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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP, INC., a Delaware corporation, Plaintiff, vs. NOVELL, INC., a Delaware corporation, Defendant.	Case No. 2:04CV00139 **REPLY IN SUPPORT OF NOVELL'S RULE 60(b) MOTION FOR RELIEF FROM FINAL JUDGMENT** Judge Ted Stewart
AND RELATED COUNTERCLAIMS.	

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I. PRELIMINARY STATEMENT

SCO concedes in its Opposition that Rule 60(b)(5) authorizes relief from a judgment that is "based on an earlier judgment that has been reversed or vacated." SCO also concedes that the district court rejected Novell's claim for SVRX Royalties based, at least in part, on a ruling that the Tenth Circuit recently reversed. SCO nevertheless contends that reversal of that ruling does not entitle Novell to relief from the judgment on Novell's SVRX claim ("SVRX judgment") because (1) the "mandate rule" prohibits use of Rule 60(b)(5) to obtain relief from a judgment that a party has not appealed; and (2) other independent grounds support the SVRX judgment.

SCO's mandate rule argument is refuted by the plain language of Rule 60(b)(5), which explicitly authorizes relief from a judgment that is based on a ruling that has been reversed. This provision can apply only to a judgment that is still effective, meaning that it has not been overturned on appeal. Federal courts have unanimously held that Rule 60(b)(5) authorizes relief from a judgment based on a ruling that has been reversed, even when the judgment was not appealed. SCO's cited cases are irrelevant because they either did not involve Rule 60(b)(5) or did not involve a judgment based on a ruling that had been reversed.

SCO's argument that independent grounds support the SVRX judgment is also without merit. The district court held that the release in the Other SCOsource Licenses and the Microsoft Agreement did not constitute an "SVRX License" because SCO did not own the UNIX copyrights, and thus could not release claims based on copyrights that SCO did not own. This holding was based squarely on the prior summary judgment ruling that SCO did not own the copyrights. The district court did not rely on any other ground that would independently support the SVRX judgment. Therefore, the reversal of the summary judgment ruling that was the essential predicate for the SVRX judgment entitles Novell to relief from that judgment.

II. THE MANDATE RULE DOES NOT NULLIFY THE COURT'S AUTHORITY UNDER RULE 60(B)(5) TO GRANT RELIEF FROM A JUDGMENT THAT IS BASED ON A RULING THAT HAS BEEN REVERSED.

A. The Plain Language of Rule 60(b)(5) Authorizes Relief from a Final Judgment that Is Based on a Ruling that Has Been Reversed.

SCO admits, as it must, that "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.'" (SCO's Opposition, Dkt No. 612 ("Opp."), at 10.) Nevertheless, SCO asserts that the so-called mandate rule nullifies this Court's Rule 60(b)(5) authority because Novell did not file an appeal to make the "conditional" argument that *if* the copyright ownership ruling were reversed, the SVRX judgment should be reversed. SCO asserts that the mandate rule "prevents a party from having the district court consider an argument that the party could have made on appeal." (Opp. at 7.)

SCO's argument fails because Rule 60(b)(5) explicitly carves out an exception to the binding nature of a final judgment. It authorizes relief from a judgment "based on an earlier judgment that has been reversed or vacated." This provision can apply *only* to a judgment that has *not* been successfully appealed, as there is no need for relief from a judgment that has already been reversed. SCO's argument that Rule 60(b)(5) does not apply to an unappealed judgment would make this exception meaningless, violating the rule that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous." *FDIC v. Canfield*, 967 F.2d 443, 447-448 (10th Cir. 1992) (citation omitted).

SCO asserts that Rule 60(b)(5) "does not trump the mandate rule, but rather is subject to it." (Opp. at 9.) Novell is not arguing, however, that Rule 60(b)(5) means that the mandate rule *never* applies. Rather, Novell contends that Rule 60(b)(5) allows relief from an unappealed judgment in the unusual situation where the judgment is "based on" a ruling that has been reversed. The mandate rule still applies in other situations.

