

Brent O. Hatch (5715)  
 Mark F. James (5295)  
 HATCH, JAMES & DODGE, PC  
 10 West Broadway, Suite 400  
 Salt Lake City, Utah 84101  
 Telephone: (801) 363-6363  
 Facsimile: (801) 363-6666

David Boies (admitted pro hac vice)  
 Robert Silver (admitted pro hac vice)  
 Edward Normand (admitted pro hac vice)  
 BOIES SCHILLER & FLEXNER LLP  
 333 Main Street  
 Armonk, New York 10504  
 Telephone: (914) 749-8200  
 Facsimile: (914) 749-8300

Devan V. Padmanabhan (admitted pro hac vice)  
 DORSEY & WHITNEY LLP  
 50 south Sixth Street, Suite 1500  
 Minneapolis, Minnesota 55402  
 Telephone: (612) 340-2600  
 Facsimile: (612) 340-2868

Stephen N. Zack (admitted Pro Hac Vice)  
 BOIES SCHILLER & FLEXNER LLP  
 Bank of America Tower, suite 2800  
 100 Southeast Second Street  
 Miami, Florida 33131  
 Telephone: (305) 539-8400  
 Facsimile: (305) 539-1307

Stuart Singer (admitted pro hac vice)  
 BOIES SCHILLER & FLEXNER LLP  
 401 East Las Olas Blvd.  
 Suite 1200  
 Fort Lauderdale, Florida 33301  
 Telephone: (954) 356-0011  
 Facsimile: (954) 356-0022

*Attorneys for Plaintiff, The SCO Group, Inc.*

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

<p>THE SCO GROUP, INC., by and through          Edward N. Cahn as Chapter 11 Trustee,</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><b>SCO'S RESPONSE TO NOVELL'S          "NOTICE OF RELATED          PROCEEDING"</b></p> <p>Civil No. 2:04 CV-00139</p> <p>Judge Ted Stewart</p>
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Plaintiff, The SCO Group, Inc., by and through Edward N. Cahn as Chapter 11 Trustee (“SCO”), respectfully submits this response to Novell, Inc.’s “Notice of Related Proceeding.”

Novell requests (at 5) 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.” In reality, a prompt trial on SCO’s claims on remand from the Tenth Circuit Court of Appeals would advance the prompt determination of the cases; the reassignment or consolidation Novell proposes would not.

Indeed, although this case has been pending since 2004, and the IBM case since 2003, and although both Novell and IBM have repeatedly asserted their interest in proceeding to trial as soon as possible, until now neither Novell nor IBM has suggested consolidation. When both cases were before Judge Dale A. Kimball, they had separate discovery schedules, separate motion practice, separate briefing, and were to be tried separately. SCO shows below that it is neither necessary nor efficient at this juncture to reassign or consolidate the cases, especially given the importance to SCO of moving forward as quickly as possible to trial on the Tenth Circuit’s remand.

### **BACKGROUND**

Novell does not set out the full history or posture of the cases.

#### A. SCO v. Novell in the District Court.

SCO filed this lawsuit in January 2004 alleging one count for slander of title, arising from Novell’s repeated public statements that SCO did not own the UNIX copyrights, notwithstanding Novell’s sale of the UNIX business to SCO’s predecessor-in-interest in 1995. The parties subsequently added claims and counterclaims. On Novell’s motion, over two years after the case had commenced, Judge Kimball severed and stayed SCO’s claims for copyright infringement

and certain related claims pending an arbitration proceeding that Novell's subsidiary SuSE Linux had initiated in Zurich, Switzerland. SCO's other claims and Novell's counterclaims before Judge Kimball went forward.

The parties completed discovery on those claims and filed motions for summary judgment, which Judge Kimball heard in the first half of 2007. Following the hearings on the summary judgment motions, Judge Kimball scheduled the trial to commence in September 2007. (Exhibit C to the attached Declaration of Brent O. Hatch dated November 24, 2009 ("Hatch Decl.")) On August 10, 2007, Judge Kimball ruled that (i) as a matter of law Novell, not SCO, owned the UNIX copyrights; (ii) Novell had the right to waive certain contract claims SCO had asserted; and (iii) Novell was entitled to receive certain additional royalties from SCO. (Judge Kimball denied Novell's motion for summary judgment on SCO's claim that Novell had breached non-compete provisions in related agreements.) Judge Kimball reserved for trial the amount of royalties to which Novell was entitled.

Judge Kimball's ruling led SCO to file a bankruptcy petition in Delaware under Chapter 11 in September 2007. The Bankruptcy Court lifted the automatic stay in bankruptcy so that Judge Kimball could conduct a non-jury trial to determine the royalties to which Novell was entitled. In support of its motion to lift the stay at that point, Novell stated (among other things):

- "Efficient resolution of remaining issues and claims in this dispute is important not only to Novell, but also to SCO, for the issues concern both legal and financial questions that are critical to the direction of SCO's reorganization."
- "Decisions on these issues are relevant to SCO's reorganization prospects because, obviously, SCO's post-petition business model cannot continue to be based on Novell's property."
- "Moreover, given the role of the underlying copyrights in SCO's business model and already historically marginal financial affairs, resolution of the balance of the District Court Action is paramount to the prospects of these Chapter 11 cases."

