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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP, INC., a Delaware corporation, Plaintiff, vs. NOVELL, INC., a Delaware corporation, Defendant.	Case No. 2:04CV00139 **NOVELL'S MOTION TO DETERMINE THAT FIRST AMENDMENT DEFENSES APPLY TO SLANDER OF TITLE AND REQUIRE PROOF OF CONSTITUTIONAL MALICE** Judge Ted Stewart

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I. INTRODUCTION

Pursuant to the Court's Order of February 25, 2010 (Dkt. No. 735), Novell submits this brief and requests a ruling that (1) First Amendment defenses apply to SCO's slander of title claim; and (2) SCO must prove "constitutional malice" on its slander of title claim because it is a limited purpose public figure. This brief focuses on the first issue, because SCO has not disputed Novell's prior showing that SCO became a "limited purpose public figure" by voluntarily injecting itself into the "public controversy" concerning SCO's highly publicized claims that all Linux users are infringing the UNIX copyrights allegedly owned by SCO. (*See* Novell's Motion In Limine No. 3 at 1-3, Dkt. No. 630.) Rather, SCO's only argument is that "First Amendment standards should not apply to SCO's claim for slander of title." (SCO's Opposition to Motion In Limine No. 3 at 1, Dkt. No. 683.) SCO admits that if the First Amendment applies, the verdict form should include "constitutional malice." (*Id.* at 2.)

Thus, the critical issue is whether First Amendment defenses apply to SCO's slander of title claim. Novell requests that the Court decide this critical issue before the trial begins because it will affect opening statements and the rest of the trial.

II. CONTROLLING PRECEDENT COMPELS THE CONCLUSION THAT FIRST AMENDMENT DEFENSES APPLY TO SLANDER OF TITLE

First Amendment defenses apply to slander of title claims because (A) the Tenth Circuit has held that the First Amendment applies to a claim for "injurious falsehood"; and (B) the Utah Supreme Court has held that slander of title is a claim for "injurious falsehood."

A. First Amendment Defenses Apply to a Claim for Injurious Falsehood

The Tenth Circuit held in *Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Services, Inc.*, 175 F.3d 848, 860-61 (10th Cir. 1999) ("*Jefferson*"), that First Amendment defenses apply to claims for "injurious falsehood," antitrust, and intentional interference with contract and business relations. *Jefferson* involved a school district that sued Moody's Investor's

Services for publishing an allegedly false "negative outlook" rating of school district bonds. *Id.* at 850. The school district claimed that the Moody's report caused investors to shun the bonds, forcing it to reprice the bonds at a higher interest rate at a net loss of $769,000. *Id.* at 850-51. The school district alleged that Moody's was retaliating against it for using a different credit rating agency for the bonds. *Id.* at 850-51. The district court dismissed the school district's complaint, holding that the Moody's report "was protected by the First Amendment because it neither stated nor implied an assertion that was provably false." *Id.* at 850.

The Tenth Circuit affirmed, holding that the First Amendment required dismissal of the claims for injurious falsehood, antitrust, and interference with contract and business relations. *Id.* at 854-61. The Tenth Circuit first noted that "the First Amendment's guarantee of freedom of expression limits the scope of state defamation laws," by requiring a public figure to prove that the allegedly defamatory statement was made with "actual malice," and by also requiring that "a statement on matters of public concern must be provable as false before there can be liability under state defamation law." *Id.* at 852 (citations and internal quotation marks omitted).

The Tenth Circuit then held that First Amendment protection extends equally to *non-defamation* claims directed against speech. The Tenth Circuit relied on the Supreme Court's holding that the First Amendment applies to an emotional distress claim based on an allegedly false parody, in view of "the chilling effect on protected speech that might ensue if damages could be recovered on emotional distress claims for publications that were not provably false." *Id.* at 857, *citing Hustler Magazine v. Falwell*, 485 U.S. 46, 53-55 (1988). The Tenth Circuit noted that the Ninth Circuit and other courts had "reject[ed] a variety of tort claims based on speech protected by the First Amendment," including trade libel, tortious interference, and disparagement.[1] *Id.*; *see also Time, Inc. v. Hill*, 385 U.S. 374, 390-91 (1967) (private individuals

[1] The Tenth Circuit cited *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990) (First Amendment applies to product disparagement, trade libel, and tortious interference); *Henderson*

must prove constitutional malice on invasion of privacy claim based on false report on newsworthy matter); *Bose Corp. v. Consumers Union*, 508 F. Supp. 1249, 1270-71 (D. Mass. 1981) (First Amendment applies to product disparagement claim), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1982), *aff'd in relevant part*, 466 U.S. 485 (1984).

