Brent O. Hatch (5715)
bhatch@hjdlaw.com
Mark F. James (5295)
mjames@hjdlaw.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
Sashi Bach Boruchow (admitted pro hac vice)
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
Edward Normand (admitted pro hac vice)
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

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 MEMORANDUM ADDRESSING NOVELL'S REQUEST FOR ADVISORY VERDICT** Civil No. 2:04 CV-00139 Judge Ted Stewart

Plaintiff/counterclaim-defendant, The SCO Group, Inc. ("SCO"), by and through the Chapter 11 Trustee in Bankruptcy, Edward N. Cahn, respectfully submits this Memorandum Addressing Novell's Request for Advisory Verdict.

DISCUSSION

Novell seeks an advisory verdict with respect to SCO's claim for breach of the implied covenant of good faith and fair dealing and with respect to Novell's affirmative defense of "unclean hands." SCO opposes the request.

The use of an advisory jury is codified in Federal Rule of Civil Procedure 39(c). "[I]t is completely discretionary with the trial judge whether or not to use an advisory jury under Rule 39(c), and the district court's exercise of this discretion is not reviewable." C. Wright et al., Federal Practice and Procedure § 2335 (2009). The Court may consider whether the issues or claims at issue are traditionally considered appropriate for jury resolution; whether the factual and legal issues are not complex; and whether there are unique or peculiar circumstances justifying an advisory jury. 8 J.W. Moore et al., Moore's Federal Practice § 39.41, at 39-87 (3d ed. 2004); accord Doe v. Barrow County, Ga., Civil Action No. 2:03-CV-156-WCO, 2005 WL 6033020, at *5 (N.D. Ga. Mar. 2005).

The courts have thus repeatedly declined to use an advisory jury where the issues for the jury would be "complex." Coleman v. Kroger Co., 399 F. Supp. 724, 732 (W.D. Va. 1975) (deciding to use advisory jury in case in which plaintiff alleged and union and employer breached duty of fair representation, where "the court feels that the issues in this case are not complex"). In addition, the courts have recognized that there is no efficiency in the procedure Novell proposes. In Rosen v. Dick, 83 F.R.D. 540 (S.D.N.Y. 1979), for example, the court declined to have the jury issue an advisory verdict on issues that were for the court to resolve. Id. at 543-44. The court reasoned that the case would involve "complex issues of account

practice." Id. at 544. The court further reasoned that "there is no saving of time in proceeding with a single trial and having the jury decide the issues covered by the jury demand, and the court decking the remaining issues between the parties. The jury would be wasting its time sitting and listening to weeks of incomprehensible testimony unnecessary to the discharge of its task." Id.

In a decision particularly relevant here, moreover, a federal district court recognized that the use of an advisory jury to address equitable defenses is inappropriate, in particular where the jury has already been tasked with finally resolving other claims before it. In Pioneer Hi-Bred International, Inc. v. Ottawa Plant Food, Inc., 219 F.R.D. 135 (N.D. Iowa 2003), a patentee (Pioneer) brought an action against an unlicensed reseller (Ottawa) for infringement of certain patents. The defendant asserted affirmative defenses of laches, waiver, and estoppel. The defendant acknowledged that those equitable defenses were for the court ultimately to resolve, but asked the court to receive an advisory verdict on the defenses, on the grounds that they were "factually very closely related to its defense to Pioneer's case-in-chief." Id. at 149.

The court denied the request for an advisory verdict, in reasoning that is directly analogous (as explained further below) to the facts here. The court reasoned:

> The court finds that evidence expressly related to, or express references to, the equitable defenses of laches, estoppel, or waiver must be barred in proceedings in front of the jury. Evidence or reference to such defenses poses a very real risk of unfair prejudice outweighing any probative value such evidence might have to matters properly before the jury, or a risk of misleading and confusing the jury. See Fed. R. Evid. 403. Specifically, admission of such evidence or reference to such defenses might invite the jury to make a determination on the basis of "equitable" considerations that do not properly enter into any determination that the jury must make. Therefore, it is impracticable and potentially prejudicial to Pioneer to try Ottawa's equitable defenses to the jury, in an advisory capacity, at the same time that legal claims are tried to the same jury.

