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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

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| <p>THE SCO GROUP, INC., a Delaware corporation,</p> <p style="text-align: center;">Plaintiff,</p> <p>vs.</p> <p>NOVELL, INC., a Delaware corporation,</p> <p style="text-align: center;">Defendant.</p> | <p>Case No. 2:04CV00139</p> <p>NOVELL'S OBJECTIONS TO SCO'S PROPOSED VERDICT FORM</p> <p>Judge Ted Stewart</p> |
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Pursuant to the Court's February 4, 2010 Trial Order, Novell submits the following objections to SCO's Proposed Special Verdict Form (Dkt. No. 741).

I. GENERAL OBJECTIONS

A. SCO's Proposed Special Verdict Form Is Incomplete

SCO's proposed form is incomplete and biased because it includes no questions relating to Novell's slander of title claim. Because Novell's proposed verdict form addresses the claims and defenses of *both* parties it should be used instead of SCO's.

B. SCO's Proposed Special Verdict Form Fails to Account for Severable Damages

If Novell's statements are protected by a conditional privilege and if Novell abused that privilege through excessive publication, then Novell is only liable for those damages caused by the excessive publication. Restatement (Second) of Torts § 599 cmt. b (1977) ("If the harm done by the abuse is severable ... he is subject to liability only for the excess of harm resulting from his abuse. This is true, for example ... when the harm resulting from excessive publication ... can easily be separated from that which has resulted from the privileged publication."). Because SCO's proposed form does not reflect this limitation, but Novell's does, Novell's form should be used. Questions 12–14 of Novell's Proposed Special Verdict Form (Dkt. 737) are reproduced below for comparison:

12. Did SCO prove that Novell excessively published its statement by publishing it to persons who did not share the interest affected by the statement?
13. Did SCO suffer special damages to its business as a result of such excessive publication?
14. What are SCO's special damages resulting from the excessive publication?

II. OBJECTIONS TO SPECIFIC QUESTIONS

A. SCO's Proposed Special Verdict Form: Question 2 (*Novell's Competing Proposed Special Verdict Form Question: 3*)

Question 2 of SCO's proposed form reads as follows, with objectionable language bolded:

2. Has Novell made **one or more false statements** with respect to SCO's ownership of UNIX **and UnixWare** copyrights?

The counterpart question in Novell's form follows the California model verdict form for defamation (Utah does not have a model) by inquiring whether Novell made "a false statement, *to anyone other than SCO*, regarding ownership of the UNIX copyrights." See Judicial Council of California Civil Jury Instructions No. VF-1701. As reflected in Novell's questions, the relevant inquiry is whether Novell made false statements *to anyone other than SCO*, because statements made only to SCO are not actionable. See *DeBry v. Godbe*, 1999 UT 111, ¶ 23, 992 P.2d 979 ("The requirement of 'publication' means that the defamatory statement be communicated to a third person and that the third person read and understand the statement.") (citing 50 Am. Jur. 2d Libel & Slander §§ 250-51 (1995)). Because Novell's question follows a form and directs the jury to the relevant inquiry, Novell's form should be used.

Also, Novell did not claim ownership to the UnixWare copyrights in any of the allegedly slanderous statements at issue. (See Novell's Opposition to SCO's Motion in Limine No. 1, Ex. 1A, Dkt. No. 675 (May 28, 2003 letter (referencing only "UNIX")); Order at 2-5, Dkt. No. 710 (quoting the relevant text of the five subsequent statements at issue.) Thus, even if SCO's question were used, the reference to "UnixWare" should be taken out.

B. SCO's Proposed Special Verdict Form: Question 3 (*Novell's Competing Proposed Special Verdict Form Questions: 5-9 & 12*)

Question 3 of SCO's proposed form reads as follows, with objectionable language bolded:

3. **Did Novell make** any of its false statements **without any privilege**, or in a manner that abused or exceeded **any privilege**?

Novell objects to this question on three grounds. First, the jury might incorrectly infer from the form of this question that Novell bears the burden of proof with respect to privilege. *See Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 58 (Utah 1991). Questions relating to privilege should make clear that *SCO* bears the burden of proving absence of privilege by asking whether *SCO* proved that Novell's statements were not privileged (as in Novell's form).

Second, in contrast to the single question proposed by *SCO*, Novell's form includes separate inquiries regarding the predicates for the various privileges at issue (litigation, recipient's interest, rival claimant's, and *Noerr-Pennington*), and corresponding inquiries regarding abuse. With multiple privileges in play, each with its own standards for application and abuse, it will assist the jury (and facilitate any assessment of the verdict by the Court in connection with postjudgment motions) to have separate questions pertinent to the various privileges, as in Novell's proposed form. *See* Paul R. Michel and Dr. Michelle Ryhu, "Improving Patent Jury Trials," 6 Fed. Cir. B.J. 89, 95 (1996) ("Use of special verdicts and interrogatories that direct juries to sequentially address the specific issues presented could greatly enhance the rationality, reliability, and predictability of jury verdicts, and their reviewability on post-trial motions and on appeal as well.").

Third, the concluding phrase, "any privilege," compounds the foregoing deficiencies by suggesting that Novell cannot receive the benefit of *any* of the four privileges at issue if it abused

any one of them. Novell's statements are privileged unless, in making them, Novell abused every such privilege (not *any* privilege).

C. SCO's Proposed Special Verdict Form: Question 5 (Novell's Competing Proposed Special Verdict Form Question: 10)

Question 5 of SCO's proposed form reads as follows, with objectionable language bolded:

5. Did Novell cause SCO **damages** in making any of its false statements?

To recover, SCO must prove "special damages," not just damages. *Valley Colour v. Beuchert Builders*, 944 P.2d 361, 364 (Utah 1997) ("[W]e [have] unequivocally stated that presumed or general damages are insufficient in a slander of title action. A slander of title action requires proof of actual or special damages.") (citation omitted). This question should be modified accordingly; or, better still, Novell's used instead.

D. SCO's Proposed Special Verdict Form: Question 6 (Novell's Competing Proposed Special Verdict Form Question: 11)

Question 6 of SCO's proposed form reads as follows, with objectionable language bolded:

6. What is the amount of **damages that SCO has suffered**?

This question is defective, first, because it inquires about "damages" generally rather than *special* damages. See *Valley Colour*, 944 P.2d at 364. Moreover, the pertinent inquiry is special damages that SCO would not have suffered *but for* Novell's conduct, rather than damages in general. See *Dowse v. Doris Trust Co.*, 208 P.2d 956, 959 (Utah 1949) ("slander of title is based on a wrongful act *but for which* the plaintiff would not have had to incur any expense"); Restatement (Second) of Torts § 633 cmt. h. As proposed by Novell in its form, the jury should instead be asked:

11. What are SCO's special damages resulting from Novell's statement?

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Respectfully submitted,

By: /s/ Sterling A. Brennan

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