

**WORKMAN | NYDEGGER A PROFESSIONAL CORPORATION**

Sterling A. Brennan (Utah State Bar No. 10060; E-mail: sbrennan@wnlaw.com)

David R. Wright (Utah State Bar No. 5164; E-mail: dwright@wnlaw.com)

Kirk R. Harris (Utah State Bar No. 10221; E-mail: kharris@wnlaw.com)

Cara J. Baldwin (Utah State Bar No. 11863; E-mail: cbaldwin@wnlaw.com)

1000 Eagle Gate Tower

60 E. South Temple

Salt Lake City, Utah 84111

Telephone: (801) 533-9800

Facsimile: (801) 328-1707

**MORRISON & FOERSTER LLP**Michael A. Jacobs (Admitted *Pro Hac Vice*; E-mail: mjacobs@mofo.com)Eric M. Acker (Admitted *Pro Hac Vice*; E-mail: eacker@mofo.com)Grant L. Kim (Admitted *Pro Hac Vice*; E-Mail: gkim@mofo.com)Daniel P. Muino (Admitted *Pro Hac Vice*; E-Mail: dmuino@mofo.com)

425 Market Street

San Francisco, CA 94105-2482

Telephone: (415) 268-7000

Facsimile: (415) 268-7522

*Attorneys for Defendant and Counterclaim-Plaintiff Novell, Inc.***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. 2:04 CV00139

**NOVELL'S MOTION FOR FURTHER  
RULING ON MOTION IN LIMINE  
NO. 4 TO PRECLUDE SCO FROM  
CONTESTING THAT NOVELL HAD  
AN OBJECTIVELY REASONABLE,  
GOOD FAITH BASIS FOR ITS  
STATEMENTS REGARDING  
COPYRIGHT OWNERSHIP**

Judge Ted Stewart

## **I. INTRODUCTION**

Novell requests a further ruling on Novell's Motion In Limine No. 4 because the Court's prior order was limited only to a portion of that motion. Novell's motion requested that the Court "preclude SCO from presenting any evidence or argument that Novell did not have an objectively reasonable, good faith basis for its statements regarding copyright ownership." (Mot. at 3, Dkt No. 631.) The Court addressed this issue solely in the context of SCO's covenant of good faith claim. However, Novell's motion covered *all* of SCO's claims, including slander of title. The Court's prior ruling did not expressly address other claims, so Novell requests the Court to rule on the issue that was left open by its prior order.

## **II. PROCEDURAL BACKGROUND**

SCO mischaracterized Novell's Motion In Limine No. 4 as arguing that "the law of the case doctrine precludes litigation of SCO's claims for unfair competition and for breach of the implied duty of good faith and fair dealing insofar as those claims relate to Novell's claims of copyright ownership." (Opp'n at 1, Dkt. No. 684.) In fact, Novell did not limit its motion to specific claims. On the contrary, Novell asserted that the law of the case "precludes relitigation of *issues decided for one claim that are relevant to a different claim.*" (Mot. at 2-3 (emphasis added, Dkt No. 631).) Novell requested the Court to bar SCO from "presenting any evidence or argument that Novell did not have an objectively reasonable, good faith basis for its statements regarding copyright ownership," without linking this bar to a specific claim. (*Id.* at 3.)

This Court granted Novell's Motion In Limine No. 4, but only after limiting the motion to SCO's covenant of good faith claim. (Order Granting Novell's Motion In Limine No. 4 at 2, Dkt. No. 724.) The Court stated that Novell "essentially argues that the law of the case and the mandate rule precludes litigation of the copyright ownership portions of Plaintiff's claims for unfair competition and for breach of the implied duty of good faith and fair dealing." (*Id.* at 1.)

However, as noted above, Novell generally sought to preclude SCO from contesting that Novell had a reasonable basis for its statements, without limiting this preclusion to a specific claim.

Novell pointed out in its Trial Brief that the Court's ruling on Novell's Motion in Limine No. 4 did not address Novell's request that "SCO be precluded from presenting evidence or argument that Novell lacked an objectively reasonable, good faith basis for its statements regarding copyright ownership." (Dkt. No. 738 at 6 n.12.) Novell explained that it would submit further briefing on this issue in connection with its Request for Judicial Notice. (*Id.*)

Novell's Judicial Notice brief asserted that the Court should take judicial notice of the prior findings regarding Novell's reasonable, good faith basis for its statements. (Judicial Notice Brief at 4-7, Dkt. No. 749.) Novell contended that (1) judicial notice may be taken of prior findings in a case; and (2) the doctrines of law of the case and issue preclusion bar a party from relitigating an issue decided for one claim in the context of a different claim. (*Id.* at 1-3, 5-6.)

