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**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,</p> <p style="text-align: center;">Plaintiff/Counterclaim-Defendant,</p> <p>vs.</p> <p>NOVELL, INC., a Delaware corporation,</p> <p style="text-align: center;">Defendant/Counterclaim-Plaintiff.</p>	<p>SCO'S OPPOSITION TO "NOVELL'S MOTION IN LIMINE NO. 1 TO EXCLUDE EVIDENCE AND ARGUMENT CONCERNING CLAIMS NOT INCLUDED IN SCO'S APPEAL OR THE TENTH CIRCUIT'S LIMITED MANDATE"</p> <p>Civil No. 2:04 CV-00139</p> <p>Judge Ted Stewart</p>
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Novell's motion is not a proper motion in limine,¹ it incorrectly characterizes the Tenth Circuit's decision, and it is inconsistent with Novell's own statements regarding the Tenth Circuit's decision.

In December 2009, Novell asked this Court to dismiss the remanded slander of title claim by resolving Novell's motion for summary judgment on special damages. Novell thus had concluded that the Tenth Circuit had remanded for trial of the slander of title claim. Novell also specifically represented to the Bankruptcy Court in December 2009 that the trial in this Court concerns whether "Novell slandered SCO's title." (Ex. A at 2.) In addition, this Court has previously stated that "the issue of ownership of title and slander of title will be decided in this action." (Ex. B at 15.) The Court's statement and Novell's prior statements are correct, and Novell's new position in this motion is not.

1. The remand on copyright ownership requires a trial on SCO's claims which had been erroneously dismissed solely on the basis of the court's copyright ownership ruling. The very motion for summary judgment that Judge Kimball ruled upon, that SCO appealed, and that the Tenth Circuit reversed was a motion expressly on SCO's claims for slander of title and specific performance. Judge Kimball ruled that "Novell is entitled to summary judgment on SCO's first claim for relief for slander of title because SCO cannot demonstrate that Novell's assertions of copyright ownership are false." *SCO Group, Inc. v. Novell, Inc.*, Civil No. 2:04CV139DAK, 2007 WL 2327587, at *62 (D. Utah Aug. 10, 2007). That was the one and only basis for dismissal of the slander of title count.

¹ A motion in limine seeks an advance ruling on the admissibility of evidence, whereas this motion seeks the equivalent of a summary judgment but was not brought within the various procedural requirements of Fed. R. Civ. P. 56.

The final judgment specifically incorporated this summary judgment opinion as the basis for dismissal of the slander of title claim, as well as other claims.² (Ex. C.) Thus, where SCO appealed the final judgment and successfully argued that the determination of copyright ownership was in error, adjudication is required of the claims that rested solely on that summary judgment decision. As the Tenth Circuit expressly recognized, the slander of title claim turned on the ownership issue. SCO Group, Inc. v. Novell, Inc., 578 F.3d 1201, 1207 (10th Cir. 2009). The mandate calls for a trial on the issue of copyright ownership, and it follows that all of SCO's legal claims whose resolution turned on that precise issue of copyright ownership are part of that mandate. See Procter & Gamble Co. v. Haugen, 317 F.3d 1121, 1129, 1132 (10th Cir. 2003) (district court properly resolved "issues that were necessarily implied" by the mandate, including claim that "part of the mandate might plausibly be read to have restored").

2. The Tenth Circuit's decision cannot be read as solely remanding on SCO's claim for specific performance. Novell asserts that the "Tenth Circuit remanded for trial on copyright ownership in connection with SCO's claim for specific performance and not in connection with any other claim." This assertion, the lynchpin of its motion, is not supported by any statement in the Tenth Circuit's opinion, or any statement in the appellate briefs. On the contrary, the Tenth Circuit remanded for trial on "(1) the ownership of the UNIX and UnixWare copyrights" and "(2) SCO's claim seeking specific performance." Novell's reading makes the first part of the remand a nullity.

² SCO will not pursue its claim for unfair competition as it relates to assertions of copyright ownership, because there were independent grounds for dismissal of that claim not appealed. SCO also agrees that its claims for copyright infringement and breach of the Technology Licensing Agreement are severed and not part of this trial. (See Novell Motion in Limine No. 10.) As discussed in response to Novell's Motion in Limine No. 4, the count for breach of the implied duty of good faith and fair dealing is not resolved.

In addition, SCO made perfectly clear that the appeal was not limited to the claim for specific performance, describing it on appeal “as an alternative count, relevant only if the copyrights had not already transferred.” (Ex. D at 19 (emphasis added).)³ Because the copyright ownership issue concerned whether SCO already owned the copyrights in question, the claim for specific performance would be reached only if SCO did not have present ownership of the copyrights, but had a valid legal right to compel their transfer. To say the only claim for trial is this second, alternative count for specific performance is to make a mockery of the Tenth Circuit’s decision.⁴

3. There is no inconsistency with this Court’s rejection of Novell’s Rule 60(b) motion. Finally, Novell seeks to analogize its position to the Court’s denial of Novell’s Rule 60(b) motion. The difference between the two issues is the difference between the party who did appeal and the party who did not. The Court denied Novell’s motion where “the argument raised by Defendant in its Motion could have, and should have, been raised on appeal.” (Ex. E at 4.) Novell filed no appeal at all. SCO did appeal, and raised the issue of copyright ownership, and thus the claims the District Court dismissed based on its disposition of that issue are properly now set for trial.

CONCLUSION

SCO respectfully submits, for the reasons set forth above, that the Court should deny Novell’s “Motion in Limine No. 1.”

³ In its opening brief on appeal, SCO explained that this District Court had rejected Novell’s initial attempts to dismiss SCO’s claim for slander of title on a motion to dismiss, and that Novell’s conduct in fact had constituted a “slander of title.” (Ex. F at 4, 11.) After discussing in text the factual basis for the slander of title claim (id. at 11-12), SCO proceeded to devote the bulk of its brief precisely to the issue of whether the District Court erred in finding as a matter of law that the copyrights had not transferred.

⁴ Indeed, in its recent filing with the United States Supreme Court for an extension of time within which to file a petition for a writ of certiorari, Novell stated that the Tenth Circuit’s reversal concerns “which if any copyrights were transferred” – an issue indisputably separate from the question of specific performance. (Ex. G at 6a ¶ 3 (emphasis added).)

DATED this 12th day of February, 2010.

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CERTIFICATE OF SERVICE

I, Brent O. Hatch, hereby certify that on this 12th day of February, 2010, a true and correct copy of the foregoing **SCO’S OPPOSITION TO “NOVELL’S MOTION IN LIMINE NO. 1”** was filed with the Court and served via electronic mail to the following recipients:

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