

Brent O. Hatch (5715)  
[bhatch@hjdllaw.com](mailto:bhatch@hjdllaw.com)  
 Mark F. James (5295)  
[mjames@hjdllaw.com](mailto:mjames@hjdllaw.com)  
 HATCH, JAMES & DODGE, PC  
 10 West Broadway, Suite 400  
 Salt Lake City, Utah 84101  
 Telephone: (801) 363-6363  
 Facsimile: (801) 363-6666

Stuart Singer (admitted pro hac vice)  
[ssinger@bsfllp.com](mailto:ssinger@bsfllp.com)  
 Sashi Bach Boruchow (admitted pro hac vice)  
[sboruchow@bsfllp.com](mailto:sboruchow@bsfllp.com)  
 BOIES SCHILLER & FLEXNER LLP  
 401 East Las Olas Blvd.  
 Suite 1200  
 Fort Lauderdale, Florida 33301  
 Telephone: (954) 356-0011  
 Facsimile: (954) 356-0022

David Boies (admitted pro hac vice)  
[dboies@bsfllp.com](mailto:dboies@bsfllp.com)  
 Robert Silver (admitted pro hac vice)  
[rsilver@bsfllp.com](mailto:rsilver@bsfllp.com)  
 Edward Normand (admitted pro hac vice)  
[enormand@bsfllp.com](mailto:enormand@bsfllp.com)  
 BOIES SCHILLER & FLEXNER LLP  
 333 Main Street  
 Armonk, New York 10504  
 Telephone: (914) 749-8200  
 Facsimile: (914) 749-8300

*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 style="text-align: center;">Plaintiff/Counterclaim-Defendant,</p> <p>vs.</p> <p>NOVELL, INC., a Delaware corporation,</p> <p style="text-align: center;">Defendant/Counterclaim-Plaintiff.</p>	<p><b>SCO'S BRIEF REGARDING ISSUES TO          BE TRIED IN EQUITY BY THE COURT</b></p> <p>Civil No. 2:04 CV-00139</p> <p>Judge Ted Stewart</p>
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As indicated on the Pretrial Order, the parties agree that SCO's alternative claim for specific performance should be resolved by the Court. The parties have reached agreement that the claims concerning the scope and exercise of Novell's waiver rights – specifically Novell's Fourth Counterclaim which seeks a declaration that the waiver was properly authorized by the APA and SCO's Third Claim for Relief that alleges such waiver violates the implied duty of good faith and fair dealing –also are properly resolved by the Court without a jury, as the claims seek declaratory relief and not monetary damages.

The parties' agreement follows from the general rule that claims seeking legal remedies entitle a party to a jury trial, and claims for equitable relief are determined by the Court. Simplot v. Chevron Pipeline Co., 563 F.3d 1102, 1115 (10th Cir. 2009) (quoting City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 710 (1999)). Because the relief sought on these issues is equitable, "neither the party seeking that relief nor the party opposing it is entitled to a jury trial." Marseilles Hydro Power, LLC v. Marseilles Land & Power Co., 299 F.3d 643, 648 (7th Cir. 2002) (observing that even in a breach of contract claim, where the plaintiff seeks equitable relief and not damages, there is no entitlement to trial by jury).

The testimony on these non-jury issues is largely if not entirely from the same witnesses who will be testifying regarding the slander of title claim and counterclaim. While there would be a single trial of all of these issues, the slander of title claim and counterclaim would be decided by the jury and the remaining issues by the court upon the conclusion of the jury trial.

SCO only recently learned that Novell proposes to have the jury issue an advisory verdict on SCO's alternative claim for specific performance and on Novell's defense of "unclean hands." As to "unclean hands," SCO disputes that either the Court or jury should consider that

issue and contends that it is not properly an issue in this case. SCO will explain the basis for its argument on March 5, 2010, in its objections to Novell's proposed jury instructions. As to any advisory verdict, SCO opposes that request as well. Novell has agreed that the claim of specific performance is one for the Court alone to resolve. The trial will already be sufficiently complex that it would be unduly burdensome and unreasonable to ask the jury to consider an issue that is not their province to resolve, and it would prejudice the jury's deliberations concerning the other issues before it. Unless otherwise directed, SCO would plan to put in briefing on this issue in its submission due by 5 p.m. on March 4, 2010.

### **CONCLUSION**

By agreement of the parties and in accordance with federal law, SCO submits that its alternative claim for specific performance regarding the copyrights, Novell's claim for declaratory relief regarding its purported waiver of SCO's claims against IBM, and SCO's claim that such waiver violates the implied duty of good faith and fair dealing, even if authorized, are to be decided by the Court.

DATED this 2nd day of March, 2010.

By: /s/ Brent O. Hatch  
HATCH, JAMES & DODGE, P.C.  
Brent O. Hatch  
Mark F. James

BOIES, SCHILLER & FLEXNER LLP  
David Boies  
Robert Silver  
Stuart H. Singer  
Edward Normand  
Sashi Bach Boruchow

*Counsel for The SCO Group, Inc.*

**CERTIFICATE OF SERVICE**

I, Brent O. Hatch, hereby certify that on this 2nd day of March, 2010, a true and correct copy of the foregoing **SCO'S BRIEF REGARDING ISSUES TO BE TRIED IN EQUITY BY THE COURT** was filed with the court and served via electronic mail to the following recipients:

Sterling A. Brennan  
David R. Wright  
Kirk R. Harris  
Cara J. Baldwin  
WORKMAN | NYDEGGER  
1000 Eagle Gate Tower  
60 East South Temple  
Salt Lake City, UT 84111

Thomas R. Karrenberg  
Heather M. Sneddon  
ANDERSON & KARRENBERG  
700 Bank One Tower  
50 West Broadway  
Salt Lake City, UT 84101

Michael A. Jacobs  
Eric M. Aker  
Grant L. Kim  
MORRISON & FOERSTER  
425 Market Street  
San Francisco, CA 94105-2482

*Counsel for Defendant and Counterclaim-Plaintiff Novell, Inc.*

By:     /s/ Brent O. Hatch      
HATCH, JAMES & DODGE, P.C.  
Brent O. Hatch