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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.

AND RELATED COUNTERCLAIMS.

Case No. 2:04CV00139

**NOVELL'S MOTION IN LIMINE
NO. 3 TO DETERMINE THAT SCO
IS A LIMITED PURPOSE PUBLIC
FIGURE**

Judge Ted Stewart

I. INTRODUCTION

SCO claims that Novell slandered SCO's alleged title to the UNIX copyrights by falsely stating that SCO does not own the copyrights. (Second Am. Compl. ¶¶ 8-10, 91-92, Dkt. No. 96.) SCO relies on statements allegedly made between May 28, 2003 and March 2004. (*Id.* ¶ 37.) These statements were *after* SCO had publicly asserted that the Linux operating system was an illicit copy of UNIX and that SCO's ownership of the UNIX copyrights entitled it to assert billion-dollar claims against IBM, Novell, and thousands of other Linux vendors and users.

Novell moves for a ruling that SCO is required to prove "actual malice" under the First Amendment ("constitutional malice") because SCO injected itself into the public controversy about SCO's alleged UNIX rights and thus became a "limited purpose public figure."¹

II. UNDISPUTED FACTS

SCO actively sought media coverage of its UNIX claims *before* Novell allegedly slandered SCO's title. As Judge Kimball noted, SCO made a "plethora of public statements concerning IBM's and others' infringement of SCO's purported copyrights to the UNIX software." (Order in *SCO v. IBM* at 10, Dkt. No. 398 (Ex. 3A).) Novell replied publicly "while the public was reacting to SCO's claim that use of Linux required a UNIX license." (Order in *SCO v. Novell* at 30, Dkt. No. 377.) SCO's media blitz included multiple press releases and statements, as well as threatening letters to 1,500 companies, including Novell, which asserted that Linux "infringes on [SCO's] UNIX intellectual property and other rights."² (Ex. 3E at 2.) SCO's PR firm, Schwarz Communications, provided SCO with weekly reports of upcoming press interviews and monthly summaries of the massive press coverage. (Exs. 3F, 3G.)

¹ First Amendment defenses apply for the reasons in Novell's Motion In Limine No. 2.

² SCO's press releases are at www.sco.com, and are submitted as Exhibits 3B to 3D. SCO has admitted issuing the press releases and sending the letters. (Reply to Novell's Counterclaims ¶¶ 41, 51, Dkt. No. 121; Novell's Counterclaims ¶¶ 41, 51, Dkt. No. 120.) SCO's letter noted that its suit against IBM was "widely reported and commented upon in the press." (Ex. 3E at 2.)

SCO's UNIX claims ignited a firestorm of controversy. Media comments included:

- “Has SCO fired shot to start Linux war?” (2/11/03 *InfoWorld*, Ex. 3J at 1.)
- “The worst case scenario for the Linux community could be that everyone running Linux would have to pay licensing fees,” and “[t]here also has been some concern that SCO-Caldera is planning to charge license fees for GNU, GPL, open source, free or otherwise public domain software.” (2/5/03 *MozillaQuest*, Ex. 3H at NOVTR 5837.)
- Is SCO “Linux’ New Worst Enemy”? (2/10/03 *osOpinion.com*, Ex. 3I at 1.)
- SCO “has filed a Dollars 1bn trade secrets lawsuit against IBM that could derail the massive momentum built up around the free Linux operating system” (3/8/03 *The Financial Times*, Ex. 3M; see 3/10/03 *CNET News*, Ex. 3N at 2), but “analysts questioned whether the lawsuit has merit.” (3/7/03, *NewsFactor.com*, Ex. 3L at 1.)
- SCO “sent an unsettling letter to some 1500 companies worldwide,” so “[i]f you use Linux, SCO has just threatened to sue you.” “If the company actually has something to show, it’s past time to put some cards on the table. As it is, SCO gives the impression of trying to destroy the Linux community away with words that have little backing in the real world.” (5/14/03 *LWN.net*, Ex. 3O at 1.)

(See also Exs. 3G, 3K, 3P to 3S (additional press coverage and press clipping summaries).

III. SCO IS A LIMITED PURPOSE PUBLIC FIGURE

The First Amendment requires a “limited-purpose public figure” to prove by clear and convincing evidence that the statement at issue was made with constitutional malice, meaning “knowledge that [the statement] was false or with reckless disregard of whether it was false or not.” *World Wide Ass’n of Specialty Programs v. Pure, Inc.*, 450 F.3d 1132, 1136 (10th Cir. 2006) (citations omitted). “Limited-purpose public figure” includes a party that has “voluntarily injected” itself or has been drawn into a matter of “public controversy.” *Id.*; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974). Whether a party is a limited-purpose public figure is a question for the court to resolve. *World Wide Ass’n*, 450 F.3d at 1137.

A company that invites public comment through the media may be a limited public figure. *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 273-74 (3d Cir. 1980) (company was limited public figure as to quality of beef because ads “invited public attention, comment, and

criticism”); *Bose Corp. v. Consumers Union*, 508 F. Supp. 1249, 1273 (D. Mass. 1981) (company “invited public attention” by advertising new loudspeaker and was thus limited public figure) (citation omitted), *rev’d on other grounds*, 692 F.2d 189, 197 (1st Cir. 1982) (reversing finding of constitutional malice), *aff’d*, 466 U.S. 485, 513 (1984) (no constitutional malice). “Public controversy” includes commercial matters affecting the public. *Steaks Unlimited*, 623 F.2d at 274 (beef promotion); *Bose Corp.*, 508 F. Supp. at 1273 (loudspeaker quality); *Paterson v. Little, Brown & Co.*, 502 F. Supp. 2d 1124, 1141-42 (W.D. Wash. 2007) (debate over origin of DOS computer operating system).³

Here, SCO aggressively sought media coverage of its UNIX claims by press releases and public statements issued before Novell made its allegedly slanderous statements. SCO’s campaign was widely viewed as an attack on the entire Linux community and the open source principles on which Linux is based, with far-reaching implications. Thousands of companies and individuals had a direct interest in the debate over whether SCO had the right to demand license fees for software that SCO had released on an open source basis, and industry players and other members of the public actively participated in the debate. SCO not only “thrust” itself to the forefront of this controversy to influence its resolution (*Waldbaum*, 627 F.2d at 1297, 1300), SCO *created* the controversy. Thus, SCO is a “limited-purpose public figure” concerning its alleged UNIX rights and must prove that Novell acted with “constitutional malice.”

³ See also *Waldbaum v. Fairchild Pubs.*, 627 F.2d 1287, 1297, 1299 (D.C. Cir. 1980) (“viability of cooperatives as a form of commercial enterprise” was “public controversy” because “debated publicly” and had “substantial ramifications for nonparticipants”); *Carr v. Forbes*, 259 F.3d 273, 279 (4th Cir. 2001) (“public controversy” includes dispute that “has received public attention because its ramifications will be felt by persons who are not direct participants”); *World Wide Ass’n*, 450 F.3d at 1137 (debate concerning residential treatment programs for troubled teens).

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Respectfully submitted,

By: /s/ Sterling A. Brennan
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