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

<p>THE SCO GROUP, INC., by and through the Chapter 11 Trustee in Bankruptcy, Edward N. Cahn,</p> <p>Plaintiff/Counterclaim-Defendant,</p> <p>vs.</p> <p>NOVELL, INC., a Delaware corporation,</p> <p>Defendant/Counterclaim-Plaintiff.</p>	<p>SCO'S MEMORANDUM IN OPPOSITION TO NOVELL'S RULE 60(b) MOTION FOR RELIEF FROM FINAL JUDGMENT</p> <p>Civil No. 2:04 CV-00139</p> <p>Judge Ted Stewart</p>
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Plaintiff, The SCO Group, Inc. (“SCO”), by and through the Chapter 11 Trustee in Bankruptcy, Edward N. Cahn, respectfully submits this Memorandum in Opposition to the Motion of Defendant, Novell, Inc. (“Novell”), pursuant to Rule 60(b) for Relief from Final Judgment.

PRELIMINARY STATEMENT

Novell asks this Court to disregard the clear mandate from the Tenth Circuit, to forgive Novell’s failure to raise its argument previously, to apply Rule 60(b)(5) in an unprecedented fashion, and to take all of those steps without any compelling justification. In addition to these threshold problems, Novell’s motion fails on its “merits,” where Novell’s motion is an inaccurate assessment of this Court’s prior decision. These constitute three independent grounds for denial of Novell’s motion.

First, the mandate rule bars the motion. Novell’s failure even to acknowledge the rule is telling. The mandate rule prevents a party from having the district court consider an argument that the party could have made on the prior appeal. That is exactly what has happened here. SCO appealed from not only this Court’s (Kimball, J.) entry of summary judgment against SCO in August 2007, but also the Court’s findings from the parties’ 2008 bench trial. Novell could have filed a protective cross-appeal and argued that, if Novell were to lose on appeal, it would be entitled to certain relief. It did not. The argument it makes now is the exact same one it chose not to make then, and Novell offers no justification for the Court to disregard that deliberate strategy. Under these circumstances, the mandate rule precludes this Court from considering the argument.

Second, independent of the specific application of the mandate rule, Rule 60(b)(5) does not serve as a basis for relieving a party from the consequences of its own strategic

decision in deciding not to pursue a cross-appeal. The Rule 60 movant cannot be relieved of its deliberate choice not to pursue an issue on appeal merely because hindsight seems to indicate to him that his decision not to appeal was wrong. In this specific context the Supreme Court has long held: “There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.” Ackerman v. United States, 340 U.S. 193, 211-12 (1950).

Third, Novell’s motion fails on its “merits,” because the Court’s prior summary judgment ruling was not a necessary element of its subsequent findings at trial. SCO is obligated to remit to Novell a percentage of royalties paid to SCO under “SVRX Licenses,” under the APA by which Novell sold the UNIX business to SCO’s predecessor, the Santa Cruz Organization. The premise of Novell’s motion is that in its findings from the bench trial, this Court decided that SCO was entitled to keep monies from certain licenses only because SCO did not own the UNIX copyrights when it executed those licenses, and thus by definition could not have executed an “SVRX License.” Yet the Court said much more. The Court’s findings reflect the independent grounds that (1) the contracts were not licenses at all, and (2) if the contracts were licenses, they were UnixWare licenses, or else SVRX licenses incidental to UnixWare licenses, and SCO has no obligation to remit to Novell any royalties from them.

BACKGROUND

A. The Parties’ Respective Claims

In September 1995, The Santa Cruz Operation, Inc. (SCO’s predecessor-in-interest) and Novell entered into the APA. As a result of that transaction, SCO owns the UNIX and UnixWare technology and licensing businesses. SCO contends that in

connection with its ownership of the technology, it also acquired and owns the UNIX and UnixWare copyrights underlying the UNIX technology and licensing business.