Jefferson is controlling precedent for the principle that First Amendment defenses apply to claims for "injurious falsehood" and other torts based on an allegedly false statement. This principle is supported by the Supreme Court's decision in *Hustler* and the numerous other cases cited by the Tenth Circuit. These cases share the same fundamental principle: First Amendment defenses "apply to all claims whose gravamen is the alleged injurious falsehood of a statement" because "constitutional protection does not depend on the label given the stated cause of action." *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1042-1043 (1986) (citation omitted). [2]

B. Slander of Title Is a Claim for Injurious Falsehood

The Tenth Circuit's application of First Amendment defenses in *Jefferson* was directed to a claim labeled "injurious falsehood" rather than "slander of title." This holding nonetheless applies to SCO's claim because slander of title is a type of "injurious falsehood." The Utah Supreme Court has held:

> The elements of slander of title actions are well-settled and are not present here. *A slander of title action, which is variously known as an injurious falsehood or disparagement action,* consists of the willful recordation or publication of untrue material that is disparaging to another's title.

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v. Times Mirror Co., 669 F. Supp. 356, 362 (D. Colo. 1987) (disparagement and intentional interference), *aff'd*, 876 F.2d 108 (10th Cir. 1989); *So. Dakota v. Kansas City So. Indus.*, 880 F.2d 40, 50-54 (8th Cir. 1989) (tortious interference), *overruled on other grounds, Warfield v. KR Entm't, Inc.*, 165 F.3d 600, 601 (8th Cir. 1999); and *Eddy's Toyota of Wichita, Inc. v. Kmart Corp.*, 945 F. Supp. 220, 224 (D. Kan. 1996) (tortious interference).

[2] California Supreme Court precedent is particularly significant because the Utah Supreme Court has relied on California cases in concluding that "the Utah Constitution protects expressions of opinion." *West v. Thomson Newspapers*, 872 P.2d 999, 1016-17 (Utah 1994).

Jack B. Parson Companies v. Nield, 751 P.2d 1131, 1134 (Utah 1988) (emphasis added, citation omitted); *see Art Metal-U.S.A., Inc. v. United States*, 753 F.2d 1151, 1155 (D.C. Cir. 1985) (injurious falsehood and defamation have "always been very closely related," citing Restatement (Second) of Torts § 623A comment g (1977)).

Prominent scholars agree that slander of title is a type of "injurious falsehood." For example, Dean Prosser's article about "injurious falsehood" begins:

> There is a tort which passes by many names. Sometimes it is called slander of title, sometimes slander of goods, or disparagement of title, or disparagement of goods, or trade libel, or unfair competition, or interference with prospective advantage….Under whatever name, the essentials of the tort appear to be the same. It consists of the publication…of false statements concerning the plaintiff, his property, or his business….

William L. Prosser, *Injurious Falsehood*: *The Basis of Liability*, 59 Colum. L. Rev. 425, 425 (1959) (submitted as Ex. 2B to Novell's Motion In Limine No. 2, Dkt. No. 629-3). *Sack on Defamation* explains:

> The term "injurious falsehood" is a relatively recent term used to describe two common-law torts: slander of title and disparagement of quality (or "trade libel"), which arose out of slander of title. In both cases it is the plaintiff's interest in property, real or personal, tangible or intangible, that is protected. "Any type of legally protected property interest that is capable of being sold may be the subject of disparagement." The usual elements of the tort are publication, falsity, malice, special damages, and lack of privilege.

Robert D. Sack, *Sack on Defamation*, Third Edition, § 13.1.1 (Practicing Law Institute 2007) (footnotes omitted) (submitted herewith as Exhibit 1).

In sum, the Tenth Circuit has held that First Amendment defenses apply to injurious falsehood, and the Utah Supreme Court has held that slander of title is a claim for injurious falsehood. These two holdings compel the conclusion that First Amendment defenses apply to slander of title claims. This conclusion also follows from the principle underlying the Tenth Circuit's decision in *Jefferson*, the Supreme Court's decision in *Hustler*, and the other cases

discussed above: First Amendment defenses apply to any claim based on injurious falsehood, regardless of the label of the tort. As explained in *Sack on Defamation*:

> [C]ourts have generally been alert to attempts to use new tort labels to avoid established protection for free expression….It is useless to protect speech by preventing a money judgment for something called "libel," if the plaintiff can obtain the same money judgment simply by calling the tort by another name.
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> * * *
>
> Although the limitations that define the First Amendment's zone of protection for the press were established in defamation actions, they are not peculiar to such actions but apply to all claims whose gravamen is the alleged injurious falsehood of a statement. The fundamental reason that the various limitations rooted in the First Amendment are applicable to all injurious falsehood claims and not solely to those labeled 'defamation' is plain: although such limitations happen to have arisen in defamation actions, they do not concern matters peculiar to such actions but broadly protect free-expression and free-press values.

