EXHIBIT A

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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 REPLY IN SUPPORT OF 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** Judge Ted Stewart
AND RELATED COUNTERCLAIMS.	

SCO does not dispute that it failed to ask the Tenth Circuit to reverse the judgment on SCO's slander of title claim and the copyright ownership portions of SCO's unfair competition and covenant of good faith claims. Nor does SCO dispute that the Tenth Circuit's mandate did not mention those claims. Nevertheless, SCO contends that Novell's motion should be denied because the mandate "necessarily implied" reversal of the slander of title judgment.[1] (SCO's Opposition to Motion In Limine No. 1 ("Opp.") at 2, Dkt. No. 669.)

SCO's argument fails for several reasons. First, SCO has not even attempted to argue that the Tenth Circuit reversed the judgment on the copyright ownership portions of SCO's unfair competition and covenant of good faith claims. Therefore, Novell's motion to preclude SCO from presenting evidence or argument on those claims should indisputably be granted.

Second, SCO bases its "necessarily implied" argument on *Procter & Gamble Co. v. Haugen*, 317 F.3d 1121 (10th Cir. 2003) ("*P&G II*"). In *P&G II*, however, the Tenth Circuit had *expressly reversed* the prior summary judgment on P&G's Lanham Act claim. *Id.* at 1124-25.

> The judgment of the district court is **AFFIRMED** as to all claims except the court's grant of summary judgment on P&G's Lanham Act claim and its dismissal of P&G's Utah tortious interference claim, as to which we **REVERSE** and **REMAND** for further proceedings in accordance with this opinion.

Procter & Gamble Co. v. Haugen, 222 F.3d 1262, 1280 (10th Cir. 2000) ("*P&G I*"). The Tenth Circuit held that its prior mandate could "plausibly be read" as restoring P&G's Lanham Act claim for contributory infringement. *P&G II*, 317 F.3d at 1129. This does not help SCO, as the Tenth Circuit mandate did not even mention—let alone reverse—the slander of title judgment.[2]

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[1] SCO also argues that Novell's motion is "equivalent" to a summary judgment motion. (Opp. 1 n.1.) SCO is wrong. In fact, Novell simply seeks to enforce the summary judgment that has *already* been granted, and which was not appealed by SCO or reversed by the Tenth Circuit.

[2] *P&G* is also inapposite because it involved a "general" mandate that left the district court "free to decide anything not foreclosed by the mandate." *P&G II*, 317 F.3d at 1125. This Court cited *P&G* for this point in holding that the Tenth Circuit's "very specific" mandate in this case is *not* a general mandate. (Ex. 6 at 4 n.9 [exhibits are attached to Novell's motion, Dkt. No. 627].)

Third, SCO asserts that the Tenth Circuit's reversal of the copyright ownership ruling requires reversal of the slander of title judgment because that ruling was the "only basis for dismissal of the slander of title count." (Opp. 1.) However, SCO did not make this argument in its appellate briefs, and the Tenth Circuit did not address it.[3] SCO's assertion about what the Tenth Circuit *might* have done *if* SCO had made this argument is pure speculation. Indeed, the Tenth Circuit might have affirmed the judgment on the ground that slander of title requires proof of malice, and SCO did *not* challenge Judge Kimball's ruling that "there is no evidence that Novell's public statements were based on anything but its good faith interpretation of the contracts."[4] (Ex. 5 at 64, Dkt. No. 377.)

Fourth, SCO contends that limiting the trial to SCO's claim for specific performance of Novell's alleged duty to transfer the copyrights would "make a mockery of the Tenth Circuit's decision" because SCO referred to this claim as "an alternative count." (Opp. 3.) However, SCO's specific performance claim requires the Court to decide whether the contracts entitle SCO to obtain ownership of the copyrights. This is the same issue that the Tenth Circuit analyzed in reversing Judge Kimball's summary judgment that the contracts did *not* require Novell to transfer the copyrights. *See The SCO Group*, 578 F.3d at 1214-19. Specific performance is an "alternative" only in that it applies if SCO has a contractual right to ownership that has not been perfected because Novell has not executed the required transfer documents. This does not change the fact that a trial concerning specific performance will necessarily require a decision on

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[3] SCO suggests that the Tenth Circuit did address this issue by "expressly recogniz[ing]" that slander of title "turned on" the ownership ruling. (Opp. 2.) But the Tenth Circuit's only reference to slander of title was in the statement of facts. *See The SCO Group, Inc. v. Novell, Inc.*, 578 F.3d 1201, 1207 (10th Cir. 2009). The Tenth Circuit did not analyze whether the slander of title judgment should be reversed, nor did it state (or even suggest) that it was reversing this judgment.

[4] Judge Kimball did not rely on this ruling in rejecting SCO's slander of title claim, but a judgment may be affirmed based on any ground supported by the record. *See, e.g., In re Courtesy Inns, Ltd., Inc.*, 40 F.3d 1084, 1087 (10th Cir. 1994).

whether SCO had a contractual right to ownership. Thus, holding a trial on copyright ownership in connection with specific performance is consistent with the Tenth Circuit's mandate to conduct a trial on "ownership of the UNIX and UnixWare copyrights" and "SCO's claim seeking specific performance." *See The SCO Group,* 578 F.3d at 1227.

Fifth, SCO notes that Novell had previously assumed that the trial would include slander of title. (Opp. 1.) SCO is correct, but Novell had *also* assumed that the trial would include its claim for SVRX royalties for other SCOsource licenses, since Judge Kimball's prior denial of that claim "turned on" the copyright ownership ruling that the Tenth Circuit reversed. Both assumptions are now obsolete in view of this Court's recent ruling that the trial will be narrowly limited to the four specific issues in the Tenth Circuit's mandate.

Finally, SCO argues that this Court's reasoning in denying Novell's Rule 60(b) motion does not apply here, as SCO "did appeal." (Opp. 3.) But SCO did *not* argue in its appellate briefs that the slander of title judgment should be reversed. Therefore, this Court's prior holding is directly on point. SCO "could have easily argued to the Tenth Circuit that if this Court's decision concerning the ownership of the copyrights was reversed, the decision concerning [slander of title] should similarly be reversed." (*See* Ex. 6 at 4, Dkt. No. 627.) SCO failed to do so. Thus, SCO should be barred from attempting to reopen a judgment that it did not challenge in its appeal and that was not reversed by the Tenth Circuit.

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Respectfully submitted,

By: /s/ Sterling A. Brennan

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