In early 2003, without having made any such assertion in the years since the execution of the APA, and in the face of its own and SCO's longstanding conduct and public representations to the contrary, Novell publicly claimed for the first time that it had never transferred the UNIX copyrights under the APA, and therefore SCO did not own them. Shortly after Novell made its public announcement that it owned the UNIX copyrights, SCO presented Novell with a clarifying amendment to the APA indicating that Novell had not, in fact, retained the UNIX copyrights. Novell immediately issued a press release admitting that the amendment appeared to confirm that Novell had transferred copyrights to SCO. Novell later changed its position once again and claimed that the amendment accomplished no such result.

This led SCO, in early 2004, to sue Novell for (among other claims) slander of title. Novell counterclaimed, alleging that (among other things) SCO was obligated to remit to Novell 95% of any "royalties" that SCO received under "SVRX Licenses," a term used, but not defined, in the APA. Novell alleged that the agreements that SCO had entered into with Sun Microsystems, Inc. ("Sun"), Microsoft Corporation ("Microsoft"), and several agreements under the "SCOsource" licensing program (the "SCOsource Agreements") constituted, in whole or in part, "SVRX Licenses."

B. This Court's Rulings and Findings

In August 2007, this Court (Kimball, J.) granted Novell's motion for summary judgment against SCO on SCO's claim for slander of title and also entered a partial summary judgment on liability on certain of Novell's counterclaims, holding that Novell

was entitled to additional royalty amounts for agreements entered by SCO after 1995 that constituted “SVRX licenses.” SCO filed 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 April and May 2008, the parties proceeded to a bench trial on Novell’s claim for recovery of the alleged “SVRX Royalties” under the Sun, Microsoft and SCOSource Agreements. Although Novell had originally sought over \$30 million, the Court awarded Novell approximately \$2.5 million, plus interest.

The Court decided that SCO was not obligated to remit to Novell any monies received under the SCOSource Agreements. The Court reasoned that under those agreements SCO licensed only the rights to use copyrights that SCO owned at the time, and since (under the Court’s August 2007 order) SCO did not own the UNIX copyrights, it could not have licensed the right to use them to the SCOSource licensees. In addition, the Court concluded that the SCOSource Agreements were not “SVRX Licenses” in either substance or form, but rather were UnixWare licenses for which SCO did not owe Novell any royalties.

Addressing the fact that the Agreements contained SCO’s releases of rights, the Court explained:

Although Novell asserts that these provisions should be viewed as a license because a license insulates a party from liability, the release terms of the SCOSource Agreements, including Section 2 of the Microsoft Agreement and Section 12 of the 2003 Sun Agreement, are not licenses to product. Unlike the licenses to product included under the APA, these releases are not royalty-bearing SVRX Licenses.

(Findings of Fact, Conclusions of Law, and Order (July 16, 2008), at 29.) Considering SCO's licensing practices over the years, moreover, the Court then further reasoned:

SCO's July 2003 press release regarding SCOsource agreements states SCOsource agreements are UnixWare licenses and the hold harmless clauses are incidental to a UnixWare license. In the SCOsource program, the pricing of a SCOsource license was set as the same as SCO's pricing for a UnixWare binary license. This pricing is consistent with SCO's use of the "one line of code rule" and practice of not charging additional amounts for the prior products listed in a license for the latest release. It also demonstrates that SCO believed that the SCOsource license had a value equivalent to a binary license to its most recent release of UnixWare.

(Id. at 30.) In referring to Section 2 of the Microsoft Agreement, the Court then cross-referenced its earlier discussion of the SCOsource Agreements, where the "release does not specify any technology," and further reasoned that the SVRX license in Section 4 of the Agreement was incidental to a UnixWare license, and on that basis lacked any independent value. (Id. at 31-33.)

The Court decided, however, that SCO was obligated to remit a portion of the money received under the Sun Agreement attributable to the part of the agreement that revised or relaxed a confidentiality clause in a prior royalty buy-out with Sun, from 1994. The Court calculated that this amount was \$2.5 million.