Id., § 13.1.4.2 (footnotes omitted) (Ex. 1 hereto).

III. SCO HAS FAILED TO REBUT NOVELL'S SHOWING THAT FIRST AMENDMENT DEFENSES APPLY TO SCO'S SLANDER OF TITLE CLAIM

SCO has asserted that First Amendment defenses do not apply because (A) slander of title differs from defamation because it *never* raises issues of public concern; (B) SCO's slander of title claim is similar to a claim for misappropriation of a celebrity's right of publicity; and (C) Novell's statements are unprotected "commercial speech." All of these arguments lack merit.

A. SCO's Slander of Title Claim Is Based on Injurious Falsehood and Indisputably Raises Issues of Public Concern

SCO has *not* disputed that the Tenth Circuit held in *Jefferson* that First Amendment defenses apply to a claim for injurious falsehood and other claims based on an allegedly false statement. Indeed, SCO did not even mention *Jefferson* in its opposition to Novell's Motion In Limine No. 2, even though Novell relied heavily on this case. (*Compare* Novell's Motion In Limine No. 2 at 2, Dkt. No. 629; *with* SCO's Opposition at 1-3, Dkt. No. 682.)

SCO has also not disputed that slander of title is a form of injurious falsehood. Instead, SCO attempts to divert attention from *Jefferson* by mischaracterizing Novell's position as

arguing that slander of title "is essentially the same as a claim for defamation." (SCO's Opposition to Novell's Motion In Limine No. 2 at 1, Dkt. No. 682.) SCO misses the point. The critical issue is whether slander of title is "essentially the same" as a claim for *injurious falsehood.* The answer is "yes," under the controlling authorities cited above. Therefore, the Tenth Circuit's holding that the First Amendment applies to an injurious falsehood claim compels the conclusion that the First Amendment applies to slander of title.

Instead of addressing the Tenth Circuit's holding in *Jefferson*, SCO relies instead on an Eighth Circuit decision, *Mueller v. Abdnor*, 972 F.2d 931 (8th Cir. 1992). That decision is irrelevant because this case is controlled by Tenth Circuit and Utah law. *Mueller* is also inapposite because it did *not* involve matters of public concern and had no implications beyond the immediate parties. Mueller entered a contract to buy property from the Small Business Administration ("SBA") under the mistaken belief that the contract covered two parcels instead of one. *Id.* at 933. The SBA told Mueller that the contract had expired due to his failure to make an earnest money deposit. *Id.* The district court held that Mueller had slandered the SBA's title by recording the contract despite knowing that it had expired, thereby putting a cloud on the title that caused the SBA to lose a sale to a third party. *Id.* at 933-34.

On appeal, the Eighth Circuit rejected Mueller's argument that the SBA should have been required to prove slander of title by "clear and convincing" evidence, holding that the higher standard "does not apply in the ordinary defamation case, but in an action brought by an individual, specifically, a public official or a public figure." *Id.* at 936 (footnote omitted). The Eighth Circuit explained that the higher standard applies "where the cause of action is disfavored, *e.g.*, to avoid the possibility of *inhibiting discussion of public figures or public issues*." *Id.* (emphasis added, footnote omitted). The Eighth Circuit found that the dispute did not raise such considerations because it was limited to slander of the ownership of land. *Id.* at 936-37. That conclusion is unremarkable since there was no evidence that the dispute affected

anyone other than the immediate parties. However, the Eighth Circuit did *not* hold that a dispute about ownership could *never* raise "public issues" that implicate the First Amendment.