Further, granting Rule 60(b)(5) relief in this case does not conflict with the mandate rule because the Tenth Circuit did not decide whether such relief is proper. The Eighth Circuit addressed a similar issue in *Jones v. U.S.*, 255 F.3d 507 (8th Cir. 2001). On a prior appeal, the Eighth Circuit held that sovereign immunity required reversal of a prejudgment interest award and that "[t]he judgment must therefore be reduced by $2,560,081." *Jones*, 255 F.3d at 509-10. On remand, plaintiffs sought to reopen the judgment, arguing that the late assertion of sovereign immunity constituted "unfair surprise" under Rule 60(b)(1), in that earlier notice of this defense would have enabled them to establish similar damages in a different manner. *Id.* The district court held that the mandate required it to enter judgment in the specified amount. *Id.* at 510.

The Eighth Circuit held that its mandate did *not* bar consideration of the Rule 60(b) motion because it had not resolved the question of whether the government's late assertion of sovereign immunity constituted "unfair surprise." *Id.* The Eighth Circuit noted that its prior opinion "does not explicitly settle the question." Moreover, "that issue simply could not have been before this court" in the prior appeal because the district court had rejected the sovereign immunity argument, so the plaintiffs previously "had no cause to raise a Rule 60(b) motion seeking relief from a judgment due to surprise." *Id.* The Eighth Circuit explained:

> [A]n appellate court order resolving one issue, here that the award as originally ordered improperly included pre-judgment interest, *does not strip the district court of other post-judgment authority, such as that granted by Rule 60(b)*. Certainly, the district court could not use its Rule 60(b) authority to ignore or reverse this court's mandate, but *that mandate does not prevent it from entertaining the merits of such a motion*. We therefore conclude that the district court had authority to visit the merits of the Joneses' motion.

Id. at 510-11 (emphasis added).

Similarly, the Tenth Circuit did *not* address whether its reversal of the summary judgment that SCO does not own the UNIX copyrights entitled Novell to relief under Rule 60(b)(5). Novell had no reason to seek such relief before the Tenth Circuit reversal, as the district court

had held that SCO did not own the copyrights.[1] The Tenth Circuit opinion "does not strip the district court of other post-judgment authority," such as its Rule 60 authority to grant relief from a judgment based on a ruling that has been reversed. *See Jones*, 255 F.3d at 510-11.

B. Federal Courts Have Unanimously Held that Rule 60(b)(5) Authorizes Relief from an Unappealed Judgment Based on a Ruling that Has Been Reversed.

Federal courts have uniformly held that Rule 60(b)(5) authorizes relief from an unappealed judgment that is based on a ruling that has been reversed. The Fourth Circuit held that when a judgment against a physician was reversed, but the judgment against the physician's corporation was not appealed or reversed, denying the corporation's motion for Rule 60(b)(5) relief was an abuse of discretion. *Werner v. Carbo*, 731 F.2d 204, 206-09 (4th Cir. 1984).[2] Similarly, the Ninth Circuit held that reversal of a liability judgment entitled a defendant to relief from a related attorney fees award that defendant had not appealed. *California Med. Ass'n v. Shalala*, 207 F.3d 575, 576-78 (9th Cir. 2000). The Ninth Circuit explained:

> The text of Rule 60(b)(5) supports this approach. The Rule provides that "[o]n motion and upon such terms as are just, the court may relieve a party ... from a final judgment ... [if] a prior judgment upon which it is based has been reversed or otherwise vacated." Fed. R. Civ. P. 60(b). As the district court noted, "Rule 60(b)(5) appears to contemplate exactly the type of motion brought here." Since the fee award is based on the merits judgment, reversal of the merits removes the underpinnings of the fee award. Were we to accept the [plaintiff's] argument that Rule 60(b)(5) is inapplicable here, we would be hard pressed to figure out where it ever *would* apply.

Id. at 577-78 (emphasis in original). The Fifth and Seventh Circuits have reached the same conclusion. *Flowers v. S. Reg'l Physician Servs.*, 286 F.3d 798, 799-802 (5th Cir. 2002); *Mother Goose v. Sendak*, 770 F.2d 668, 675-76 (7th Cir. 1985).

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[1] SCO asserts that Novell should have filed a "protective cross-appeal," but has cited no Rule 60(b)(5) case requiring such an appeal when, as here, the party does *not* dispute the basis for the judgment.

[2] SCO attempts to distinguish *Werner* on the ground that the failure to appeal was "inadvertent" (Opp. at 10 n. 1), but the Fourth Circuit expressly relied on Rule 60(b)(5), and *not* on "mistake, inadvertence, surprise, or excusable neglect" under Rule 60(b)(1). *Werner*, 731 F.2d at 207.

