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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 **MEMORANDUM OF AUTHORITIES REGARDING EXCUSING POTENTIAL JURORS HAVING KNOWLEDGE PERTAINING TO THIS DISPUTE** Judge Ted Stewart
AND RELATED COUNTERCLAIMS.	

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I. INTRODUCTION

Since at least as early as January 20th, 2004, the filing date of the original complaint in this action, the dispute between the SCO Group and Novell has been the subject of substantial and widespread media coverage, to which some potential jurors may have been exposed. Similarly, some potential jurors may already possess knowledge of or experience with UNIX, Linux, or the open source software movement. And some potential jurors may have formed opinions of the merits, based on one or more of the foregoing. This submission summarizes the legal standards pertinent to excusing jurors who have been exposed to media coverage, or have knowledge related to the subject matter, or have preconceptions regarding the merits.

II. GENERAL PRINCIPLES

Excusal of a potential juror may be warranted if "such person may be unable to render impartial jury service … [or] upon a challenge by any party for good cause shown." 28 U.S.C. § 1866(c); *see also United States v. Black*, 369 F.3d 1171, 1176 (10th Cir. 2004) (stating the determination of "whether to excuse a juror rests on whether the juror can remain impartial") (citation omitted.). "All challenges for cause or favor … shall be determined by the court." 28 U.S.C. § 1870.

"Generally, a court must grant a challenge for cause if the prospective juror's actual prejudice or bias is shown." *Vasey v. Martin Marietta Corp.*, 29 F.3d 1460, 1467 (10th Cir. 1994). Actual bias may be established as either (1) express bias exhibited in the form of a juror's admission, or (2) implied bias shown by specific facts that indicate the juror has such a close connection to the trial that bias must be presumed. *Id.*

Since implied bias "depends heavily on the surrounding circumstances," courts have typically only inferred bias "in extraordinary situations where a prospective juror has had a direct financial interest in the trial's outcome … or where the prospective juror was an employee of a party to a lawsuit." *Id.* at 1467-1468 (internal quotations and citations omitted). In such

situations, "even the juror's own assertions of impartiality must be discounted in ruling on a challenge for cause." *Id* at 1468.

Showing bias requires the challenging party to prove that the potential juror possesses "such a fixed opinion that he or she could not judge impartially." *Hale v. Gibson*, 227 F.3d 1298, 1319 (10th Cir. 2000) (citing *Patton v. Yount*, 467 U.S. 1025, 1035 (1985)). Stated differently, "a juror is not shown to have been partial simply because he or she had a preconceived notion as to the guilt or innocence of the accused." *Id.* (citing *Murphy v. Florida*, 421 U.S. 794, 800 (1975)).

Thus, a juror is sufficiently impartial "if they can lay aside any preconceived opinions regarding the outcome of the case and 'render a verdict based on the evidence presented in court.'" *Goss v. Nelson*, 439 F.3d 621, 627 (10th Cir. 2006) (quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)). The policy underlying this standard was clearly set forth by the Supreme Court:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. … To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard.

Irvin v. Dowd, 366 U.S. 722-23.

III. INDEPENDENT POSSESSION OF RELEVANT KNOWLEDGE

"The possession of mere knowledge is not enough to disqualify a juror." *United States v. Affleck*, 776 F.2d 1451, 1455 (10th Cir. 1985). At least two decisions by the Tenth Circuit have supported the proposition that mere knowledge or experience held by a prospective juror, without more, is insufficient to find partiality justifying excusal.

First, in *Staley v. Bridgestone/Firestone, Inc.*, the Tenth Circuit found that the plaintiff was not prejudiced by the district court's decision not to excuse a juror having knowledge and experience with subject matter involved in the case. 106 F.3d 1504, 1513-14 (10th Cir. 1997). In particular, *Staley* involved issues relating to the safe installation of multi-piece tire and rim assemblies. *Id.* at 1507-08. Coincidentally, one of the potential jurors had "worked with multi-piece rims and had used protective cages while working on tires." *Id.* at 1513. However, this potential juror was not disqualified because he affirmed that "he could be fair and would base his decisions on the evidence and not on his own experience." *Id.* at 1514. Consequently, the Tenth Circuit upheld the lower court's denial of excusing the potential juror upon a challenge for cause. *Id.*

Second, in *United States v. McCullah*, a criminal case involving a capital murder charge, the Tenth Circuit affirmed the retention of a potential juror who had prior knowledge and experience as a prison guard. 76 F.3d 1087, 1100 (10th Cir. 1996). The court stated further:

> We agree with the Second and Seventh Circuits that "a trial court is not required to excuse any juror on the basis of his occupational background so long as the court is able to conclude that the juror would be able to view the evidence and decide the case without bias."

Id. (citation omitted). As a result, since voir dire did not reveal any bias or fixed opinions on the part of the juror, the Tenth Circuit upheld his inclusion on the jury. *Id.*

IV. EXPOSURE TO MEDIA COVERAGE

Numerous cases decided by the Tenth Circuit have found juries impartial, despite the fact that actual jurors had been exposed to media coverage prior to being impaneled. For example, in *United States v. McVeigh*, the Tenth Circuit upheld the district court's jury selection as impartial, despite the fact that four jurors had been exposed to pretrial publicity concerning the case, including media reports of a purported confession by the defendant. 153 F.3d 1166, 1184 (10th Cir. 1998.) Similarly, in *Hale*, the Tenth Circuit affirmed the impartiality of the jury, even

though "almost all of [the actual and potential jurors] had heard about the case and some … had formed opinions based on pretrial publicity." 227 F.3d at 1333.

In *Goss*, the Tenth Circuit reviewed and summarized the Supreme Court's jurisprudence on what constitutes an impartial jury. 439 F.3d at 629. *Goss* explained that the Supreme Court has found impartial juries even where "pretrial publicity revealed … [the] defendant's prior conviction [to some of the potential jurors]" or substantial media coverage resulted in eight of twelve seated jurors having read or heard something about the case prior to trial. *Id.* (citing *Patton*, 467 U.S. at 1029-30 and *Mu'Min v. Virginia*, 500 U.S. 415 (1991)).

V. PRECONCEPTIONS

Jurors are not required to be completely devoid of any preconceived thoughts, opinions, beliefs, views or other determinations. *See Irvin*, 366 U.S. at 722-723. Instead, potential jurors need only be capable of setting aside their opinions or impressions and rendering a verdict based on the evidence put forth in court. *Id.*

Thus in *McVeigh*, during voir dire, each of the seated jurors, including four of whom were exposed to media reports of the defendant's confession, affirmed that they could "put aside [such] media reports and decide the case only on evidence presented in court." 153 F.3d at 1184. Consequently, the jury was upheld to be impartial because:

> [T]he district court repeatedly stressed the importance of avoiding … pretrial publicity …, … each of the seated jurors was individually questioned about his or her ability to set aside the effects that any exposure to pretrial publicity may have had, … each juror declared that he or she could remain impartial and decide the case on its merits, and … the district court was satisfied that each juror seated was sincere in that declaration.

Id.

Similarly, in *Hale*, twelve of the thirty-seven potential jurors had formed opinions, and six of those twelve were seated on the jury following their responses that "they could put aside their opinions and judge the case on the facts." 227 F.3d at 1333. Thus, the selection of the jury

was upheld because "none of the seated jurors stated unequivocally that they believed [the defendant] was guilty, nor was there a showing that any of the seated jurors had such fixed opinions that they could not judge the case impartially." *Id.* at 1334.

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Respectfully submitted

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