Here, in contrast, Novell has submitted overwhelming, unrebutted evidence that the dispute about SCO's claim that all Linux users were infringing the UNIX copyrights allegedly owned by SCO was a significant public controversy that attracted intense media coverage and public debate. (*See* Novell's Motion In Limine No. 3 at 1-3 and Exs. 3A to 3S thereto, Dkt. No. 630.) Therefore, the rationale of the Eighth Circuit's decision supports Novell, not SCO, since First Amendment protection is needed "to avoid the possibility of inhibiting discussion of public figures or public issues." *See Mueller*, 972 F.2d at 936; *see also Paterson v. Little, Brown & Co*., 502 F. Supp. 2d 1124, 1140-42 (W.D. Wash. 2007) (dispute about paternity of the DOS computer operating system is a public controversy requiring proof of constitutional malice); *Mast v. Overson*, 971 P.2d 928, 929-32 (Utah Ct. Ap. 1998) (dispute about proposed golf course development involved a "spirited public debate on an issue of public interest").

B. SCO's Slander of Title Claim Has Nothing to Do with the Right of Publicity.

SCO reaches even further afield by analogizing its slander of title claim to "a claim for misappropriation of property, with respect to the broadcast of a videotape of the plaintiff's public entertainment act." (SCO's Opposition to Motion In Limine No. 2 at 1, Dkt. No. 682.) SCO relies on *Zacchani v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), which held that the First Amendment did not sanction the unauthorized broadcast of a professional performer's *entire* show, since "[t]he broadcast of a film of petitioner's entire act poses a substantial threat to the economic value of that performance." *Id.* at 575.

Zacchani has nothing to do with SCO's slander of title claim. Novell's statements on copyright ownership cannot be deemed, by any stretch, to be a "misappropriation" of SCO's right of publicity or other property. Indeed, Judge Kimball *already rejected* this argument in his

summary judgment ruling on SCO's unfair competition claim, holding that "there is no basis in the evidence before this court for finding that Novell's public claims of ownership were a misappropriation or seizure of SCO's property." (Order at 64, Dkt. No. 377.) As noted by this Court, SCO has conceded that this summary judgment ruling was not appealed or reversed. (Order Granting Novell's Motion In Limine No. 4 at 1-2, Dkt. No. 724.) Thus, Judge Kimball's ruling that there was "no misappropriation or seizure of SCO's property" is binding law of the case. (*See* Novell's Motion In Limine No. 4 at 2-3, Dkt. No. 631.)

SCO also cites the Supreme Court's comment in *Hustler* that "the 'actual malice' standard does not apply to the tort of appropriation of a right of publicity." (SCO's Opposition to Motion In Limine No. 2 at 2, Dkt. No. 682.) But SCO's slander of title claim has nothing to do with the "right of publicity." Rather, SCO's claim is based on the allegedly "false" nature of Novell's statement on a matter of public interest, and thus implicates the Tenth Circuit's concern about "the chilling effect on protected speech that might ensue," if the First Amendment did not apply to tort claims directed against allegedly false speech. *See Jefferson*, 175 F.3d at 857 (*citing Hustler*, 485 U.S. at 53-55).

C. SCO's "Commercial Speech" Argument Lacks Merit

SCO contends that the First Amendment does not apply because Novell's statements about copyright ownership were "advertisements" under the "commercial speech" doctrine. (SCO's Opposition to Motion In Limine No. 2 at 2-3, Dkt. No. 682.) This argument fails because Novell's statements do not constitute "advertisements" as a matter of law.[3]

The Supreme Court has held that "the core notion of commercial speech" is "speech which does 'no more than propose a commercial transaction.'" *Bolger*, 463 U.S. at 66 (citations

[3] Whether speech is "commercial" is a constitutional issue that is generally decided by the court. *See, e.g., Bolger v. Young Drug Products Corp.*, 463 U.S. 60, 66-75 (1983) (contraceptive advertisement is commercial speech but prohibition on mailing violates the First Amendment).

omitted); *see City of Cincinnati v. Discovery Network*, 507 U.S. 410, 423 (1993) (proposing a commercial transaction is "*the test* for identifying commercial speech") (original emphasis; citation and internal quotation marks omitted). The Tenth Circuit has followed the Supreme Court by holding that "commercial speech is best understood as speech that merely advertises a product or service for business purposes." *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 970 (10th Cir. 1996) (parody trading cards not commercial speech because "they do not merely advertise another unrelated product"); *see also P&G v. Haugen*, 222 F.3d 1262, 1274 (10th Cir. 2000) (Supreme Court has distinguished between "speech proposing a commercial transaction…and other varieties of speech").

Novell's public statements concerning the UNIX copyrights did not "propose a commercial transaction." Rather, Novell stated its position on a matter that was indisputably of public concern in view of the far-reaching implications of SCO's widely-publicized attack on the entire Linux community.[4] (*See* Novell's Motion In Limine No. 3 at 1-3, Dkt. No. 630.)

