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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 **NOVELL'S MEMORANDUM OF POINTS AND AUTHORITIES RESPONDING TO SCO'S OBJECTION TO BOARD MEETING MINUTES** Judge Ted Stewart
AND RELATED COUNTERCLAIMS.	

I. INTRODUCTION

SCO objects to the introduction of minutes of a meeting of Novell's Board of Directors that state, in pertinent part:

> Then, upon motion duly made, seconded, and unanimously carried, the following recitations, and resolutions were adopted:
>
> RESOLVED: … [¶] … [¶] Novell will retain all of its patents, copyrights and trademarks (except for the trademarks UNIX and UnixWare) …

According to SCO, the minutes constitute inadmissible hearsay within hearsay. As explained below, SCO is wrong.

II. ARGUMENT

First, "minutes themselves plainly are admissible as a business record under Rule 803(6)." *Major League Baseball v. Salvino,* 542 F.3d 290, 314 (2d Cir. 2008). As explained by one of SCO's own authorities,

> Meeting minutes may fall under the hearsay exception in Rule 803(6) of the Federal Rules of Civil Procedure for records of regularly conducted activities, if the document is authenticated "by the testimony of the custodian or other qualified witness." Fed.R.Evid. 803(6); *Lloyd v. Prof'l Realty Servs., Inc.*, 734 F.2d 1428, 1433 (11th Cir. 1984).

Bookworld Trade v. Daughters of St. Paul, 532 F. Supp. 2d 1350, 1354 (M.D. Fla. 2007). The only reason *Bookworld Trade* held the minutes there under consideration inadmissible was the proponent of the evidence did not "propose[] a 'qualified witness'" to authenticate the minutes "and the identity of the author of the minutes is not apparent from the document." *Id.* at 1355. Here, by contrast, Novell has proposed two qualified witnesses to authenticate the minutes: Mr. Frankenberg, identified on the face of the document as the presiding officer of the meeting; and Mr. Bradford, identified on the face of the document as its author. Thus the minutes are admissible to prove that at the meeting, "upon motion duly made, seconded, and unanimously carried," it was "RESOLVED" that Novell would enter into a transaction whereby "Novell will

retain all of its patents, copyrights and trademarks (except for the trademarks UNIX and UnixWare)."

Second, there is no nested hearsay problem because Novell is not offering the minutes as (direct) evidence that Novell *did* retain the copyrights. Rather, Novell is offering the minutes as evidence of (1) what Novell's Board approved and (2) what Novell's intent was in entering into the transaction. With regard to the former, the 1972 Advisory Committee notes to Federal Rule of Evidence 801(c) explain:

> If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. ... The effect is to exclude from hearsay the entire category of "verbal acts" ... in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights.

The resolution of Novell's Board was a verbal act, not subject to exclusion by the hearsay rule. With regard to the latter purpose, Federal Rule of Evidence 803 expressly provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: ... (3) A statement of the declarant's then-existing state of mind ... (such as intent ...) ...

Third, the other two cases cited by SCO are, like *Bookworld Trade,* inapposite. In *Simmons Foods v. Capital City Bank,* 58 Fed. Appx. 450, 453 (10th Cir. 2003), the statement "Per Randy Hart, Jeff Willis advised Brock Snyder ..." was characterized as hearsay within hearsay. Here, by contrast, Novell is not offering the minutes to prove that events transpiring outside of the meeting occurred, because they were reported in the meeting; but only to prove what happened in the meeting itself.

Similarly, in *New York ex rel. Spitzer v. St. Francis Hospital,* 94 F. Supp. 2d 399, 404 n. 2 (S.D.N.Y. 2000), "[d]efendants ... cite[d] minutes prepared by defendants of meetings between the hospitals and the DOH which report that division of services between the hospitals was discussed." The court concluded: "to the extent that these minutes record defendants' own

statements, they are self-serving hearsay and can be accorded no weight." *Id.* There is no further information available in the opinion, but from what is stated, it appears that—as in *Simmons Foods*—the defendants were offering the minutes to prove the truth of statements reported in the minutes. That is not the case, here. Here, Novell is offering the minutes as proof of what its Board approved and intended.

III. CONCLUSION

The proffered minutes "plainly are admissible as a business record under Rule 803(6)," *Major League Baseball,* 542 F.3d at 314, to prove that at the meeting the resolution was presented and adopted; and the introduction of those minutes for the non-hearsay purposes of establishing (1) what Novell's Board approved and (2) its intent in entering into the transaction presents no nested hearsay problem.

DATED: March 8, 2010

Respectfully submitted,

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