operating system. Given this core similarity, the claims and defenses in the two cases overlap in numerous respects, including:

- SCO contends that it acquired ownership of the UNIX copyrights through an Asset Purchase Agreement ("APA") that SCO's predecessor entered with Novell in 1995. (SCO's Second Amended Complaint in *SCO v. IBM*, Dkt. No. 108 ("SCO Complaint Against IBM"), ¶¶ 31, 176, 194; SCO's Second Amended Complaint in *SCO v. Novell*, Dkt. No. 96 ("SCO Complaint Against Novell"), ¶¶ 1, 90, 110, 111.) In contrast, Novell and IBM contend that SCO does not own the UNIX copyrights. (IBM's Answer to Second Amended Complaint in *SCO v. IBM*, Dkt. No. 126 ("IBM's Answer"), ¶¶ 31, 176, 194; Novell's Answer and Counterclaims to Second Amended Complaint in *SCO v. Novell*, Dkt. No. 120 ("Novell's Answer"), Answer ¶¶ 1, 90, 110, 111 and Counterclaims ¶¶ 17, 21-27.)

- SCO claims that IBM and Novell have infringed SCO's alleged UNIX copyrights through various activities, including by contributing copyrighted code to the Linux operating system and by distributing allegedly infringing versions of Linux. (SCO Complaint Against IBM, ¶¶ 78-79, 84-109, 175, 179; SCO Complaint Against Novell, ¶¶ 46-49, 52, 116-18.)

- IBM and Novell, in contrast, contend that they have not infringed any copyrights owned by SCO for multiple reasons, including that the

allegedly infringing Linux code identified by SCO is (a) not substantially similar to copyrighted UNIX code; (b) freely available to the public pursuant to the terms of the General Public License, which is binding on SCO; (c) otherwise in the public domain or freely available for use by IBM, Novell, and others, including pursuant to a broad license in joint development contracts signed by SCO in 2002, which are the subject of a pending arbitration between SCO and SUSE Linux GmbH, a subsidiary of Novell that developed the version of Linux distributed by Novell.[1]

- SCO claims that IBM breached the terms of licenses to Unix System V ("SVRX Licenses"), and IBM improperly induced Novell to direct SCO to waive its SVRX claims against IBM and others. (SCO Complaint Against IBM, ¶¶ 110-172, 200-204; SCO Complaint Against Novell, ¶¶ 55-71.) Novell and IBM deny these allegations and assert that *SCO* violated the APA by improperly refusing to comply with Novell's instructions regarding SVRX Licenses. (IBM's Answer, ¶¶ 110-172, 200-204; Novell's Answer, ¶¶ 55-71; Novell's Counterclaims, ¶¶ 83-89, 112-13.)

- SCO claims that IBM improperly induced Novell to assert that SCO did not own the UNIX copyrights, and that Novell maliciously "slandered" SCO's alleged title to these copyrights. (SCO Complaint Against IBM, ¶¶ 194-199; SCO Complaint Against Novell, ¶¶ 36, 38, 91-95.) IBM and Novell deny these claims. (IBM's Answer, ¶¶ 194-199; Novell's Answer, ¶¶ 36, 38, 91-95.)

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[1] IBM and Novell have asserted these defenses in multiple pleadings and motions, including several pending summary judgment motions filed by IBM, as well as Novell's Motion to Stay Claims Raising Issues Subject to Arbitration, filed herein on April 10, 2007 (Dkt. No. 106).

Judge Kimball has presided over extensive proceedings in both *SCO v. IBM* and *SCO v. Novell*, including numerous summary judgment motions in both cases and a bench trial of certain Novell counterclaims. The *SCO v. IBM* docket reflects over 1,000 filings, and the docket in this case shows nearly 600 entries.

In August 2009, the United States Court of Appeals for the Tenth Circuit affirmed Judge Kimball's bench trial ruling for Novell, but reversed certain summary judgment rulings and remanded for further proceedings. *The SCO Group, Inc. v. Novell, Inc.*, 578 F.3d 1201 (10th Cir. 2009). A few days later, Judge Kimball recused himself from both this case and from *SCO v. IBM*. This case has been assigned to the Honorable Ted Stewart, while *SCO v. IBM* has been assigned to the Honorable Tena Campbell.

Because this case presents many of the same issues as *SCO v. IBM*, judicial economy and efficiency would be best served by ensuring the same judge decides both cases, which could be accomplished either by reassigning this case to the same judge as *SCO v. IBM*, or by consolidating the two cases. This would enable efficient resolution of similar issues and avoid wasteful duplication of efforts by the parties, as well as by the Court and its staff.

The extensive overlap between the two cases is illustrated by Judge Kimball's August 2007 Order in *SCO v. IBM*, which followed his summary judgment rulings in *SCO v. Novell*. Judge Kimball stated that "[b]ecause the ruling in *SCO v. Novell* significantly impacts the claims and counterclaims asserted in the instant case [*SCO v. IBM*], the court requests that each party submit…a statement of its view of the status of this case and, more specifically, the effect of the *SCO v. Novell* decision on each of the pending motions." (Notice of Decision and Request for Status Update, entered August 10, 2007, Ex. A hereto.) SCO and IBM replied that the summary judgment rulings in *SCO v. Novell* mooted many of the pending summary judgment motions in *SCO v. IBM*, and would be a ground to dismiss many of SCO's claims against IBM. (IBM's Memorandum In Response to the Court's Order of August 10, 2007, Ex. B hereto; and SCO's

Statement in Compliance with the Court's Notice of Decision and Request for Status Update Dated August 10, 2007, Ex. C hereto.)

The Tenth Circuit has now reversed some (but not all) of the summary judgment rulings in *SCO v. Novell*. Thus, a decision will need to be made in *SCO v. IBM* as to which of the numerous pending summary judgment motions is no longer moot, and hence needs to be decided. If one or more of IBM's pending summary judgment motions is granted, a decision will then need to be made as to whether this requires dismissal of SCO's related claims in *SCO v. Novell*. For example, if the Court grants IBM's pending motion for summary judgment that the Linux code identified by SCO does not infringe SCO's alleged copyrights, this will likely require dismissal of SCO's copyright infringement claims against both IBM and Novell.

In sum, *SCO v. Novell* and *SCO v. IBM* involve similar claims, defenses, and issues, so a ruling in one case may have a significant impact on the other. Therefore, Novell requests that this case be assigned to the same judge as *SCO v. IBM*, or consolidated with *SCO v. IBM*, so as to promote the efficient administration and prompt resolution of both cases.

DATED: November 10, 2009

ANDERSON & KARRENBERG

By: _____ */s/ Heather M. Sneddon* _____

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-and-

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of November, 2009, I caused a true and correct copy of the foregoing **NOTICE OF RELATED PROCEEDING** to be served to the following:

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