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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

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.	**SCO'S OPPOSITION TO "NOVELL'S MOTION IN LIMINE NO. 5 TO PRECLUDE SCO FROM RELYING ON NOVELL'S JUNE AND AUGUST 2003 STATEMENTS AS FACTUAL ASSERTIONS OF COPYRIGHT OWNERSHIP"** Civil No. 2:04 CV-00139 Judge Ted Stewart

Novell argues that as matter of law certain statements it made in June and August 2003, and published to the world, cannot be a basis for SCO's claim for slander of title because they do not constitute "factual assertions of copyright ownership."[1]

The Supreme Court long ago rejected the argument that a party can insulate itself from liability for a defamatory or slanderous statement simply by using the words "I think" or "in my opinion" in making the statement. The Court held that "expressions of 'opinion' may often imply an assertion of objective fact." Milkovich v. Lorain Journal Co., 497 U.S. 1, 11-19 (1990); accord Russell v. Thomson Newspapers, Inc., 842 P.2d 896, 902 (Utah 1992). The question is whether a "reasonable factfinder" could conclude that the statement at issue contains such a factual assertion. Milkovich, 497 U.S. at 21; see, e.g., Warren v. City of Junction City, 207 F. Supp. 2d 1216, 1220-21 (D. Kan. 2002); Computerized Thermal Imaging, Inc. v. Bloomberg, L.P., No. 1:00-CV98K, 2001 WL 670927, at *2 (D. Utah. Mar. 26, 2001).[2] In addition, as Novell acknowledges, its statements cannot be assessed in a vacuum. All of Novell's statements after May 28, 2003, must be considered against the backdrop that on that date, Novell indisputably did assert its ownership over the copyrights.

June 6, 2003. Novell publishes a press release admitting, as Novell itself emphasizes (at 2), that Amendment No. 2 "appears to support SCO's claim that ownership of certain copyrights

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[1] This motion is the first part, with motion no. 6, of Novell's two-part motion. The motions address the same subject matter and apply the same law, they just address different statements. Insofar as Novell's motions seek a ruling that certain of the slanderous statements are not actionable, that is a motion for partial summary judgment that was required to have been brought – like Novell's other summary judgment motions – by April 20, 2007, the deadline for dispositive motions.

[2] Novell argues for the proposition that whether a statement is "reasonably capable of a wrongful meaning" is a question of law for the Court, but the cited cases address the discrete and particular question of whether "a statement is capable of sustaining a defamatory meaning," which is a term of art that means a statement "impeaches an individual's honesty, integrity, virtue or reputation and thereby exposes the individual to public hatred, contempt, or ridicule." West v. Thomson Newspapers, 872 P.2d 999, 1008 (Utah 1994). Those questions are not at issue here.

for UNIX did transfer to SCO in 1996." SCO does not assert that this statement constitutes slander of title. The June 6, 2003 press release, however, together with the entire chain of Novell publications, are independently relevant to show Novell's intent and recklessness in a making its initial assertion of copyright ownership on May 28, 2003, and then "retracting the retraction" after the June 6, 2003 press release. Novell made the claim of ownership, then retracted it several days later, then privately retracted its retraction, then later published its retraction of its retraction. The jury is more than entitled to infer Novell's capriciousness and actual knowledge of falsity from these facts.

Novell's June 6 letter is also relevant. Novell made the letter public in December 2003. Novell's June 6 letter responds to a letter that SCO had sent the same day. At the outset of its letter, SCO asserted: "As you know, your accusation that SCO does not own the UNIX copyrights was false and was without a good faith basis for belief." (Novell Ex. B.) In its brief letter in response, Novell asserted: "Your letter contains absurd and unfounded accusations against Novell and others." (Novell Ex. A.) Novell now argues that it did not mean to say that SCO's claim to own the UNIX copyrights was "absurd and unfounded," but that is not the question. The relevant question is: Could a reasonable factfinder conclude that Novell was saying that SCO's ownership claim was "absurd and unfounded"? Yes. Novell did not seek to limit its assertion in any way, or contend that only some of SCO's statements in its letter were false, or in any other way rule out that it was contending that SCO's claim to own the copyrights was unfounded. These are issues for the jury to resolve.

June 26, 2003. In its letter to SCO dated June 26, 2003, which Novell also published in December 2003, Novell addresses certain statements that SCO had made. In particular, Novell took issue with SCO's statements it "owns 'all rights to the UNIX and UnixWare technology,'"

and SCO's statement on its website that "SCO owns 'the patents, copyrights and core technology associated with the UNIX System.'" (Novell Ex. C.) After quoting SCO's foregoing statements, Novell then asserted: "SCO's statements are simply wrong." This is the relevant question: Could a reasonable factfinder conclude that Novell was saying that SCO was "simply wrong" in claiming to own the copyrights? Yes. Novell now argues that it qualified its assertion by acknowledging its earlier admission in its June 6 press release, yet Novell's argument has always been that its admission is not really an admission, but rather just a statement what Amendment No. 2 merely "appears" to do. Similarly, Novell points to its statement that Amendment No. 2 "raises as many questions about copyright transfers as it answers," but Novell's argument has been that the lack of clarity in Amendment No. 2 must mean that SCO cannot own the copyrights. These, too, are issues for the jury.

August 4, 2003. In this letter to SCO, Novell states: "We dispute SCO's claim to ownership of these copyrights." (Novell Ex. D.) This statement alone is the equivalent of claiming that SCO does not own the copyrights, and Novell's argument to the contrary is inexplicable. Novell also goes on to state that as of the time of the letter, "SCO's claim to ownership of any copyrights in UNIX technologies must be rejected, and ownership of such rights instead remains with Novell." (Id.) Novell tries to argue that it qualified these statements by acknowledging that its view was contingent on SCO making some showing of need, but this argument is disingenuous. Novell makes the unequivocal statement that "ownership of such rights instead remains with Novell" – necessarily meaning that, as of that time, Novell had been and continued to be the owner of the copyrights. In sum, a reasonable factfinder again could easily conclude from Novell's statements that it was claiming to be the owner of the copyrights.

CONCLUSION

SCO respectfully submits, for the reasons set forth above, that the Court should deny Novell's "Motion in Limine No. 5."

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. 5"** was filed with the court and served via electronic mail to the following recipients:

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