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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 **NOVELL'S MOTION IN LIMINE NO. 8 TO PRECLUDE SCO FROM RELYING ON NOVELL'S APPLICATIONS FOR COPYRIGHT REGISTRATION** Judge Ted Stewart
AND RELATED COUNTERCLAIMS.	

In paragraph 91 of its operative Second Amended Complaint (Dkt. 96), SCO alleges that "Novell … slandered SCO's title … to its … copyrights," *inter alia,* "by making false oaths of ownership to public officials." SCO has reference to declarations made by Novell in support of applications for copyright registration that Novell made to the United States Copyright Office, pursuant to 17 U.S.C. § 409. By this motion, Novell seeks an order precluding SCO from relying on Novell's applications to support its slander of title claim. This motion is made pursuant to Federal Rule of Evidence 105, and on the ground that Novell's applications are a privileged exercise of its First Amendment right to petition the Government.

I. ARGUMENT

The right "to petition the Government" is enshrined in the First Amendment to the United States Constitution.

> In recognition of this right, the United States Supreme Court has held that … organizations are immune from liability under antitrust laws for actions constituting petitions to the government. [Citations.] Over the years, courts have extended this immunity doctrine, referred to as the *Noerr-Pennington* Doctrine [citation], to "protect … against tort claims as well as antitrust claims." *Searle v. Johnson*, 646 P.2d 682, 684 (Utah 1982).

Anderson Devel. Co. v. Tobias, 2005 UT 36, ¶ 26, 116 P.3d 323, 332. "An exception to this immunity doctrine exists for actions constituting a 'sham.'" *Id.* at ¶ 27, 116 P.3d at 332. A "sham" petition, as opposed to a genuine petition, is one that is both objectively baseless and subjectively made for an improper purpose. *See Professional Real Estate Inv., Inc. v. Columbia Pictures Ind., Inc.*, 508 U.S. 49, 57, 113 S. Ct. 1920 (1993) ("an objectively reasonable effort to litigate cannot be sham regardless of subjective intent").

"[T]he right to petition extends to all departments of the Government," including "administrative agencies," *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510, 92 S. Ct. 609 (1972), such as the United States Copyright Office. Novell was exercising

this right when it applied to register its copyrights. Thus unless Novell's applications were a sham, no tort liability can arise from them. *See Anderson*, 2005 UT at ¶ 26.

Judge Kimball granted Novell summary judgment on the copyrights ownership issue. (Dkt. 377 at 62.) Although that grant was reversed on appeal, the fact that Judge Kimball made it demonstrates that Novell's assertions of ownership in support of its applications to register those copyrights were not objectively baseless. *See Harris Custom Builders Inc. v. Hoffmeyer*, 834 F. Supp. 256, 261-62 (N.D. Ill. 1993) ("An action that is well enough grounded, factually and legally, to survive a motion for summary judgment is sufficiently meritorious to lead a reasonable litigant to conclude that they had some chance of success on the merits"). Moreover, the Tenth Circuit has ruled:

> If we were to interpret the contract based initially only on the APA itself—without regard to Amendment No. 2—we agree that its language unambiguously excludes the transfer of copyrights. … [¶] … [T]he contractual language of Amendment No. 2 concerning the transfer of copyrights is ambiguous.

SCO Group, Inc. v. Novell, Inc., 578 F.3d 1201, 1210 (10th Cir. 2009). The Tenth Circuit further observed: "Novell has powerful arguments to support its version of the transaction." *Id.* at 1215. Those determinations likewise conclusively establish Novell's objective reasonableness.[1] Thus the sham exception to the petitioner's immunity does not apply, *see Professional Real Estate*, 508 U.S. at 57 ("an objectively reasonable effort … cannot be sham"), and the First Amendment bars SCO from relying on Novell's privileged applications to support its slander of title claim.

Here in the Tenth Circuit there is a wrinkle. The Tenth Circuit has stated that outside the antitrust context, "the Petition Clause protects objectively reasonable lawsuits from being enjoined, but requires a court to look at the underlying statute to determine whether the initiator

[1] In a companion motion in limine (no. 4), Novell demonstrates at greater length that its objective reasonableness is law of the case.

of the suit can be held liable." *Cardtoons v. Major League Baseball Players Ass'n,* 208 F.3d 885, 890 n. 4 (10th Cir. 2000) (en banc). However, that statement "is dicta," and "[n]umerous other courts have … held that the Petition Clause places limits on liability for the commission of a range of common law torts." *Scott v. Hern,* 216 F.3d 897, 914 & n. 9 (10th Cir. 2000) (citing cases); *see also Sosa v. DirecTV, Inc.*, 437 F.3d 923, 938 (9th Cir. 2006) ("we are doubtful that … *Cardtoons* survives the Supreme Court's decision" in *BE & K Construction Co. v. NLRB,* 536 U.S. 516, 525, 122 S. Ct. 2390 (2002)). Even if this Court were to apply the criticized dicta from *Cardtoons,* the Utah Supreme Court is the final authority on "the underlying statute" (viz., Utah defamation law) to which *Cardtoons* says the Court should look "to determine whether the initiator … can be held liable," and the Utah Supreme Court has apparently recognized that the petitioner's immunity and correlative sham analysis applies to *all* Utah torts. *See Anderson,* 2005 UT at ¶ 26, 116 P.3d at 332; *see also Scott,* 216 F.3d at 915 (finding *Cardtoons* dicta inapposite where Colorado courts had already "articulated an objectively-reasonable-litigation standard" for state law tort).

II. CONCLUSION

Because Novell's constitutionally-protected applications for copyright registration cannot give rise to tort liability, SCO cannot rely on them to support its slander of title claim.

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Respectfully submitted,

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