On March 5, 2010, the Court denied Novell's Request for Judicial Notice on the ground that taking judicial notice of "factual findings" made in the context of a different claim "would be misleading and confusing if read to the jury." (Order at 3, Dkt. No. 763.) The Court did not expressly address Novell's second argument based on the law of the case. (*See id.*)

### **III. ARGUMENT**

Judge Kimball's ruling that SCO failed to present evidence that Novell lacked an objectively reasonable, good faith basis for its statements is law of the case that bars SCO from relitigating this ruling in connection with any claim. (*See* Novell's Motion in Limine No. 4 at 2-3, Dkt. No. 631; Novell's Judicial Notice Brief at 2-7, Dkt. No. 749.) The Tenth Circuit has held that a party is barred from "relitigating an issue once it has suffered an adverse determination on the issue, even if the issue arises when the party is pursuing or defending against *a different claim.*" *Moss v. Kopp*, 559 F.3d 1155, 1161 (10th Cir. 2009) (emphasis added). *See also Ag Servs. of Am., Inc. v. Nielsen*, 231 F.3d 726, 732-33 (10th Cir. 2000) ("once

a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit *on a different cause of action*”) (emphasis added), *reh’g denied* 235 F.3d 559 (10th Cir. 2000); *St. Paul Fire & Marine Ins. Co. v. Heath Fielding Ins. Broking Ltd.*, No. 91 Civ. 0748, 1995 U.S. Dist. LEXIS 19847, at \*30-35 (S.D.N.Y. Dec. 30, 1995) (dismissal of negligence claim is law of the case that bars negligent misrepresentation claim).

Further, SCO did *not* appeal the adverse rulings on its unfair competition and covenant of good faith claims, and the Tenth Circuit did not reverse those rulings. (*See* Order Granting Novell’s Motion In Limine No. 4 at 1-2, 4, Dkt No. 724.) Indeed, the Tenth Circuit held that Novell had “powerful arguments” on copyright ownership, and that this issue presented “ambiguities” that “could legitimately be resolved in favor of either party.” *The SCO Group, Inc. v. Novell, Inc.*, 578 F.3d 1201, 1215 (10th Cir. 2009). Therefore, controlling Tenth Circuit precedent bars SCO from relitigating those rulings in the context of any claim, including slander of title. *See Moss*, 559 F.3d at 1161; *Ag Servs.*, 231 F.3d at 732-33.

SCO asserts that good faith is an issue for the jury. (SCO’s Opp’n to Judicial Notice at 1, Dkt. No. 758.) However, Judge Kimball held *as a matter of law on summary judgment* that “there is no evidence to demonstrate that Novell’s position was contrary to its own understanding of the contractual language or objectively unreasonable given the history of the dispute between the parties.” (Order at 65, Dkt. No. 377.) Judge Kimball thus rejected SCO’s argument that “the evidence shows that Novell has asserted an interpretation of the APA and related documents contrary to its own understanding.” (*See* SCO’s Summary Judgment Briefs, Dkt No. 299 at 18-19; Dkt No. 259 at 2-3, 17-18, 28-30; Dkt No. 306 at 2, 62-74.) On appeal, SCO could have argued that SCO had presented sufficient evidence to raise a triable issue as to whether Novell had a reasonable, good faith basis for its statements. However, SCO failed to do so. Accordingly, Novell requests an order barring SCO from presenting evidence or argument on any claim at trial that Novell lacked an objectively reasonable, good faith basis for its statements.

DATED: March 7, 2010

Respectfully submitted

By: /s/ Sterling A. Brennan

WORKMAN NYDEGGER  
Sterling A. Brennan  
David R. Wright  
Kirk R. Harris  
Cara J. Baldwin

MORRISON & FOERSTER <sup>LLP</sup>  
Michael A. Jacobs, *pro hac vice*  
Eric M. Acker, *pro hac vice*  
Grant L. Kim, *pro hac vice*  
Daniel P. Muino, *pro hac vice*

Attorneys for Defendant and  
Counterclaim-Plaintiff Novell, Inc.