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March 5, 2010

Hon. Ted Stewart
United States District Judge
United States District Court, District of Utah
350 South Main
Room 148
Salt Lake City, Utah 84101

By E-mail and Hand Delivery

Re: *The SCO Group v. Novell, Inc.*
Case No. 2:04CV00139

Dear Judge Stewart,

We are responding to SCO's letter of earlier today regarding the trial testimony of Jack Messman, former CEO of Novell. SCO requests that the Court either (1) order Novell to produce Mr. Messman to testify during the first week of trial, or (2) allow SCO to both present Mr. Messman's deposition testimony (without Novell's counter-designations) *and* call Mr. Messman as an adverse witness when he is available to testify live on March 24. These requests are improper and contrary to the Federal Rules of Civil Procedure. As explained below, Novell has offered two alternative approaches, but SCO has declined both.

In its February 1, 2010 Pretrial Disclosures, Novell listed Mr. Messman as an expected live witness at trial. SCO's disclosures listed Mr. Messman as a witness to be presented through deposition testimony only. On February 13, 2010, SCO asked Novell for permission to call Mr. Messman as a live witness in SCO's case. Novell agreed to try to accommodate SCO's request, subject to Mr. Messman's schedule. On March 1, 2010, Novell first learned that Mr. Messman would be out of the country on business from approximately March 9 to March 21. Mr. Messman has volunteered to travel to Salt Lake City and be available to testify on March 24.

SCO's request for an order compelling Mr. Messman's attendance during the first week of trial must be rejected, because it exceeds the Court's authority. Mr. Messman is outside of the subpoena power of this Court, as he lives and works in California and Massachusetts. *See* Fed. R. Civ. P. 45(b)(2) & (c)(3). Indeed, SCO has not even attempted to serve a subpoena on Mr. Messman. Nor is Mr. Messman subject to Novell's control, either by employment or contract. Mr. Messman left Novell's employ in 2006 and he has no ongoing relationship with the company. Mr. Messman has volunteered to participate in the upcoming trial, but Novell cannot compel him to alter his existing travel plans that include travel outside the country for business between March 9 and March 21.[1]

[1] SCO cites *Garcia v. Lee*, 976 F.2d 1344 (10th Cir. 1992) for the proposition that trial courts have the power to control the presentation of evidence. *Garcia* addressed the propriety of a district court's decision to exclude certain

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In light of Mr. Messman's schedule, Novell has proposed two alternatives for presenting his testimony:

(1) SCO may hold its case open until March 24 when Mr. Messman will be available to testify as an adverse witness in SCO's case; or

(2) SCO may play Mr. Messman's video testimony (with Novell's counter-designations) during its case in the first half of trial. Mr. Messman would then be called by Novell as a witness in Novell's case on March 24.

SCO rejected these proposals, insisting instead that it be permitted both to play Mr. Messman's testimony (without Novell's counter-designations) in the first half of trial *and* present Mr. Messman's live testimony as an adverse witness by leaving open SCO's case-in-chief until March 24. SCO is not entitled to present Mr. Messman twice. Novell has agreed that SCO may either present Mr. Messman's live testimony (on March 24) by leaving open SCO's case-in-chief until that date or play his video testimony (together with Novell's counter-designations) during the first half of trial, but SCO is not entitled to both. If SCO chooses to play Mr. Messman's video testimony during the first half of trial, the Federal Rules require that Novell's counter-designations be played at the same time. *See* Fed. R. Civ. P. 32(a)(6).

Novell requests that the Court direct SCO to choose from among Novell's proposed alternatives, which are reasonable and legally appropriate.

Sincerely,

WORKMAN | NYDEGGER
A PROFESSIONAL CORPORATION

Sterling A. Brennan

c: Counsel for The SCO Group, Inc. (via e-mail)

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deposition testimony from trial. *Id.* at 1345. The opinion did not address a court's authority to compel the attendance of trial witnesses.