WORKMAN | NYDEGGER A PROFESSIONAL CORPORATION
Sterling A. Brennan (Utah State Bar No. 10060; E-mail: sbrennan@wnlaw.com)
David R. Wright (Utah State Bar No. 5164: E-mail: dwright@wnlaw.com)
Kirk R. Harris (Utah State Bar No. 10221; E-mail: kharris@wnlaw.com)
Cara J. Baldwin (Utah State Bar No. 11863; E-mail: cbaldwin@wnlaw.com)
1000 Eagle Gate Tower
60 E. South Temple
Salt Lake City, Utah 84111
Telephone: (801) 533-9800
Facsimile: (801) 328-1707

MORRISON & FOERSTER LLP
Michael A. Jacobs (Admitted *Pro Hac Vice;* E-mail: mjacobs@mofo.com)
Eric M. Acker (Admitted *Pro Hac Vice;* E-mail: eacker@mofo.com)
Grant L. Kim (Admitted *Pro Hac Vice*; E-Mail: gkim@mofo.com)
425 Market Street
San Francisco, California 94105-2482
Telephone: (415) 268-7000
Facsimile: (415) 268-7522

Attorneys for Defendant and Counterclaim-Plaintiff Novell, Inc.

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. 4 TO PRECLUDE SCO FROM CONTESTING THAT NOVELL HAD AN OBJECTIVELY REASONABLE, GOOD FAITH BASIS FOR ITS STATEMENTS REGARDING COPYRIGHT OWNERSHIP** Judge Ted Stewart

Judge Kimball held, as a matter of law, that Novell's statements regarding ownership of the UNIX copyrights were based on Novell's "good faith interpretation" of the contracts and were not "objectively unreasonable." SCO did not appeal — and the Tenth Circuit did not reverse — these rulings. Therefore, the law of the case and the mandate rule preclude SCO from presenting any evidence or argument contrary to these rulings.

I. UNDISPUTED FACTS

SCO asserted in its Second Amended Complaint that Novell breached the implied covenant of good faith by "numerous acts of bad faith," including "making false and misleading statements denying SCO's ownership of the copyrights in UNIX and UnixWare." (Second Am. Compl. ¶ 99, Dkt. No. 96.) SCO also asserted that Novell engaged in "unfair competition" by "falsely claim[ing] ownership of SCO's copyrights in UNIX and UnixWare." (*Id.* ¶ 122.)[1]

In April 2007, Novell moved for summary judgment on SCO's breach of contract and unfair competition claims. (Novell's Mot. for Partial Summ. J., Dkt. No. 272.) SCO argued in its Opposition that the implied covenant can be breached by "objectively unreasonable conduct," and that SCO's other concurrent motions and evidence showed that "Novell's statements were false and Novell knew it." (SCO's Mem. in Opp'n at 18-19, Dkt. No. 299.) Novell replied that the implied covenant did not "prohibit[] a party from making statements about its understanding of contractual rights," and that Novell's statements were not false for the reasons in its concurrent motions. (Reply ISO Novell's Mot. for Partial Summ. J. at 15-16, Dkt No. 332.)

In August 2007, Judge Kimball granted summary judgment for Novell on SCO's unfair competition and contract claims on several grounds. (Order at 63-65, 102, Dkt. No. 377.) Judge Kimball ruled that even if SCO owned the copyrights, Novell would be entitled to summary judgment on unfair competition because "there is no evidence that Novell's public statements

[1] SCO's contract and unfair competition claims include other theories not at issue in this motion; references to these claims herein are limited to the "false assertion of copyright ownership" claim.

were based on anything but its good faith interpretation of the contracts." (*Id.* at 64.) He also held that breach of the implied covenant requires "objectively unreasonable conduct," and that "there is no evidence to demonstrate that Novell's position was contrary to its own understanding of the contractual language or objectively unreasonable…." (*Id.* at 65.)