C. The Tenth Circuit's Opinion and Mandate

After this Court entered final judgment, based upon its August 2007 order on summary judgment and its findings from the 2008 bench trial, SCO appealed. SCO argued to the Tenth Circuit that the Court erred in entering summary judgment against SCO with respect to the ownership of copyrights and Novell's actions to prevent SCO

from enforcing contract rights. SCO further argued that the Court erred in finding at the bench trial that Novell was entitled to any money from the Sun Agreement.

Novell did not file a cross-appeal. Novell thus did not argue that this Court erred, in any respect, in finding that Novell was not entitled to any money under the SCOSource Agreements or under any part of the Microsoft Agreement. Specifically, Novell did not argue conditionally that if the Tenth Circuit were to reverse this Court's entry of summary judgment against Novell, it should vacate and remand the determination that Novell was not entitled to any portion of the revenue from the SCOSource Agreements or Microsoft Agreement.

On August 24, 2009, the Tenth Circuit reversed this Court's entry of summary judgment against SCO relating to the ownership of copyrights and to the waiver of SCO's contract claims. The Court of Appeals, rejected SCO's arguments and affirmed the finding at trial that Novell is entitled to approximately \$2.5 million from the Sun Agreement. SCO Group, Inc. v. Novell, Inc., No. 08-4217, 2009 WL 2581735 (10th Cir. Aug. 24, 2009). On September 8, 2009, Novell filed a motion for rehearing and rehearing en banc. In its petition, Novell again did not argue that the Tenth Circuit's reversal of this Court's entry of summary judgment would have any bearing on this Court's findings at trial. On October 20, 2009, the Tenth Circuit denied the petition. On October 27, 2009, Novell moved to stay the mandate pending its petition for writ of certiorari to the United States Supreme Court. On October 28, 2009, the Tenth Circuit denied the motion, the day after it was filed. On October 29, 2009, the Tenth Circuit issued its Mandate.

ARGUMENT

I. THE MANDATE RULE BARS NOVELL'S MOTION

The mandate rule governs the scope of the district court's authority on remand. Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am., 962 F.2d 1528, 1534 (10th Cir. 1992); Fox v. Mazda Corp. of Am., 868 F.2d 1190, 1194-95 (10th Cir. 1989); Procter & Gamble Co. v. Haugen, 506 F. Supp. 2d 883, 886-87 (D. Utah 2007); MaCarthur v. San Juan County, 391 F. Supp. 2d 895, 920 n.35 (D. Utah 2005).

The rule prevents a party from having the district court consider an argument that the party could have made on appeal. United States v. Webb, 98 F.3d 585, 589 (10th Cir. 1996); accord Doe v. Chao, 511 F.3d 461, 465 (4th Cir. 2007) (holding that under the mandate rule, "any issue that could have been but was not raised on appeal is waived and thus not remanded" (quotations and citation omitted)); Volvo Trademark Holding Aktiebolaget v. Clark Mach. Co., 510 F.3d 474, 481 (4th Cir. 2007) (same); United States v. Husband, 312 F.3d 247, 250-51 (7th Cir. 2002) (same); 18B Federal Practice & Procedure § 4478.3 (2d ed. 2009) (under the mandate rule the district court is not permitted "to reconsider its own rulings made before appeal and not raised on appeal").

The rule thus specifically applies where an appellee has failed to file a protective cross-appeal – including an appeal whose merits would be relevant only if the appellant were to prevail. Webb, 98 F.3d at 589; accord Bethea v. Levi Strauss & Co., 916 F.2d 453, 456 (8th Cir. 1990). The mandate rule is rooted in considerations of efficiency, finality, and the hierarchy of appellate court-trial court relations. Fox, 868 F.2d at 1194; see also Doe, 511 F.3d at 465.

