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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. 11 TO EXCLUDE EVIDENCE OF SUBSTANTIAL PERFORMANCE** Judge Ted Stewart
AND RELATED COUNTERCLAIMS.	

SCO's second and third claims for relief in its Second Amended Complaint are for breach of the covenant of good faith and fair dealing and specific performance. (Dkt. 96 at ¶¶ 99, 107.) To prevail on either claim SCO must prove that it substantially performed its own obligations under the Asset Purchase Agreement ("APA"). However, the law of this case is that SCO did not. Thus Novell moves the Court to preclude SCO from arguing or introducing evidence to the contrary.

I. ARGUMENT

To recover damages for breach of contract or obtain specific performance, SCO must show that it substantially performed its own obligations under the APA. Cal. Civ. Code § 3392 ("Specific performance cannot be enforced in favor of a party who has not fully and fairly performed"); Judicial Council of Cal. Civ. Jury Instr. 303 ("To recover damages … for breach of contract, [plaintiff] must prove … [t]hat [plaintiff] did all, or substantially all, of the significant things that the contract required").[1] SCO never pled that it substantially performed, and as explained below, the law of this case is that it did *not.*

In this case, Judge Kimball found, and the Tenth Circuit affirmed, that:

> SCO was required to follow the additional restrictions imposed by Amendment No. 2 on transactions that concern buy-outs. SCO did not comply with these terms. … SCO was without authority to enter into the 2003 Sun Agreement under Amendment 2, Section B, of the APA.

(Dkt. 542 at 36.) *SCO Group, Inc. v. Novell, Inc.*, 578 F.3d 1201, 1227 (10th Cir. 2009). That adjudication is now law of the case. *See Midland Valley R. Co. v. Jones*, 115 F.2d 508, 509 (10th Cir. 1940) ("The decision of this court in the former appeal became the law of the case as to all questions of fact or matters of law decided therein")[2]; *see also Agostini v. Felton*, 521 U.S.

[1] Section 9.8 of the APA chooses California law. For convenient reference, the cited statute and jury instruction are reproduced in Exhibit 11A hereto.

[2] Some more recent Tenth Circuit opinions, apparently unaware that the issue had been decided by a prior panel, have stated: "Whether the 'law of the case' doctrine applies to questions of fact

203, 236, 117 S. Ct. 1997 (1997) ("Under this doctrine, a court should not reopen issues decided in earlier stages of the same litigation").

Substantial performance requires that any "departure from the terms of the contact … be such as may be easily remedied or compensated." *Posner v. Grunwald-Marx, Inc.*, 56 Cal. 2d 169, 186–87, 363 P.2d 313 (1961). "[U]nder certain circumstances the court should declare as a matter of law that there has been a failure of substantial performance." *Austin v. Brown Bros. Co.*, 164 P. 95, 97 (Idaho 1917). Specifically, "where there exists no dispute as to material facts, and under those facts reasonable men may not arrive at different conclusions, the question of substantial performance becomes a matter of law for the court to decide." *Lawless, Adm'x v. Merrick*, 227 Md. 65, 72, 175 A.2d 27 (1961); *see also Pressey v. McCornack*, 84 A. 427, 428 (Pa. 1912) ("if the undisputed testimony shows a substantial variance, not authorized by the owner, and made without his knowledge or assent, it is the duty of the court to so declare as a matter of law"); *cf. Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1530 (9th Cir. 1993) *rev'd on other grounds*, 510 U.S. 517 (1994) ("whether a breach is material … need not be left to the trier of fact where, as here, the underlying facts are undisputed and only the legal conclusion to be drawn from those facts remains in doubt").

Here, although Judge Kimball awarded some damages to prevent SCO's unjust enrichment, he concluded that "the court could not return the parties to the same position they were in prior to the 2003 Agreement" because "Sun [had] already received the benefits of the agreement [with SCO] and developed and marketed a product based upon those benefits." (Dkt. 542 at 37.) Such harms are not easily remedied by damages. *See, e.g., Acumed LLC v. Stryker*

… is unclear." *See, e.g., Johnson v. Champion*, 288 F.3d 1215, 1226 (10th Cir. 2002). Here, because the Tenth Circuit affirmed not just an underlying holding but Judge Kimball's judgment based thereon, even if law of the case did not apply, issue preclusion would. *See Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 466, 102 S. Ct. 1883 (1982) ("once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties").

Corp., 551 F.3d 1323, 1329 (Fed. Cir. 2008) ("Adding a new competitor to the market may create an irreparable harm").

Further, because SCO is now bankrupt and so cannot pay (or at least has not paid) the damages Judge Kimball awarded, the irreparability of Novell's injury is "virtually self-evident." *Cf. Hendricks v. Bank of America*, 408 F.3d 1127, 1141 (9th Cir. 2005) (affirming finding of irreparable injury where defendants were in "serious financial straits"). In addition to establishing that SCO did not substantially perform, and thus is precluded from obtaining *any* relief on its breach of contract claims, SCO's failure to pay the damages awarded by Judge Kimball is an expressly enumerated statutory bar to specific performance, in particular. *See* Cal. Civ. Code § 3392 ("Specific performance cannot be enforced in favor of a party who has not fully and fairly performed … except where his failure to perform is only partial, and either entirely immaterial, or capable of being fully compensated, *in which case specific performance may be compelled, upon full compensation being made for the default*" [emphasis added]).

II. CONCLUSION

Because the law of this case is that SCO did not substantially perform its obligations, evidence purporting to show the contrary should be excluded.

DATED: February 8, 2010

Respectfully submitted,

By: /s/ Sterling A. Brennan
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