In sum, the Fourth, Fifth, Seventh, and Ninth Circuits have all held that Rule 60(b)(5) authorizes relief from a judgment that has not been appealed but that is based on a ruling that has been reversed. Further, the Eighth Circuit has held that the mandate rule does not bar consideration of a Rule 60(b) motion when the appellate court did not address whether such relief should be granted. The Tenth Circuit has not addressed this issue, but there is no reason to deviate from the uniform holding of the other circuits.

C. SCO's Cited Cases Do Not Hold that the Mandate Rule Nullifies the Court's Rule 60(b)(5) Authority to Grant Relief from a Judgment that is Based On a Ruling that Has Been Reversed.

SCO's cited cases are inapposite. (*See* Opp. at 7-10 (relying on "mandate rule" cases and "independent" cases.) Most do not involve Rule 60(b)(5), and SCO's few Rule 60(b)(5) cases do not involve a judgment based on a ruling that has been reversed.

1. Cases that do not involve any provision of Rule 60(b) are irrelevant.

SCO places the most reliance on *United States v. Webb*, 98 F.3d 585 (10th Cir. 1996). *Webb* involved a criminal defendant who failed to challenge his conviction or sentence on appeal, but attempted to do so after the Tenth Circuit vacated the sentence as too lenient and remanded for sentencing under the applicable guidelines. *Id.* at 586, 588-89. Defendant did not seek relief from judgment under Rule 60(b)(5) or any other provision, and Rule 60(b)(5) did not apply as the portions of the judgment that the defendant belatedly sought to challenge were not based on any rulings that the Tenth Circuit had reversed. *See id.* Thus, that decision has no bearing here.

Many of SCO's other cases also did not involve any provision of Rule 60(b) or a judgment based on a ruling that had been reversed. *See Fox v. Mazda Corp. of Am.*, 868 F.2d 1190, 1192-95 (10th Cir. 1989) (remand for retrial on one damage theory supported exclusion of evidence that "went well beyond" that theory; no Rule 60(b) motion); *Huffman v. Saul Holdings Ltd. P'ship*, 262 F.3d 1128, 1131-33 (10th Cir. 2001) (appellate court's rejection of appellant's

request for attorney fees precluded district court from awarding such fees on remand; no Rule 60(b) motion); *Procter & Gamble Co. v. Haugen*, 506 F. Supp. 2d 883, 886-87 (D. Utah 2007) (appellate decision that "commercial speech" element of a four-part test was met, but remanding for consideration of other factors, barred reconsideration of that element; no Rule 60(b) motion).[3]

2. Cases that involve Rule 60(b)(1), (4), and (6) are irrelevant.

SCO also relies on cases that involve a *different* provision of Rule 60(b) and thus do not address whether the mandate rule nullifies the Rule 60(b)(5) authority to grant relief from an unappealed judgment based on a ruling that has been reversed. For example, *Ackerman v. United States*, 340 U.S. 193, 197-202 (1950), and *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of Am.*, 962 F.2d 1528, 1533 (10th Cir. 1992), both involved Rule 60(b)(6), which is a "catch-all" that authorizes relief for "any other reason justifying relief from operation of the judgment." By its terms, Rule 60(b)(6) applies only if Rule 60(b)(5) does *not* apply. Several other cases cited by SCO are likewise irrelevant because they involved different provisions of Rule 60(b). *See Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 576-80 (10th Cir. 1996) (relief from judgment for "mistake" under Rule 60(b)(1), and "any other reason" under Rule 60(b)(6)); *In re Pettle*, 410 F.3d 189, 192-93 (5th Cir. 2005) (same)); *Massengale v. Okla. Bd. of Exam'rs in Optometry*, 30 F.3d 1325, 1330 (10th Cir. 1994) (administrative board's denial of disqualification request does not constitute "exceptional circumstances" warranting Rule 60(b) relief from judgment based on failure to exhaust administrative remedies); *Wadley v. Equifax*

[3] The following additional cases cited by SCO are irrelevant because there was no Rule 60(b) motion or basis for such a motion: *Doe v. Chao*, 511 F.3d 461,466-67 (4th Cir. 2007); *Volvo Trademark Holding Aktiebolaget v. Clark Mach. Co.*, 510 F.3d 474, 476-81 (4th Cir. 2007); *United States v. Husband*, 312 F.3d 247, 248-52 (7th Cir. 2002); *Bethea v. Levis Strauss & Co.*, 916 F.2d 453, 454-57 (8th Cir. 1990); *Steinert v. The Winn Group, Inc.*, No. 98-2564-CM, 2006 WL 3028249 (D. Kan. Oct. 11, 2006); *MacArthur v. San Juan County*, 391 F. Supp. 2d 895, 920 n.35 (D. Utah 2005).