The mandate rule bars Novell's motion. The final judgment that SCO appealed to the Tenth Circuit included not only this Court's (Kimball, J.) entry of summary judgment against SCO in August 2007, but also the Court's findings from the parties' 2008 bench trial. Novell could have filed a protective cross-appeal and argued that, if SCO were to prevail on its appeal from the August 2007 order, then Novell would be entitled to certain relief – namely, reversal of the Court's resolution of Novell's alleged entitlement to royalties from the SCOSource and Microsoft Agreements. For whatever reasons, Novell chose not to file any such cross-appeal.

Novell's motion falls directly within the mandate rule. This is not a situation in which new facts have unfolded such that the party seeking to avoid the mandate rule may credibly contend that it could not have made its argument in the appellate court. Cf. FDIC v. United Pac. Ins. Co., 152 F.3d 1266, 1273 (10th Cir. 1998) (applying Rule 60(b) and considering facts that could not have been raised on appeal and an argument that “was precluded from consideration at trial by the district court's pre-trial order”). The argument that Novell now makes is the exact same one it could have made to the Tenth Circuit, but simply chose not to make. See, e.g., Webb, 98 F.3d at 589 (where government appealed to challenge downward-departure sentence and defendant failed to cross-appeal, defendant failed to preserve challenge to the conviction in any court); Ray v. Simmons, No. 03-3006-WEB, 2005 WL 2807362, at *2 (D. Kan. Oct. 26, 2005) (holding that mandate rule precludes Rule 60(b) motion on grounds of new legal authority where the “new” case was decided two months before the Tenth Circuit's resolution of the movant's appeal).

Novell also does not satisfy any exception to the mandate rule. The rare “exceptional circumstances” in which a district court may “deviate from the mandate” have been described as dramatic changes in legal authority, significant new evidence that was not previously obtainable, or blatant error in the prior decision that would result in “serious injustice.” Huffman v. Saul Holdings Ltd. P’ship, 262 F.3d 1128, 1133 (10th Cir. 2001). No such circumstance exists here. There has been no change in legal authority, no new evidence that was previously unobtainable, no error in the prior decision. See, e.g., Steinert v. The Winn Group, Inc., No. 98-2564-CM, 2006 WL 3028249, at *2 (D. Kan. Oct. 11, 2006) (finding that no exception to the mandate rule applied where plaintiff’s counsel had recently discovered discrepancies in calculating fee award that counsel simply failed previously to identify).

II. NOVELL’S MOTION FAILS UNDER RULE 60(B)

A. Rule 60(b) Does Not Trump the Mandate Rule.

With respect to the form of motion Novell has brought, neither this Court nor the Tenth Circuit has ever applied Rule 60(b)(5) to create any exception to the mandate rule. Rule 60(b) does not trump the mandate rule, but rather is subject to it. See Colo. Interstate Gas, 962 F.2d at 1534 (holding that as a “corollary” to the mandate rule, “we are convinced that Rule 60(b)(6) cannot be properly used to alter the substantive content of a judgment once it has been affirmed on appeal except in extraordinary situations”); Lubben v. Selective Serv. Sys. Local Bd. No. 27, 453 F.2d 645, 650 (1st Cir. 1972) (Rule 60(b)(5) does not apply where the moving party could have argued the merits of the issue in the prior appeal).

