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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>SCO'S OPPOSITION TO NOVELL'S MOTION IN LIMINE NO. 19 TO EXCLUDE CERTAIN TESTIMONY FROM EDWARD CHATLOS, BURT LEVINE AND KIM MADSEN FOR LACK OF PERSONAL KNOWLEDGE</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 Edward Chatlos, Burt Levine, and Kim Madsen on the grounds that they 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 the experience and testimony of these witnesses.¹

Mr. Chatlos was the Novell Senior Director for UNIX Strategic Partnerships and Business Development at the time of the APA. (Ex. 1 ¶ 4.) He was also Novell's lead negotiator of the APA. (Id. ¶ 6.) He was the primary negotiator during the "detailed discussions" with Jim Wilt (of Santa Cruz) that resulted in the APA, and "negotiated and structured" Amendment No. 1 to the APA. (Ex. 2 at 11-13.) Mr. Chatlos explains:

It was always my understanding and intent, on behalf of Novell, that the UNIX source code and its copyrights were part of the assets SCO purchased. I do not recall anyone else ever suggesting that Novell would retain any copyright relating to UNIX, nor was I present for any discussion, general or specific, during the negotiations that contradicted my understanding of the transaction described herein. None of my superiors at Novell ever informed me that Novell was not transferring the UNIX copyrights to SCO. Likewise, I never communicated to SCO in any way that the UNIX copyrights were not being sold to SCO. Nor am I aware of any instance in which anyone from Novell ever informed SCO in any way that the UNIX copyrights were not being sold to SCO as part of the transaction.

Given my central role in the negotiations, I believe I would have known if the parties had agreed that Novell would retain UNIX copyrights. My intent and understanding as the lead negotiator for Novell was that Novell was transferring the copyrights to SCO in the APA. At the time the transaction was signed and closed, I did not observe anyone at Novell or SCO stating or acting as if Novell had retained any UNIX copyrights. If they had, it would have been contrary to the intent and structure of the deal as I understood it and communicated with SCO. In fact, from the time the APA

¹ This is the eighth 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.

transaction closed in 1995 until this day, it has been my understanding and belief that Novell sold the UNIX copyrights to SCO as of the time of the closing in 1995.

(Ex. 1 ¶¶ 9-10 (emphasis added).) In his deposition, Mr. Chatlos confirmed his views regarding the transfer of the copyrights. (Ex. 2 at 37-39.) In recounting the extrinsic evidence relevant to the issue of the transfer of copyright ownership, the Tenth Circuit specifically cited Mr. Chatlos's testimony. SCO Group, Inc. v. Novell, Inc., 578 F.3d 1201, 1206 (10th Cir. 2009).

Mr. Levine was an attorney at Novell at the time of the APA. (Ex. 3 at 15-23.) He reviewed and revised drafts of the APA. (Id. at 163-64.) He drafted “some of the provisions of the APA” and reviewed and revised drafts. (Id. at 56, 163-64.) After the UNIX Business was transitioned to Santa Cruz in February 1996, Mr. Levine worked as an attorney for Santa Cruz. (Id. at 22-23.) Mr. Levine testified that under the APA the “intention was to convey all of these ownership and auxiliary ownership rights to the asset including copyright.” (Id. at 68.)

Ms. Madsen was a member of the Santa Cruz legal department at the time of the APA and Amendment No. 2 and assisted in the negotiations. (Ex. 4 ¶¶ 3-4.) She “participated in meetings, negotiations, a review of the asset purchase agreement, and possibly preparation of some of the schedules.” (Ex. 5 at 33-34.) She explains:

It was always my understanding that the UNIX source code and its copyrights were part of the assets Santa Cruz purchased and were transferred to Santa Cruz at the closing in December 1995.

I do not recall anyone in the negotiation teams ever saying, or suggesting, that Novell would retain any UNIX copyrights. The negotiation team for Santa Cruz never discussed the possibility, as far as I am aware, that Novell sought to retain any UNIX copyright.

Since the transaction closed in 1995 until Novell publicly announced in 2003 that it still owned the UNIX copyrights, it was my understanding and belief that neither party disputed that Santa Cruz had acquired the UNIX copyrights in 1995.

* * * *

My understanding from the negotiations and discussions leading up to the Amendment was that Amendment No. 2 was intended to confirm, among other things, the parties' intent and agreement that Santa Cruz had obtained ownership of the UNIX copyrights under the APA and that Novell had received no rights with respect to UNIX source code under the APA.

(Ex. 4 ¶¶ 9-11 (emphasis added).) In her deposition, Ms. Madsen confirmed that the parties' intent and understanding at the time of negotiations was that the APA transferred the copyrights to Santa Cruz. (Ex. 5 at 73-75, 81.)

Such testimony is admissible. These witnesses have personal knowledge of the negotiators' intent concerning the transaction, because they participated in the negotiations. Their testimony constitutes relevant extrinsic evidence of the circumstances in which the APA and Amendment No. 2 were drafted; of the negotiations that occurred leading up to the execution of the APA and Amendment No. 2; of the object, nature, and subject matter of the APA and Amendment No. 2; 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). Their testimony is integral to helping the factfinder place itself in the same situation in which the parties found themselves in negotiating and executing the documents. 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 the testimony of these witnesses, not its relevance.

CONCLUSION

SCO respectfully submits, for the reasons set forth above, that the Court should deny Novell's Motion in Limine No. 19.

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

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