- “Given the high-profile nature of the litigation and the profound interest of the software community in the matter, it is unjust to delay resolution of the District Court Action.”

(Hatch Decl. Ex. F at 1, 6, & 8; Ex.G at 9.) After a four-day trial in April 2008, Judge Kimball issued findings of fact and conclusions of law awarding Novell approximately \$2.5 million (instead of the more than \$30 million Novell had initially sought). Having determined those damages, Judge Kimball was able to enter final judgment and permit appeal of his earlier ruling on summary judgment.

B. SCO v. Novell in the Tenth Circuit.

SCO appealed from Judge Kimball’s final judgment, and Judge Kimball did not conduct any further proceedings in either of the cases. On August 24, 2009, the Tenth Circuit issued its ruling, affirming the \$2.5 million damages ruling in favor of Novell and reversing Judge Kimball’s rulings on summary judgment with respect to SCO’s claims. Specifically, the Tenth Circuit ruled that (i) Novell does not own the UNIX copyrights as a matter of law; (ii) SCO may be entitled to specific performance to obtain the copyrights if they had not previously been transferred; (iii) Novell does not have the right to waive SCO’s contract claims as a matter of law; and (iv) Novell may be found obligated to have exercised good faith and fair dealing in exercising any waiver rights it may have. The Tenth Circuit denied Novell’s motion for rehearing en banc, and immediately denied Novell’s motion for a stay pending the filing of a petition for a writ of certiorari in the United States Supreme Court that Novell indicated it intended to file. The Tenth Circuit then remanded the case to this Court for trial.

C. SCO v. IBM.

SCO’s case against IBM is not as far advanced. In that case, SCO asserts claims for (among other things) breach of software agreements dating back to the time when AT&T owned

the UNIX business, for copyright infringement arising out of IBM's activities relating to Linux, and for unfair competition arising from a joint venture between SCO's predecessor-in-interest and IBM. IBM brought over a dozen counterclaims, several of which it subsequently decided voluntarily to dismiss. The parties completed both fact and expert discovery, then filed motions for summary judgment. Judge Kimball heard argument on those motions in 2007 but never ruled on them. Accordingly, they remain pending.

D. SuSE Arbitration.

With respect to the SuSE arbitration, Novell's subsidiary claims that SCO surrendered its copyrights as part the joint venture called "United Linux." At the time of SCO's bankruptcy filing in September 2007, this ICC arbitration was set in various phases: hearings on liability were set for December 2007 with other phases to follow. Over Novell's objection, the Bankruptcy Court ruled that SCO's bankruptcy filing did and does stay the arbitration.

E. Proceedings in the Bankruptcy Court.

In the Bankruptcy Court, SCO has been unable successfully to reorganize to date, in large part because of the uncertainty over the ownership of its central intellectual property, the UNIX copyrights. Novell understands, from the recent filings and hearings in Bankruptcy Court, and from the information that SCO has provided in connection with that proceeding, that SCO is cash-strapped, that its claims in litigation are crucial assets, and that the Bankruptcy Court now regards SCO's ability to pursue its claims as its principal prospect for reorganizing and exiting bankruptcy.

In August 2009, Bankruptcy Judge Kevin Gross appointed former United States District Judge Edward N. Cahn as Chapter 11 Trustee over SCO. After meeting with counsel for the parties and reviewing their filings and the relevant orders, Trustee Cahn recently informed the

Bankruptcy Court that he has concluded that SCO's claims are meritorious and that SCO should pursue them "aggressively." (Hatch Decl. Ex. A at 12.) In response to Judge Cahn's report, Judge Gross stated: "I am particularly pleased to have someone with your expertise involved in analyzing the merits of the cases. And I take great solace in the fact that based upon your, at least – your thorough but not as yet final review of the litigations that you find that they do have merit and should proceed, and proceed aggressively." (Id. at 13.) In a declaration accompanying this response, Trustee Cahn explains that it is in SCO's best interest to proceed to trial against Novell in this case as soon as practicable, and that the reassignment or consolidation that Novell proposes would interfere with that objective. (Hatch Decl. Ex. E.)

In response to Trustee Cahn's recommendation to the Bankruptcy Court, Novell has filed not only the instant request, but also a motion in the Bankruptcy Court asking that court to lift the automatic stay of the SuSE arbitration. (Hatch Decl. Ex. B.) In that motion, Novell argues that the Bankruptcy Court should permit the arbitration to proceed before the trial of SCO's claims against Novell, notwithstanding the court's prior ruling that stayed the arbitration and notwithstanding the facts that SCO commenced this action against Novell two years before the SuSE arbitration was initiated and that Novell had the opportunity to conduct its trial against SCO on its counterclaims in early 2008. SCO intends to oppose that motion.

