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Attorneys for Plaintiff, The SCO Group, Inc.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

<p>THE SCO GROUP, INC., by and through the Chapter 11 Trustee in Bankruptcy, Edward N. Cahn, Plaintiff/Counterclaim-Defendant, vs. NOVELL, INC., a Delaware corporation, Defendant/Counterclaim-Plaintiff.</p>	<p>SCO'S MOTION IN LIMINE NO. 5 TO EXCLUDE STATEMENTS MADE BY MICHAEL ANDERER AS AN INDEPENDENT CONTRACTOR FOR SCO</p> <p>Civil No. 2:04 CV-00139</p> <p>Judge Ted Stewart</p>
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Plaintiff, The SCO Group, Inc. (“SCO”), respectfully moves for an order in limine excluding statements made by Michael Anderer as an independent contractor for SCO.

ARGUMENT

At trial, Novell may reference or offer statements made by Michael Anderer concerning the un-amended APA when he was an independent contractor for SCO.

In 2003, SCO engaged Mr. Anderer for about a year as an outside consultant under an Independent Contractor Agreement with his firm S2 Strategic Consulting, LLC. (Ex. 1; Ex. 2 at 72; Ex. 3 at 12-13, 86.) That Agreement governed his engagement and fees. (Ex. 1.) His services pursuant to the Agreement were largely limited to acting as liaison with Microsoft Corporation in the early negotiations of the SCOSource agreement with that company. (Ex. 2 at 76; Ex. 3 at 11-12, 86-87.)

There is no evidence that Mr. Anderer acted as SCO’s agent during the brief period of his engagement. (Ex. 3 at 11-12, 86.) On the contrary, all the evidence shows that he acted as an independent contractor, who played a limited role in one transaction. (Ex. 1; Ex. 2 at 72; Ex. 3 at 12-13, 86.) There is no evidence that Mr. Anderer was authorized to act on SCO’s behalf beyond this agreement, had an employment relationship with SCO, or received any salary for his services. Mr. Anderer did not have any authority to bind or speak for SCO even in its negotiations with Microsoft. (Ex. 4 at 125.) Instead, he merely brokered the early negotiations and ceased playing even this limited role when the process advanced to final negotiations, which were handled directly by SCO. (Ex. 2 at 76; Ex. 3 at 15; Ex. 4 at 125.)

Mr. Anderer himself acknowledged at his deposition that he did not have an interest in or fully understand even the terms of the Microsoft contract. (Ex. 3 at 24-25, 62-63, 76-77.) With

respect to statements he made unrelated to the Microsoft negotiations, Mr. Anderer made them at his own discretion, to “put his two cents in,” and not at the request or direction of SCO. (Ex. 2 at 76; Ex. 3 at 109-10; Ex. 4 at 125.) Indeed, Mr. Anderer also acknowledged that such statements reflected the legal interpretations of a layman, reflected his own musings based on incomplete information, and were largely disregarded by SCO. (Ex. 3 at 86-87, 91-92.)

“Evidence Rule 801(d)(2)(D) provides that a statement is not hearsay if it is ‘offered against a party and is . . . a statement by the party’s agent . . . concerning a matter within the scope of the agency . . . made during the existence of the relationship.’” Merrick v. Farmers Insurance Group, 892 F.2d 1434, 1440 (9th Cir. 1990). The burden of proving the elements of the rule rests on the proponent of the evidence. Id. Here, Novell cannot meet its burden because there is no evidence even for the threshold agency requirement.

If a proffered statement was made by an independent contractor, as opposed to an agent, the statement falls outside Rule 801(d)(2)(D) and remains inadmissible hearsay. Id. (concluding the district court “properly rejected” evidence because proponent failed to establish that declarants were agents “as opposed to independent contractors”); Coleman v. Wilson, 912 F. Supp. 1282, 1296 (E.D. Cal. 1995) (inadmissibility “turns on whether [declarants] were agents”) (citation omitted); Powers v. Coccia, 861 A.2d 466, 470-01 (R.I. 2004) (excluding statements because declarants “were independent contractors, and their statements do not fall within the parameters of Rule 801(d)(2)(D)”); 5 Weinstein’s Federal Evidence § 801.33[2][b] at 801-65, 67 (2d ed. 2002) (“statements of a party’s independent contractors typically do not come within Rule 801(d)(2)(D)”). Here, because Mr. Anderer’s relationship with SCO was governed by an

independent contractor agreement and there is no evidence of an agency relationship, his statements should be excluded without more.

Some courts consider certain factors in determining whether an agency relationship in fact existed. These factors include whether the consultant had the authority to bind or speak for the client, whether the client had control over the consultant or directed his work in a meaningful way, whether the conclusions the consultant drew were not at his discretion, and whether the consultant was paid a salary. See Westfed Holdings, Inc. v. United States, 55 Fed. Cl. 544, 564-65 (Fed. Cl. 2003) (statements of consultants were not admissions of client because proponent failed to provide evidence that factors were met); Sabel v. Mead Johnson & Co., 737 F. Supp. 135, 139 (D. Mass. 1990) (statements inadmissible because, among other things, consultant did not have “speaking authority” or possess “the power to act” on client’s behalf). Even considering these factors, Mr. Anderer’s statements fall outside Rule 801(d)(2)(D), because there are no facts suggesting that he acted as an agent for SCO.

In addition, Mr. Anderer’s statements are irrelevant. Rule 401 defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Telum, Inc. v. E.F. Hutton Credit Corp., 859 F.2d 835 (10th Cir. 1988). There is no evidence that Mr. Anderer has any personal knowledge of the negotiations or intent of the APA. Moreover, by his own account, he formed his lay opinions without considering Amendment No. 2, which he “never saw,” or other relevant documents. (Ex. 3 at 89-92.)

Accordingly, SCO requests that the Court enter an order in limine excluding statements Mr. Anderer made when he was an independent contractor for SCO.

DATED this 8th day of February, 2010.

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CERTIFICATE OF SERVICE

I, Edward Normand, hereby certify that on this 8th day of February, 2010, a true and correct copy of the foregoing **MOTION IN LIMINE NO. 5** was filed with the Court and served via electronic mail to the following recipients:

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