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*Attorneys for Plaintiff, The SCO Group, Inc.*

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

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| <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><b>SCO'S OPPOSITION TO "NOVELL'S MOTION IN LIMINE NO. 3 TO DETERMINE THAT SCO IS A LIMITED PURPOSE PUBLIC FIGURE"</b></p> <p>Civil No. 2:04 CV-00139</p> <p>Judge Ted Stewart</p> |
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Novell argues that SCO must prove that Novell has acted with “actual malice” because SCO was a “limited purpose public figure” when Novell made its statements at issue.<sup>1</sup> SCO has shown in opposition to Novell’s “Motion in Limine No. 2” that First Amendment standards should not apply to SCO’s claim for slander of title. If the First Amendment is found to apply to a slander of title claim and Novell’s statements qualify for heightened protection notwithstanding their commercial nature, the appropriate course would be to provide a special question on the verdict form. (See SCO Response to Motion in Limine No. 2.)

SCO will present at trial an abundance of evidence from which the jury can find that Novell acted with “actual” or “constitutional malice,” meaning knowledge that the statement was false or with reckless disregard for its truth.<sup>2</sup> This evidence includes Novell not having duly investigated or considered Amendment No. 2 to the Asset Purchase Agreement before making its initial slander, retracting its retraction after having undisputed knowledge of Amendment No. 2, and continuing on a campaign of slander through false copyright registrations, speeches and statements on its website that continue to the present day. The knowing falsity of Novell’s claim to have kept the copyrights will further be underscored by its delivery of the registrations to SCO, its letters to third parties stating the entire ownership interest of the UNIX business had been sold, its press release at the time of the sale saying its intellectual property rights had been transferred, and a pattern of conduct after the sale which reflected knowledge and understanding that the copyrights had been sold to SCO.

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<sup>1</sup> This is the “second half” to Novell’s Motion in Limine, concerning the First Amendment.

<sup>2</sup> If Novell’s motion means to suggest that SCO cannot present evidence of Novell’s common law malice, the law is that “common law malice does provide supporting evidence of constitutional actual malice in many ways,” such that “almost any evidence of common law malice may be *relevant and admissible* evidence on the constitutional actual malice issue.” D. Elder, Defamation: A Lawyer’s Guide § 7:3 (2009) (collecting extensive authority).

If the First Amendment is found to apply to a slander of title claim and that Novell's speech is not "commercial" in nature (see SCO's Response to Motion in Limine No. 2), the verdict form can be appropriately structured with a question concerning "constitutional malice." Indeed, even while denying Novell's motion, the Court may protect against the possibility of appellate reversal on this issue by having a special question on the verdict form asking whether the jury has found by clear and convincing evidence that Novell has acted either with actual knowledge of the falsity of their statements or with reckless disregard for their truth.

### **CONCLUSION**

SCO respectfully submits, for the reasons set forth above, that the Court should deny Novell's "Motion in Limine No. 3," but without prejudice to consideration of the issue with respect to jury instructions and the verdict form.

DATED this 19th day of February, 2010.

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**CERTIFICATE OF SERVICE**

I, Brent O. Hatch, hereby certify that on this 19th day of February, 2010, a true and correct copy of the foregoing **SCO'S OPPOSITION TO "NOVELL'S MOTION IN LIMINE NO. 3"** was filed with the court and served via electronic mail to the following recipients:

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