Info. Servs., LLC, 296 Fed. Appx. 366, 368 (4th Cir. 2008) (unpublished) (denying relief from a "void" judgment under Rule 60(b)(4)).

3. The Rule 60(b)(5) cases relied upon by SCO do not involve a judgment that is based on a ruling that has been reversed.

The few Rule 60(b)(5) cases cited by SCO are inapposite because they do not involve a judgment based on a prior ruling that has been reversed. *Lubben v. Selective Serv. Sys. Local Bd.*, 453 F.2d 645, 650 (1st Cir. 1972), merely states that Rule 60(b)(5) applies only when a judgment that is the basis for the judgment at issue has been reversed, and not when the governing law has been overruled in an unrelated case.[4] This principle does not help SCO, as Novell relies on reversal of an underlying judgment, and not on a change in the applicable law.

Similarly, *Cruikshank & Co. v. Dutchess Shipping Co.*, 112 F.R.D. 4 (S.D.N.Y. 1986), does not support SCO because the judgment at issue was not based on a judgment that had been reversed. Rather, the judgment was based on the fact that the corporate defendants that owned and managed a ship "made a considered default as to liability and then made a considered decision not to appeal." *Id.* at 5, 7. When the Second Circuit reversed the judgment against the ship captain, the corporate officers sought to vacate the default judgment against the corporate defendants, relying on the Fourth Circuit decision in *Werner*. *Id.* at 6. The district court denied relief, emphasizing that "the identity of interest between the corporate defendants and [the ship captain] is far less than that of a doctor to his professional corporation." *Id.* at 7. The court also noted that the Second Circuit's reasoning in reversing the judgment against the captain "is not applicable to the corporate defendants." *Id.* at 8. The default judgment against the corporate defendants was thus not based on any ruling that the Second Circuit had reversed.

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[4] *See also Ray v. Simmons*, No. 03-3006, 2005 WL 2807362 (D. Kan. Oct. 26, 2005) (change in state law does not warrant Rule 60(b) relief because "new" case decided before judgment affirmed, and was thus presumably considered by appellate court); *Ute Indian Tribe v. State of Utah*, 114 F.3d 1513, 1522 (10th Cir. 1997) (change in law does not warrant recalling mandate).

Coltec Indus., Inc. v. Hobgood, 280 F.3d 262, 274-75 (3d Cir. 2002) — SCO's only other Rule 60(b)(5) case — is irrelevant because it involved a different clause of Rule 60(b)(5), which applies when "it is no longer equitable that the judgment should have prospective application."

III. NOVELL IS ENTITLED TO RULE 60(B)(5) RELIEF BECAUSE THE SVRX JUDGMENT WAS BASED ON THE SUMMARY JUDGMENT RULING THAT WAS REVERSED, AND NOT ON INDEPENDENT GROUNDS.

SCO does not dispute that Judge Kimball relied on his summary judgment ruling that SCO did not own the SVRX copyrights in concluding that the Other SCOsource Licenses and the Microsoft Agreement (collectively, "the SCOsource Agreements") did not constitute "SVRX Licenses" because SCO could not license copyrights that SCO did not own. (*See* July 16, 2009 Order, Dkt. No. 542, at 31; Novell's Motion, Dkt. No. 609, at 4.) Nevertheless, SCO contends that the SVRX judgment is not "based on" the summary judgment ruling under Rule 60(b)(5) because Judge Kimball relied on several independent grounds. This argument lacks merit.[5]

A. The Fact that the SCOsource Agreements Involved a Release Does Not Independently Support the SVRX Judgment.

SCO contends that Judge Kimball's finding that the SCOsource Agreements involved a release of claims rather than a product license is an independent basis for the SVRX judgment. However, Judge Kimball made clear that this was a preliminary finding only, and not a sufficient basis by itself. After noting that the SCOsource Agreements involved a release, Judge Kimball reviewed the details of that release to "determin[e] whether the SCOsource Agreements constitute SVRX Licenses." (July 16, 2009 Order, Dkt. No. 542, at 28.) This review would have been unnecessary if, as SCO contends, the fact that these agreements involved a release were a sufficient basis for rejecting Novell's claim.