Id. at 149-50 (emphasis added). The court therefore "decline[d] to exercise its discretion to try Ottawa's equitable defenses to an advisory jury." Id. at 150.

An advisory verdict does not reasonably or sensibly apply here. As an initial matter, the trial is sufficiently complex as is. As in Rosen, 83 F.R.D. at 543-44, the jurors here plainly will have enough on their table.

On top of such existing complexity, Novell proposes to ask the jury to resolve matters that involve perhaps even greater complexity. SCO's claim for breach of the implied covenant of good faith and fair dealing involves at least two significant core issues that require significant time and attention even to get one's hands around – namely, (1) what constitutes the ambiguously defined "SVRX Licenses" in the amended APA, and (2) what "waiver" right could Novell permissibly have, under principles of contract law, without undercutting the entire point of the transaction and thus affording SCO merely an illusory set of rights. The former will involve a good deal of testimony regarding the mechanics of software licensing within the UNIX companies over the prior decades, and the latter primarily concerns the operation of contract law, rather than the type of factual or expert evidence that juries typically need to consider. These are additional, complex issues that the jury need not resolve. Coleman, 399 F. Supp. at 732.

Moreover, the jury's consideration of Novell's arguments and evidence for "unclean hands" create a significant risk of prejudicially affecting how the jury perceives and resolves SCO's claim for slander of title – to which unclean hands is not even a defense – and Novell's own competing claim. Pioneer, 219 F.R.D. at 149-50. SCO brings its claim for slander of title under Utah common law and Utah statutory law. Under that law, "unclean hands" is an affirmative defense to a plaintiff's request for equitable relief; it does not pertain to SCO's claim for slander of title. Pelt v. State of Utah, 611 F. Supp. 2d 1267, 1286 (D. Utah 2009); Hill v.

Estate of Allred, 216 P.3d 929, 935 (Utah 2009). In addition, the defense is for the Court alone to consider. Utah Labor Comm'n v. Paradise Town, 660 F. Supp. 2d 1256, 1263 (D. Utah 2009); Pelt, 611 F. Supp. 2d at 1286; Parduhn v. Bennett, 112 P.3d 495, 506 (Utah 2005).[1] The jury should be permitted to consider SCO's claim for slander of title, which it is the province of the jury alone to resolve, on its own terms.

Contrary to Novell's suggestion, the Court is particularly well suited to resolve the issues on which Novell seeks an advisory verdict (ostensibly to assist the Court). SCO's claim for breach is in significant part an exercise in reconciling competing contractual provisions in consideration of the legal requirement that a contracting party not be left with illusory, or even easily nullified, contractual rights. That is the type of work that the courts regularly undertake in their many cases involving the interpretation of contracts. It is not an issue on which jurors will bring any particular expertise or insight – and certainly not over and above that of a federal judge. In addition, given that for centuries "unclean hands" has been an equitable defense that the court is to consider, there can be no serious argument that a jury should be favored with offering its views on the resolution of such an issue. SCO has not found any case in which the jury was asked to resolve "unclean hands" via advisory verdict.

[1] SCO further submits that Novell's defense of "unclean hands" does not apply to any of SCO's claims, and therefore that the Court need not consider the defense. SCO will address that argument in its objections to Novell's jury instructions, and in whatever subsequent filing the Court may deem to be appropriate.

CONCLUSION

SCO respectfully submits, for the foregoing reasons, that the Court deny Novell's request to have the jury reach any advisory verdict.

DATED this 5th 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
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 5th day of March, 2010, a true and correct copy of the foregoing **SCO'S MEMORANDUM ADDRESSING NOVELL'S REQUEST FOR ADVISORY VERDICT** 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
Brent O. Hatch
HATCH, JAMES & DODGE, P.C.
10 West Broadway, Suite 400
Salt Lake City, Utah 84101
Telephone: (801) 363-6363
Facsimile: (801) 363-6666