### **ARGUMENT**

SCO respectfully submits that the Court should deny Novell's motion (styled as a "notice") to reassign or consolidate the cases, for the following reasons.

First, the fact that the cases have never been consolidated is evidence that they need not and should not be consolidated now. The Tenth Circuit's decision addresses the principal issues of overlap between the two cases, holding that whether UNIX copyrights transferred to SCO and

whether Novell has the waiver rights it claims are issues for trial. This Court should proceed to the trial that the Tenth Circuit has directed as necessary.

Second, Novell is not seeking the “prompt resolution” of the cases. Indeed, prior to making this filing, Novell had unsuccessfully sought to have the Tenth Circuit stay the mandate of their decision pending a petition for certiorari that Novell apparently plans to file. The Tenth Circuit denied that request the day after it was filed. Novell now couples its instant request with its motion in Bankruptcy Court to have the SuSE arbitration leapfrog the trial that the Tenth Circuit has ordered.

Third, a prompt trial of the issues the Tenth Circuit has remanded for trial is the most important step towards the resolution of all of SCO’s litigation. By setting the jury trial on the remanded issues for as early a date as practicable, this Court will facilitate the resolution of an issue that of course is central in the Novell litigation and other related litigation, and that critically affects SCO’s ability successfully to reorganize. Once the trial in this matter determines SCO’s ownership rights, the SuSE arbitration can then address how SCO handled those rights in the United Linux effort.

Fourth, there is no need to reassign or consolidate the two cases. The issues on remand are ready for a jury trial to which IBM is not a party. There is absolutely no reason for the case to be before the same judge (as of now, Judge Campbell) who will consider the IBM matters. SCO respectfully submits that Judge Campbell will have her hands full with the IBM motions for summary judgment that are pending in that matter, which include over 1400 pages of briefing and over 40,000 pages of exhibits.<sup>1</sup>

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<sup>1</sup> In September 2007, Judge Kimball cited 11 U.S.C. § 362(a)(1) as grounds for ordering that SCO v. IBM be “administratively closed and removed from the list of active pending cases.” (Hatch Decl. Ex. D.) That order reached too far, however, because Section 362(a)(1) provides in relevant part only that SCO’s bankruptcy acts as a stay of “the . . . continuation . . . of a judicial . . . action . . . against the debtor

Under the Tenth Circuit’s recent decision, moreover, there is no reason for the judge in SCO v. IBM to await the trial in SCO v. Novell. That is, with respect to the common issues in the two cases – whether SCO owns the UNIX copyrights, and whether Novell has the right to waive SCO’s contract claims under the Asset Purchase Agreement (“APA”) – the Tenth Circuit has already decided that those issues present questions of fact that are not appropriate for summary judgment. All the remaining issues to be resolved on summary judgment in SCO v. IBM are unique to that case and are ready for decision. It is important to note, moreover, that several of SCO’s claims against IBM, such as its claim for unfair competition, do not bear on (and are not affected by) the claims set to be tried in the SCO v. Novell action.

In addition, these two cases involve complex, and very different, issues regarding claims concerning intellectual property. Consolidation of the cases will undoubtedly result in the presentation to the jury of a substantial number of witnesses and exhibits on numerous, distinct issues. Such a scenario will result in a lengthy trial and is likely to lead to jury confusion.

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that was . . . commenced before the commencement of the case” in bankruptcy. 11 U.S.C. § 362(a)(1). Accordingly, only IBM’s counterclaims against SCO are stayed; the motions for summary judgment, to the extent they concern SCO’s claims against IBM, are not stayed.

**CONCLUSION**

SCO respectfully requests, for the reasons set forth above, that the Court deny Novell's request for transfer and consolidation.

DATED this 24th day of November, 2009.

HATCH, JAMES & DODGE, P.C.

Brent O. Hatch

Mark F. James

BOIES, SCHILLER & FLEXNER LLP

David Boies

Robert Silver

Stuart H. Singer

Edward Normand

DORSEY & WHITNEY LLP

Devan V. Padmanabhan

By:                   /s/ Edward Normand

**CERTIFICATE OF SERVICE**

Plaintiff/Counterclaim-Defendant, The SCO Group, Inc., hereby certifies that on this 24th day of November, 2009, a true and correct copy of the foregoing SCO'S RESPONSE TO NOVELL'S "NOTICE OF RELATED PROCEEDING" was filed with the court and served via CM/ECF to the following recipients:

Thomas R. Karrenberg  
Heather M. Sneddon  
ANDERSON & KARRENBERG  
700 Bank One Tower  
50 West Broadway  
Salt Lake City, UT 84101

Michael A. Jacobs  
George C. Harris  
David E. Melaugh  
MORRISON & FOERSTER  
425 Market Street  
San Francisco, CA 94105-2482

*Counsel for Defendant and Counterclaim-Plaintiff Novell, Inc.*

/s/ Brent O. Hatch

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Brent O. Hatch