[5] SCO focuses on the "based on" element and does not dispute Novell's showing that the other Rule 60(b) conditions are met (timely, no unfair prejudice, meritorious, and "exceptional circumstances" shown by meeting Rule 60(b)(5)). (*See* Novell's Motion, Dkt. No. 609 at 6-10.)

Judge Kimball noted that the SCOsource Agreements involve "a license to use SCO IP," which includes UNIX System V and would thus "appear to include SVRX." (*Id.* at 28-29.) However, "[b]ased on this court's ruling that SVRX copyrights were not included in the assets…transferred from Novell…, SCO could not enter into any release for copyright infringement of SVRX technologies." (*Id.* at 30.) Judge Kimball concluded that "[b]ecause the SCOsource licenses cannot be construed to include a release of SVRX copyright infringement, the court does not find the licenses to be SVRX Licenses that generated SVRX Royalties to Novell under the APA." (*Id.* at 31.) Thus, Judge Kimball held that the SCOsource Agreements were not "SVRX Licenses" because (1) they involved a release; and (2) the release could not grant any rights to SVRX because SCO did not own the SVRX copyrights. *Both* of these findings were necessary elements of the SVRX judgment; reversal of the copyright ownership ruling removes an essential predicate for that judgment.

B. Judge Kimball's Finding that the SCOsource Agreements Were Limited to UnixWare Was Based on His Ruling that SCO Did Not Own the SVRX Copyrights.

SCO contends that the SVRX judgment is independently supported by Judge Kimball's finding that the Other SCOsource Agreements were limited to UnixWare and did not include Unix System V ("SVRX"). But Judge Kimball clearly based this finding on his ruling that SCO did not own the SVRX copyrights (July 16, 2009 Order, Dkt. No. 542, at 29):

> SCO IP is defined in the agreements to include UNIX System V, which would appear to include SVRX. But given the terms of the amended APA between Novell and SCO, as this court has previously ruled, the SVRX copyrights did not transfer to SCO. Therefore, SCO IP cannot include SVRX and can only mean SCO UnixWare.

SCO quotes Judge Kimball's summary of evidence that SCO presented. (Opp. at 12.) However, Judge Kimball did not accept that evidence as proving that the SCOsource Agreements were not SVRX Licenses. Rather, his conclusion (which SCO omits) was that "there was

evidence that the SCOsource program was not *solely* focused on older System V technology." (July 16, 2009 Order, Dkt. No. 542, at 30 (emphasis added).) Judge Kimball then found that the claims released in the SCOsource Agreements "were only those claims SCO was entitled to bring," and that SCO could not grant a license to SVRX since it did not own the copyrights. (*Id.* at 30-31). This conclusion was based on the copyright ownership ruling.

C. Judge Kimball's Finding that the License in Section 4 of the Microsoft Agreement Is "Incidental" to a UnixWare License Has No Bearing on Whether the Release in Section 2 Constitutes an SVRX License.

SCO contends that Judge Kimball's finding that the SVRX license in Section 4 of the Microsoft Agreement is "incidental" to a UnixWare license is an independent ground for the SVRX judgment. (Opp. at 13.) Novell agrees, but only as to Section 4 of the Microsoft Agreement. This is critical because Novell is *not* seeking relief from judgment as to Section 4, which provided an option to license UnixWare, OpenServer, and other SVRX for a separate payment. (*See* July 16, 2009 Order, Dkt. No. 542, at 16, 32.) Rather, Novell is seeking relief as to the release in Section 2 of the Microsoft Agreement (which involved a separate payment of $1.5 million), and the similar release in the Other SCOsource Licenses. (*See id.* at 15-16, 21-22.) Judge Kimball's analysis of Section 4 is separate from Section 2, and does not support his ruling that the Section 2 release of claims did not constitute an SVRX License. (*See id.* at 31-34.)

IV. CONCLUSION

The basis for Judge Kimball's judgment that the release in the SCOsource Licenses and in Section 2 of the Microsoft Agreement did not constitute an "SVRX License" was his ruling that SCO did not own the SVRX copyrights and thus could not release claims that SCO did not own. The Tenth Circuit's reversal of that ruling is a new development that entitles Novell to Rule 60(b)(5) relief because the SVRX judgment is based on a ruling that has been reversed.

DATED: January 22, 2010

Respectfully submitted,

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