SCO contends that Novell's statements were "advertisements" because Novell incidentally referred to products. However, the only allegedly slanderous statement cited by SCO is Novell's press release of May 28, 2003, which consisted of two pages of text about the UNIX dispute, followed by a very brief description of Novell and its products. (*See* Ex. 2 hereto.)[5] Novell focused on the public controversy about SCO's alleged UNIX rights, and *not* on "advertising a product or service." SCO attempts to characterize Novell's press release as essentially an "advertisement" that *also* contains "discussions of important public issues."

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[4] The fact that Novell was addressing a widely-reported controversy on a matter of public concern distinguishes this case from *Neuralstem Inc. v. StemCells, Inc.*, 2009 WL 2412126 (D. Md. Aug. 4, 2009), which involved a private dispute between two parties to patent litigation.

[5] SCO also cites Novell's later press release of June 6, 2003, but has admitted that this press release did not slander SCO's alleged title. (*See* SCO's Opposition to Motion In Limine No. 5 at 1-2, Dkt No. 685.) In any event, Novell's June 6 press release focused on the UNIX dispute, and not on "proposing a commercial transaction." (*See* Ex. 3 hereto.)

(SCO's Opposition to Motion In Limine No. 2 at 2, Dkt. No. 682.) SCO has it backwards. As is clear on its face, Novell's press release is fundamentally a discussion of "important public issues" that *also* refers incidentally to Novell's products. Novell's lengthy discussion of the UNIX dispute cannot reasonably be considered to constitute an "advertisement."

SCO contends that the First Amendment does not apply because Novell had an "economic motive." However, almost all statements by a corporation (and many statements by individuals) have an economic motive, but that fact alone does not negate First Amendment protection. For example, the Supreme Court recently held that a federal law prohibiting corporations from using general funds for political advertisements violated the First Amendment, even though corporations presumably sponsor candidates that they believe will promote their economic interests. *Citizens United v. Federal Election Comm'n,* 2010 U.S. LEXIS 766, *16-*17, 130 S.Ct. 876 (2010) (previously submitted as Ex. 2A to Novell's Motion In Limine No. 2, Dkt. No. 629-2). Similarly, the Tenth Circuit held that the First Amendment protected the publication of a "negative outlook" bond rating by Moody's, even though Moody's presumably had an economic motive. *Jefferson*, 175 F.3d at 854-58.

SCO relies on Lanham Act cases from the Third and Fifth Circuits, but those cases unquestionably involved "advertising" that constituted "commercial speech."[6] The Third Circuit decision involved a "comparative advertising war between giants of the health care industry." *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia,* 898 F.2d 914, 917 (3rd Cir. 1990). Blue Cross launched "a deliberately 'aggressive and provocative' comparative advertising

[6] The Supreme Court decisions cited by SCO are even more remote as they involved *government regulation* of objectionable *advertising*. *See Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 454-62 (1978) (upholding ethical rule prohibiting lawyer from soliciting business by in-person visit to accident victim in hospital); *Bolger*, 463 U.S. at 66-75 (striking federal ban on mailing unsolicited contraceptive advertisements as an unconstitutional regulation of commercial speech). This case involves neither advertising nor government regulation.

campaign calculated 'to introduce and increase the attractiveness of its products'…at the expense of [U.S. Healthcare's] HMO products." *Id.* at 918. U.S. Healthcare responded with "its own aggressive, comparative advertising blitz." *Id.* at 919. Similarly, *P&G v. Amway Corp.*, 242 F.3d 539 (5th Cir. 2001), involved a "negative advertisement" that referred to specific products of a competitor (P&G), and urged consumers not to buy those products. *Id.* at 552; *see also P&G v. Haugen*, 222 F.3d at 1275 (related case involving same facts, classifying message from Amway distributor as commercial speech because it "unambiguously urges recipients to eschew purchasing P&G products in favor of Amway products").

Here, in contrast, Novell's statements focused on the highly publicized dispute about SCO's claim that all Linux users were infringing UNIX copyrights owned by SCO. This dispute was admittedly a matter of public concern. Novell did not "merely advertise a product or service for business purposes." Thus, Novell's statements are protected by the First Amendment as a matter of law.

IV. CONCLUSION

For the foregoing reasons, Novell respectfully requests that the Court issue a pre-trial ruling that First Amendment defenses apply to SCO's claim for slander of title, and that SCO is a limited public figure that must prove constitutional malice to prevail on its claim.

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Respectfully submitted

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