In addition, independent of the operation of the mandate rule, the well-established law across jurisdictions holds that a party may not invoke Rule 60(b) to try to remedy a “considered choice not to appeal.” Ackerman v. United States, 340 U.S. 193, 211 (1950). The Rule 60 movant “cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong.” Id. “There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.” Id. at 211-12; accord Cashner v. Freedom Stores, Inc., 98 F.3d 572, 579-80 (10th Cir. 1996); see also Wadley v. Equifax Info. Servs., LLC, 296 Fed. Appx. 366, 368 (4th Cir. 2008) (per curiam) (same); Coltec Indus., Inc. v. Hobgood, 280 F.3d 262, 274-75 (3d Cir. 2002) (same); In re Pettie, 410 F.3d 189, 192-93 (5th Cir. 2005) (same).¹

B. Novell’s Motion Does Not Fall Within Rule 60(b)(5).

Rule 60(b)(5) permits the Court to relieve a party from a final judgment “based on an earlier judgment that has been reversed or vacated.” “Rule 60(b) relief is only

¹ Novell cites Pierce v. Cook & Co., 518 F.2d 720, 722 (10th Cir. 1975), for the general proposition that Rule 60(b) gives the Court equitable power to serve justice. The court in Pierce acknowledged an extraordinary circumstance where a subsequent change in state law arose out of the very accident in which plaintiffs had been involved, but the Tenth Circuit has emphasized that Pierce was an “extraordinary case” based on an “unusual combination of events,” and has reaffirmed the general rule that a change in the law or in the judicial view of an established rule of law is not such an extraordinary circumstance justifying relief. Ute Indian Tribe v. State of Utah, 114 F.3d 1513, 1522 (10th Cir. 1997). In addition, as shown above, the mandate rule applies.

Novell also cites in this context the Fourth Circuit’s decision in Werner v. Carbo, 731 F.2d 204 (4th Cir. 1984), in which the court decided to excuse the moving party’s inadvertent failure to name both the doctor and his professional corporation in their prior appeal papers. The case has nothing to say about a decision not to advance arguments on appeal or cross-appeal. The courts have distinguished Werner on that precise basis. See, e.g., Cruikshank & Co. v. Dutchess Shipping Co., 112 F.R.D. 4, 7 (S.D.N.Y. 1986) (holding that the defendants “made a considered decision not to appeal. This is unquestionably a very different situation than the narrow exception of Werner.”).

appropriate under extraordinary circumstances.” Massengale v. Okla. Bd. of Examiners in Optometry, 30 F.3d 1325, 1330 (10th Cir. 1994).² The prior judgment on which the final judgment is based “must be a necessary element of the decision.” Lubben, 453 F.2d at 650. Novell cites no on-point case, nor is SCO aware of any, applying Rule 60(b)(5) in these circumstances.

C. The District Court’s Prior Decision Rests on Grounds Independent From Those Novell Relies Upon as Having Been Vacated.

The premise of Novell’s motion is that the sole ground for this Court’s determination that no royalty was due Novell on the Microsoft Agreement and the SCOSource Agreements was the Court’s prior summary judgment decision that Novell, not SCO, owned the UNIX copyrights and thus these agreements could not “license” intellectual property SCO did not own. This fundamental premise is wrong. The Court’s prior summary judgment decision was not a “necessary element” of its findings at trial. Instead, the Court’s decision rested on three additional independent bases: (1) these Agreements in releasing claims were different from licenses of a product – the only type of agreement from which Novell was entitled to any royalties; (2) to the extent they were to be considered a license at all, they were licenses of UnixWare, a product which SCO

² On the question of extraordinary circumstances, Novell cites Van Skiver v. United States, 952 F.2d 1241 (10th Cir. 1991), but in that case, as in Cashner, the Tenth Circuit held that Rule 60(b) is not available to allow a party to argue an issue that it previously had the opportunity to argue, whether it made the argument or not. Id. at 1243.

Novell also cites FDIC, 152 F.3d 1266, in which the Tenth Circuit found that reliance on Rule 60(b) in the face of the mandate rule was appropriate based on “facts arising after the trial,” such that the motions “did not raise an issue which was resolved on appeal, either expressly or impliedly.” Id. at 1273. Here, in contrast, and in keeping with all of the law cited herein concerning the consequences of a party’s failure to raise on appeal an argument it could have raised, Novell raises an issue – the consequences of a reversal of the conclusion that SCO did not own the UNIX copyrights – available at the time of appeal, and thus resolved on appeal.

was entitled to license and to keep 100% of the proceeds; and (3) to the extent they were considered SVRX licenses, they were incidental to UnixWare licenses, and thus they had no independent value, and therefore SCO was not obligated to pay royalties to Novell from them.

