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

**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>Plaintiff/Counterclaim-Defendant,</p> <p>vs.</p> <p>NOVELL, INC., a Delaware corporation,</p> <p>Defendant/Counterclaim-Plaintiff.</p>	<p><b>SCO'S OPPOSITION TO NOVELL'S MOTION IN LIMINE NO. 18 TO EXCLUDE CERTAIN TESTIMONY FROM DOUGLAS MICHELS FOR LACK OF PERSONAL KNOWLEDGE AND VIOLATION OF PAROL EVIDENCE RULE</b></p> <p>Civil No. 2:04 CV-00139</p> <p>Judge Ted Stewart</p>
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Novell seeks to preclude SCO from offering certain testimony of Doug Michels on the grounds that Mr. Michels did not participate in negotiating the APA or Amendment No. 2. Novell adopts an unduly restrictive interpretation of the law and of the nature of Mr. Michels's experience and testimony.<sup>1</sup>

Mr. Michels founded Santa Cruz and was its Senior Vice President at the time of the APA. (Ex. 1 ¶¶ 2-3.) He was "very involved" in the "initiation" of the APA, "the strategy behind it," and he "was very involved in the high level structure of the agreement," and "was involved in supervising pretty directly the people who were negotiating the details of the agreement." (Ex. 2 at 9.) He states:

In connection with the 1995 purchase from Novell, the parties agreed that (as is accurately explained by both Mr. Wilt and Ms. Madsen) Novell could retain the existing binary royalty stream even though the entire UNIX business, source code and related assets, including copyrights, were transferred to Santa Cruz.

(Ex. 1 ¶ 9 (emphasis added).) Mr. Michels has repeatedly confirmed that the parties to the APA intended for Novell to transfer and for Santa Cruz to acquire the UNIX and UnixWare copyrights:

Q. To the extent that you did, what did you mean by that?

A. Well, I meant that the only way that I know of, and anyone on my team knew of to buy a software business is to buy the copyrights, and there's no way we would have ever done a deal to buy a software business where we didn't get the copyrights and all the other intellectual property. That's what you're buying. And especially in the case of UNIX, with its convoluted intellectual property history, and whatnot, to not get that stuff would be to not do the deal. And so it was implicit in everything we did, everything we thought. Every single person on my team understood that. The lawyers understood. The business

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<sup>1</sup> This is the seventh of Novell's eight similar motions (Motions in Limine Nos. 12-19) regarding witness testimony. SCO sets forth the controlling law governing the admissibility of such testimony in its Memorandum in Opposition to Novell's Motion in Limine No. 12, and hereby incorporates that discussion.

development people understood it. The people at Novell understood it.

I mean, it – it’s just so essential. It’s -- you know, it’s like breathing oxygen, you know, I mean, you just – there’s no way that deal could have happened without getting the copyrights.

\* \* \* \*

A. I know that everybody involved in this negotiation knew the copyrights were being transferred. I know that.

Q. How do you know that?

A. Because I was there and I know it. That’s -- I -- I know what -- I know there were discussions. I know there was shared vision. I know we all understood what it meant to buy a software company. You know, I’ve known these people for many years. It -- it just wasn’t ambiguous. It wasn’t something that was ambiguous.

(Ex. 2 at 134-38 (emphasis added).)

Such testimony is admissible. Mr. Michels has personal knowledge of the business negotiators’ intent concerning the transaction, because he helped to supervise the negotiations. His testimony constitutes relevant extrinsic evidence of the circumstances in which the APA was drafted; of the negotiations that occurred leading up to the execution of the APA; of the object, nature, and subject matter of the APA; and of circumstances helping to explain the execution and meaning of Amendment No. 2. SCO Group, Inc. v. Novell, Inc., 578 F.3d 1201, 1211, 1217 (10th Cir. 2009). His testimony is integral to helping the factfinder place itself in the same situation in which the parties found themselves in negotiating and executing the APA. Consistent with well-established California law, the Tenth Circuit has necessarily rejected the argument that only the testimony of the individuals who negotiated the language of the APA or Amendment No. 2 is relevant. Novell’s arguments go to the weight of Mr. Michels’s testimony, not its relevance.

## **CONCLUSION**

SCO respectfully submits, for the reasons set forth above, that the Court should deny Novell's Motion in Limine No. 18.

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 MEMORNANDUM IN OPPOSITION TO NOVELL'S MOTION IN LIMINE NO. 18** was filed with the court and served via electronic mail to the following recipients:

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