In November 2008, Judge Kimball entered a final judgment dismissing SCO's unfair competition and contract claims (as well as other claims) per his prior rulings. (Final Judgment at 1, Dkt. No. 565.) SCO appealed *other* rulings, but did *not* challenge the dismissal of its contract and unfair competition claims or the ruling that SCO failed to present evidence that Novell lacked an objectively reasonable, good faith basis for stating that SCO did not own the copyrights.[2] The Tenth Circuit did not reverse that ruling; on the contrary, it held that Novell had "powerful arguments" to support its position on copyright ownership, and that this issue presented "ambiguities" that "could legitimately be resolved in favor of either party." *SCO Group, Inc. v. Novell, Inc.*, 578 F.3d 1201, 1215 (10th Cir. 2009).

II. THE LAW OF THE CASE AND THE MANDATE RULE BAR SCO FROM DISPUTING THAT NOVELL'S STATEMENTS WERE REASONABLE.

The law of the case doctrine bars relitigation of "issues previously decided, either explicitly or by necessary implication." *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1183 (10th Cir. 1995) (citation omitted).[3] This doctrine precludes relitigation of issues decided for one claim that are relevant to a different claim. *See St. Paul Fire & Marine Ins. Co. v. Heath*

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[2] Copies of SCO's appellate briefs, as well as Judge Kimball's summary judgment ruling and the Tenth Circuit decision, were included with Novell's Motion In Limine No. 1. SCO's appellate briefs did not even mention Judge Kimball's determination that Novell had a reasonable, good faith basis for its statements.

[3] *See Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250-251 (D.C. Cir. 1987) ("legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time").

Fielding Ins. Broking Ltd., No. 91 Civ. 0748 (MJL), 1995 U.S. Dist. LEXIS 19847, at *30-35 (S.D.N.Y. Dec. 30, 1995) (Ex. 4A) (law of the case bars negligent misrepresentation claim in view of prior dismissal of negligence claim). It applies to an alternate ground for a ruling, *United States v. Sanchez*, 35 F.3d 673, 678 (2d Cir. 1994), as well as to a ruling that the evidence is legally insufficient to support a claim. *Rohrbaugh*, 53 F.3d at 1183 (applying law of case to ruling that evidence was legally insufficient to show that plaintiff was a foreseeable buyer whom defendant had a duty to warn). This doctrine is subject to three "exceptionally narrow" exceptions for (1) substantially different evidence in a later trial; (2) intervening change in controlling legal authority; or (3) a clearly erroneous decision whose application would work a manifest injustice. *United States v. Alvarez*, 142 F.3d 1243, 1247 (10th Cir. 1998).[4]

Here, Judge Kimball dismissed SCO's contract and unfair competition claims based on his ruling that SCO presented no evidence that Novell lacked an objectively reasonable, good faith basis for its statements regarding copyright ownership. SCO could have appealed this ruling, but failed to do so. None of the narrow exceptions apply. Therefore, Judge Kimball's ruling is binding law of the case that bars SCO from relitigating this ruling.

The mandate rule requires the same result. As this Court held in denying Novell's Rule 60(b) motion, "the mandate rule prevents a court from considering an argument that could have been, but was not, made on appeal." (Order at 3, Dkt. No. 620.) SCO could have argued on appeal that it had presented evidence that Novell lacked a good faith basis for its statements. SCO did not make this argument. Therefore, the Court should preclude SCO from presenting any evidence or argument that Novell did not have an objectively reasonable, good faith basis for its statements regarding copyright ownership.

[4] *See also United States v. Alexander*, 106 F.3d 874, 878 (9th Cir. 1997) (district court's failure to apply law of the case to previous ruling constituted abuse of discretion where none of the exceptions were met); *Thomas v. Bible*, 983 F.2d 152, 155 (9th Cir. 1993) (same).

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Respectfully submitted,

By: /s/ Sterling A. Brennan
WORKMAN NYDEGGER

MORRISON & FOERSTER LLP

Attorneys for Defendant and
Counterclaim-Plaintiff Novell, Inc.

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