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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. 9 TO PRECLUDE SCO FROM  
CONTESTING THAT AGREEMENTS  
THAT POST-DATE THE APA MAY  
CONSTITUTE SVRX LICENSES**

Judge Ted Stewart

Judge Kimball held, as a matter of law, that “SVRX Licenses” in the Asset Purchase Agreement (“APA”) are not limited to license agreements in existence at the time of the APA. SCO appealed this issue and the Tenth Circuit upheld Judge Kimball’s determination. Therefore, the law of the case precludes SCO from presenting any evidence or argument contrary to this ruling.

## **I. UNDISPUTED FACTS**

In October 2006, Novell moved for summary judgment on its claims for breach of fiduciary duty and conversion based on SCO’s retention of certain payments SCO received under its 2003 license agreements with Sun Microsystems and Microsoft Corporation that Novell contended constituted “SVRX Royalties” under the APA. (Mem. ISO Novell’s Mot. for Partial Summ. J. or Preliminary Inj., Dkt. No. 155 (under seal).) In its opposition and cross motion for partial summary judgment, SCO argued that Novell’s interest in SVRX Royalties was limited to SVRX Licenses in existence at the time of the APA. (Mem. In Opp’n to Mot. for Partial Summ. J. or Preliminary Inj. at 35-37, Dkt. No. 183 (under seal).) Novell replied that there is no basis in the APA for any temporal limitation on SVRX Licenses. (Novell’s Reply to Opp’n at 4-5, Dkt. No. 205 (under seal).)

In August 2007, Judge Kimball granted summary judgment for Novell on its claims for breach of fiduciary duty and conversion. (Order at 96, Dkt. No. 377.) Judge Kimball considered SCO’s argument that the term “SVRX Licenses” refers only to licenses in existence at the time of the APA and rejected it as a matter of law, concluding that “there is no limitation in the APA to ‘then-existing’ SVRX Licenses.” (*Id.* at 90-93.) SCO appealed this issue and the Tenth Circuit affirmed Judge Kimball’s ruling with respect to SCO’s liability from its 2003 agreement with Sun. In so doing, the Tenth Circuit “agree[d] with the district court that agreements that post-date the APA may constitute SVRX Licenses.” *The SCO Group, Inc. v. Novell, Inc.*, 578 F.3d 1201, 1227 (10th Cir. 2009).

Under the 10th Circuit’s limited mandate, the only issue to be resolved regarding “SVRX Licenses” is whether that term refers to “all three types of agreements bearing upon the licensing of SVRX technology — software agreements, sublicensing agreements, and product supplement agreements (or Product Schedule Licenses) — or just to product supplement agreements.” *SCO Group*, 578 F.3d at 1219.

**II. SCO SHOULD BE PRECLUDED FROM CONTESTING THAT SVRX LICENSES MAY INCLUDE POST-APA AGREEMENTS**

The law of the case doctrine precludes SCO from contesting matters that have been decided as a matter of law. *Mason v. Texaco, Inc.*, 948 F.2d 1546, 1553 (10th Cir. 1991) (“[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case”) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). This principle applies to all “issues previously decided, either explicitly or by necessary implication.” *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1183 (10th Cir. 1995) (citation omitted).

In this case, Judge Kimball explicitly decided that SVRX Licenses are not limited to agreements in existence at the time of the APA. The Tenth Circuit affirmed this ruling, leaving open only the issue of whether SVRX License includes all three types of agreements bearing on the licensing of SVRX technology, or are instead limited to just product supplement agreements. Therefore, the Court should preclude SCO from contesting that license agreements that post-date the APA may constitute “SVRX Licenses.”

DATED: February 8, 2010

Respectfully submitted,

By:           /s/ Sterling A. Brennan            
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