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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 MOTION TO ALLOW EVIDENCE RESPONDING TO SCO'S ALLEGATION THAT NOVELL'S SLANDER CONTINUES "TO THIS VERY DAY"** Judge Ted Stewart
AND RELATED COUNTERCLAIMS.	

I. INTRODUCTION

Yesterday, SCO's lead counsel elicited from Robert Duff Thompson, SCO's second witness, the following testimony:

> Q. Are you aware of *continued* assertions of ownership to UNIX copyrights by Novell *to this very day*?
> A. Yes. (Tr. at 275:8-10 [emphasis added].)[1]

That testimony was previewed and emphasized by SCO not just once, or even twice, but three times the day before, in its opening statement. First, SCO's lead counsel told the jury:

- "Then in December of 2003, another important date as you'll learn, Novell goes public again, says they have the copyrights, and starts a web page where it *continues* to assert ownership of the UNIX copyrights *to this very day*." (*Id.* at 13:21-25 [emphasis added].)

Minutes later, he repeated:

- "So this is a campaign of slander, broadcast and repeated to the world that *continues to this very day*." (*Id.* at 14:8-9 [emphasis added].)

Then SCO's local counsel returned to the same theme, ensuring it would not be lost on the jury:

- "And *to this day* Novell, on their web site, *continues* to republish that slander." (*Id.* at 32:16-18 [emphasis added].)

In view of the foregoing, the Court should permit Novell to introduce evidence that Novell's representatives acted with knowledge of the following three facts:

1. Judge Kimball ruled on August 9, 2004, that "the APA did not transfer any copyrights" and "the agreements raise substantial doubt as to whether the APA as amended by Amendment No. 2 qualifies as a [17 U.S.C.] Section 204(a) writing";
2. Judge Kimball ruled on August 7, 2007 that "Novell is the owner of the UNIX and UnixWare copyrights"; and
3. The Tenth Circuit recognized on August 24, 2009 that "Novell has powerful arguments to support its version of the transaction."

[1] Transcript excerpts are reproduced as Ex. A hereto.

II. ARGUMENT

A. Any Information Bearing on Novell's Ownership and Available to Novell's Representatives when they Are Alleged to Have Asserted Ownership Is Relevant

As this Court has already ruled, SCO must prove Novell published its alleged slanders of SCO's purported title with knowledge of their falsity, or at least reckless disregard for their truth. (Dkt. 762.) Thus SCO has, by accusing Novell of "continu[ing] to assert ownership of the UNIX copyrights" and "continu[ing] to republish that slander" on its website "to this very day," placed at issue whether such publications were made with either knowledge that Novell did not own the copyrights or reckless disregard for the truth. *See United States v. Chavez*, 229 F.3d 946, 952 (10th Cir. 2000) ("It is widely recognized that a party who raises a subject in an opening statement 'opens the door' to admission of evidence on that same subject by the opposing party.").

Any evidence tending to make the existence of that scienter "more probable or less probable" is relevant, Fed. R. Evid. 401, and therefore admissible, Fed. R. Evid. 402, unless "its probative value is *substantially* outweighed by the danger of unfair prejudice," Fed. R. Evid. 403 (emphasis added). Evidence that Novell's representatives had and have information supporting Novell's ownership claim, as they asserted and continue to assert "ownership" and "republish that slander" on Novell's website, makes the existence of the requisite scienter less probable; and is thus admissible unless its probative value is substantially outweighed.

B. Certain Rulings Made by Judge Kimball and the Tenth Circuit Are Now Relevant

The information available to Novell's representatives as they asserted and continue to assert Novell's ownership includes several key judicial rulings. First, in his June 9, 2004 order denying SCO's motion to remand (Dkt. 29, reproduced as Ex. B hereto), Judge Kimball ruled:

- "It is undisputed that the APA did not transfer any copyrights" (*id.* at 8) and

- "the agreements raise substantial doubt as to whether the APA as amended by Amendment No. 2 qualifies as a [17 U.S.C.] Section 204(a) writing" (*id.* at 10).

As Novell's representatives "continue[d] to assert ownership" and "continue[d] to republish that slander" from June 9, 2004 "to this very day," they did so knowing that a sitting United States District Judge had ruled that the APA, without amendments, "did not transfer any copyrights"; and that there was "substantial doubt as to whether the APA," even "as amended by Amendment No. 2," satisfied the statutory requirements to transfer the copyrights. Certainly evidence that Novell's representatives were aware of that fact is probative of whether they "continue[d] to assert ownership" and "continue[d] to republish that slander" either *knowing* that those assertions were false or with reckless disregard for their truth.

Second, in his August 10, 2007 order granting summary judgment (Dkt. 377), Judge Kimball ruled:

- "Novell is the owner of the UNIX and UnixWare copyrights." (*Id.* at 62.)

And third, in its August 24, 2009 ruling reversing Judge Kimball's grant of summary judgment, the Tenth Circuit concluded:

- "Novell has powerful arguments to support its version of the transaction." *SCO Group, Inc. v. Novell, Inc.*, 578 F.3d 1201, 1215 (10th Cir. 2009).

Thus as Novell's representatives "continue[d] to assert ownership" from August 10, 2007 to August 24, 2009, they did so knowing Novell was the adjudicated owner; and as they "continue[] to republish that slander" "to this very day," they do so knowing that a sitting United States District Judge reached the same conclusion and the Tenth Circuit has recognized that "Novell has powerful arguments" in support of its contention. Again, evidence that Novell's representatives were and have been aware of those facts is highly probative of whether they "continue[d] to assert ownership" *knowing* that those assertions were false, or with reckless disregard for their truth.

C. Novell Should Be Permitted to Introduce Evidence that its Representatives Were Aware of Judge Kimball's and the Tenth Circuit's Rulings

The issue presented by this Motion is not whether prior adjudications are relevant to ownership. Instead, the issue presented is whether awareness that those rulings were made is relevant to whether Novell's representatives "continue[d] to assert ownership" and "continue[] to republish that slander" "to this very day" with either knowledge that those assertions are false or reckless disregard for their truth. Clearly, awareness of those rulings is relevant to state of mind. Thus Novell should be permitted to introduce evidence that those accused of publishing and authorizing publications on its behalf were aware of those rulings.

Necessarily, such evidence will include disclosure of the contents of the rulings themselves; which SCO will argue is unfairly prejudicial and potentially misleading. But SCO created that problem for itself when it opened the door by repeatedly asserting in its opening statement, and eliciting testimony, that Novell's supposed slander "continues to this very day." Moreover, the risks SCO has created can be minimized by a limiting instruction to the jury that they may consider the evidence only to determine the state of mind with which publications were made, and not to determine who owns the copyrights. Because any residual risk cannot be said to *substantially* outweigh the enormous probative value of this evidence, the evidence should come in. *See* Fed. R. Evid. 403.

III. CONCLUSION

Now that SCO has opened the door, by arguing and presenting evidence to the jury that Novell's supposed slander "continues to this very day," Novell should be permitted to introduce evidence that its representatives acted with knowledge that:

- On June 9, 2004, Judge Kimball ruled, "[i]t is undisputed that the APA did not transfer any copyrights" and "the agreements raise substantial doubt as

to whether the APA as amended by Amendment No. 2 qualifies as a [17 U.S.C.] Section 204(a) writing";

- On August 7, 2007, Judge Kimball ruled, "Novell is the owner of the UNIX and UnixWare copyrights"; and
- On August 24, 2009, the Tenth Circuit concluded, "Novell has powerful arguments to support its version of the transaction."

DATED: March 11, 2010 Respectfully submitted

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