Addressing the fact that the Agreements contained SCO's releases of rights, the Court explained:

Although Novell asserts that these provisions should be viewed as a license because a license insulates a party from liability, the release terms of the SCOsource Agreements, including Section 2 of the Microsoft Agreement and Section 12 of the 2003 Sun Agreement, are not licenses to product. Unlike the licenses to product included under the APA, these releases are not royalty-bearing SVRX Licenses.

(Findings of Fact, Conclusions of Law, and Order (July 16, 2008) at 29.) The Court noted: "Novell acknowledges that it is not entitled to royalties from any UnixWare licenses." (Id. at 9.) Considering SCO's licensing practices over the years, moreover, the Court then further reasoned:

SCO's July 2003 press release regarding SCOsource agreements states SCOsource agreements are UnixWare licenses and the hold harmless clauses are incidental to a UnixWare license. In the SCOsource program, the pricing of a SCOsource license was set as the same as SCO's pricing for a UnixWare binary license. This pricing is consistent with SCO's use of the "one line of code rule" and practice of not charging additional amounts for the prior products listed in a license for the latest release. It also demonstrates that SCO believed that the SCOsource license had a value equivalent to a binary license to its most recent release of UnixWare.

(Id. at 30.) In referring to Section 2 of the Microsoft Agreement, the Court then cross-referenced its earlier discussion of the SCOsource Agreements, where the "release does

not specify any technology,” and further reasoned that the SVRX license in Section 4 of the Agreement was incidental to a UnixWare license. (Id. at 31-33.)

With respect to the question of SVRX licenses incidental to UnixWare licenses, SCO argued at trial that such incidental SVRX licenses had no independent value beyond the UnixWare portion of the license. The Court concluded that where SVRX products were licensed with UnixWare, “it did not change the price paid for the most recent version of UnixWare.” (Id. at 33.) The Court further concluded that the SVRX products licensed with UnixWare lacked independent value, where (1) “there was not a market for a license to prior SVRX products because those prior products no longer utilized the most current hardware,” and (2) SCO “did not market or sell any prior SVRX product in a stand alone license.” (Id.) Closing the loop, the Court expressly found that “the term incidental as used in the APA is referring to the practice of Novell and SCO to list prior products in licenses for the newest release and charge only for the license to the newest release.” (Id.) Summarizing its foregoing analyses of the Microsoft Agreement, the Court concluded: “Accordingly, the court concludes that Novell is not entitled to any of the revenue SCO received under the 2003 Microsoft Agreement.” (Id. at 34.)

These grounds constitute independent and adequate support for the Court’s determination at trial that the Microsoft Agreement and SCOSource Agreements were not SVRX Licenses to which Novell was entitled to any royalty. Even if the court had not entered a summary judgment in favor of Novell on the copyright ownership question, it articulated the grounds for reaching the same decision on the Microsoft and SCOSource licenses. If Novell wished to challenge this decision, it was required to have filed an appeal or cross-appeal. It did not.

CONCLUSION

SCO, by and through the Chapter 11 Trustee, respectfully submits, for the reasons set forth above, that the Court should deny Novell's Rule 60(b) motion.

DATED this 5th day of January, 2010.

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By: /s/ Edward Normand

CERTIFICATE OF SERVICE

I, Edward Normand, hereby certify that on this 5th day of January, 2010, a true and correct copy of the foregoing **SCO'S MEMORANDUM IN OPPOSITION TO NOVELL'S RULE 60(b) MOTION FOR RELIEF FROM FINAL JUDGMENT** was filed with the court and served via electronic mail to the following recipients:

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