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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. 12 TO EXCLUDE CERTAIN TESTIMONY FROM WILLIAM BRODERICK FOR LACK OF PERSONAL KNOWLEDGE AND VIOLATION OF PAROL EVIDENCE RULE** Civil No. 2:04 CV-00139 Judge Ted Stewart

Novell's Motion in Limine No. 12, as well as Motions Nos. 13 to 19, which are based on the same premise, are flatly in the face of the Tenth Circuit's decision in this case.[1]

1. Under the Tenth Circuit Decision, Testimony Regarding the Intent of the Parties Clearly Is Relevant. The witnesses are trial are entitled to speak to the parties' intent as to the transaction memorialized by the APA and Amendment No. 2, which includes the parties' intent in 1995. The Tenth Circuit held that "Amendment No. 2 must be considered together with the APA as a unified document." SCO Group, Inc. v. Novell, Inc., 578 F.3d 1201, 1211 (10th Cir. 2009). The Tenth Circuit explained that "because we cannot exclude the possibility that Amendment No. 2 was designed to restore the language of the transaction to the parties' actual intent during the business negotiations over the deal, such testimony is not irrelevant." SCO, 578 F.3d at 1217. "SCO's extrinsic evidence of the business negotiators' intent concerning the transaction ought to be admissible," id. at 1210-11, concerning the "interpretation of the combined instrument." Id. at 1211. The Court cited testimony from several of SCO's witness, emphasizing that two of the witnesses, Robert Frankenberg and Ed Chatlos, were "from *Novell's* leadership." Id. at 1206, 1216-17. The Court quoted Mr. Chatlos's testimony at length. Id. at 1206. The Court also quoted and relied upon Mr. Frankenberg's testimony even though he did not draft the APA and did not negotiate the specific terms of Amendment No. 2.

The Tenth Circuit further held that "course of performance evidence may be used to interpret an ambiguous contractual provision," quoting the California law that "practical construction placed by the parties upon the instrument is the best evidence of their intention." Id. at 1217 (quotations, citations, and brackets omitted). The Court cited as relevant examples of such evidence "Novell's modification of copyright notices on certain UnixWare source code,"

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[1] Novell's motion is the first of eight similar motions (Motions Nos. 12-19) regarding witness testimony. In the interests of economy, SCO addresses the relevant witness testimony in its memoranda in opposition to those motions, but cross-references the controlling law set forth herein.

"certain statements related to the transfer of intellectual property within transition documents following the deal," and "the publication of a press release in 1995 stating that 'SCO will acquire Novell's UnixWare business and UNIX intellectual property.'" Id.[2]

Novell's argument against "parole evidence" is predicated on excluding testimony that contradicts language of the APA that was changed by Amendment No. 2. Amendment No. 2 was needed precisely because the unamended APA may not have properly reflected the parties' intent, as the Tenth Circuit expressly recognized. SCO, 578 F.3d at 1217. In sum, in contending that SCO's witnesses cannot offer testimony that "contradicts" the language of the original APA isolated from Amendment No. 2, Novell has it exactly backwards.

2. William Broderick Is Competent to Testify Regarding the Parties' Intent and Performance Under the Contract. The witness at issue, William Broderick, clearly possesses personal knowledge of relevant facts and issues. He has personal knowledge of facts that concern "the business negotiators' intent concerning the transaction" or the parties' "course of performance," which includes facts from which the jury can infer such intent or performance.[3] Mr. Broderick was a contract manager in the UNIX licensing group at Novell and Santa Cruz (Ex. 1 at ¶¶ 6-7), and remains the contract manager with SCO to this day. He was also a member of the Novell APA Transition Team charged with implementing the contract between the parties following the execution of the APA. (Id. ¶ 10.) He testified:

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[2] The relevant extrinsic evidence includes "the circumstances surrounding the making of the agreement, including the object, nature and subject matter of the writing, and the preliminary negotiations between the parties." Universal Sales Corp., Ltd. v. Cal. Press Mfg. Co., 20 Cal. 2d 751, 761 (1942); Cal. Civ. Code § 1647. All such extrinsic evidence is relevant. Halicki Films, LLC v. Sanderson Sales and Mktg., 547 F.3d 1213, 1223 (9th Cir. 2008); Morey v. Vannuci, 64 Cal. App. 4th 904, 912 (1998).

[3] "It is hornbook law that the definition of 'relevant evidence' in Rule 401 is broad and the hurdle presented by it exceedingly low." In re A.H. Robbins Co. "Dalkon Shield" IUD Prods. Liab. Litig., 575 F. Supp. 718, 723 (D. Kan. 1983).

> My understanding of the sale of the UNIX assets from Novell to Santa Cruz was that the UNIX copyrights were transferred. To the best of my knowledge, from the time of the closing of the APA in 1995 until after SCO asserted legal claims concerning its Linux-related rights in 2003, Novell never contested SCO's ownership of the UNIX copyrights.

(Id. ¶ 7 (emphasis added).) Mr. Broderick's understanding is based on (among other things) Novell's explanation of the transaction during "company-wide meetings" during which senior executives announced that Novell was divesting itself of the UNIX business and retaining only a residual interest in certain royalties, as well as discussions in the "contracts transition team," including discussion about "changing the copyright notices in the source code to Santa Cruz Operation, Inc." (Ex. 2 at 48-51.)

Finally, Mr. Broderick may testify to the parties performance, which is relevant to determination of intent. On the question of what copyrights might be "required" for SCO to operate the UNIX and UnixWare business it indisputably had acquired, the Tenth Circuit specifically acknowledged the relevance of the "actions of the transition team" as to the meaning of the APA, as amended by Amendment No. 2. SCO, 578 F.3d at 1218. The Court also stated that "we think it is a commonsense proposition that intellectual property at least *may* be required," citing the example of how SCO would "protect the underlying assets in SCO software business should, for instance, a UNIX licensee have attempted to resell technology licensed from SCO." Id. at 1218. As both a participant in the transition team and the longtime contract manager of the UNIX licenses at both Novell and SCO, Mr. Broderick can and would offer testimony of relevant facts on those issues. The latter issue in particular is his bailiwick. Mr. Broderick can certainly offer testimony relevant to and expanding upon the "commonsense proposition" that the Tenth Circuit acknowledged as a proper subject for trial testimony.

CONCLUSION

SCO respectfully submits, for the reasons set forth above, that the Court should deny Novell's Motion in Limine No. 12.

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

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