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*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 OFFER OF PROOF  
REGARDING PRIOR INCONSISTENT  
DECLARATION OF STEVEN  
SABBATH**

Judge Ted Stewart

On March 15, 2010, SCO called as a witness Kimberlee Madsen, a paralegal working for Steven M. Sabbath at the Santa Cruz Operation (“Santa Cruz”) in 1995 and 1996. SCO was permitted on direct examination to question Ms. Madsen as to whether several out-of-court statements in documents of which she was not the author comported with her understanding of the transaction between Santa Cruz and Novell in 1995. However, Novell was not permitted on cross examination to question Ms. Madsen as to whether statements made under penalty of perjury in a declaration of Mr. Sabbath, her superior in 1995, comported with her understanding of the same transaction.

Novell also intended to read to the jury portions of Mr. Sabbath’s declaration during the playing of his videotaped deposition testimony. These portions are prior inconsistent statements that impeach the videotaped testimony of Mr. Sabbath that was displayed by SCO.

Pursuant to Federal Rule of Evidence 103(a)(2), Novell makes this offer of proof regarding the December 22, 2003 declaration of Steven M. Sabbath, marked as Novell Ex. Y23 and attached for reference, setting forth the evidence the jury would have heard had Novell been permitted to proceed as set out above. The statements at issue within Mr. Sabbath’s December 22, 2003 declaration are admissible under Federal Rule of Evidence 801(c) as, consistent with the Court’s holding allowing similar questioning by SCO, the statements would not have been used with respect to Ms. Madsen’s testimony to establish the truth of the matters asserted, but to establish her understanding of the transaction between Santa Cruz and Novell, thus they are not hearsay. The portions of Mr. Sabbath’s 2003 declaration that Novell intended to read to the jury during the playing of Mr. Sabbath’s videotaped deposition testimony are admissible as non-hearsay under Federal Rule of Evidence 801(d)(1)(A), as Mr. Sabbath unequivocally lays the foundation for the declaration in his deposition, the declaration is flatly inconsistent with the very deposition testimony presented by SCO to the jury, and the declaration was given under oath subject to penalty of perjury.

### **A. Testimony of Kimberlee Madsen**

On direct examination, SCO was permitted to repeatedly question Ms. Madsen regarding the content of out-of-court statements that she did not draft. These documents were all accepted into evidence and published to the jury. Ms. Madsen was asked whether various statements within these documents comported with her understanding of the 1995 transaction between Santa Cruz and Novell.

By the same token, Novell intended to ask Ms. Madsen questions regarding the content of the declaration of Steven M. Sabbath. Mirroring SCO's direct examination, Novell would have asked Ms. Madsen whether various statements within Mr. Sabbath's declaration comported with her understanding of the 1995 transaction. Used for this purpose, the statements are not hearsay under Federal Rule of Evidence 801(c). As of 1995, Mr. Sabbath had roughly fifteen years more experience in the legal industry than did Ms. Madsen. Mr. Sabbath was the General Counsel of the company at which Ms. Madsen was a paralegal. Mr. Sabbath was Ms. Madsen's direct superior, including in the very transaction at issue. If the question "does this statement comport with your understanding" is relevant as posed by SCO regarding out-of-court statements in legal and regulatory filings not drafted by Ms. Madsen, certainly the same question as posed by Novell regarding statements made under penalty of perjury by Ms. Madsen's direct superior in the transaction at issue is relevant.

If Novell had been permitted to question Ms. Madsen consistent with what was permitted of SCO on direct examination, Novell would have cross-examined Ms. Madsen regarding the following statements in Mr. Sabbath's declaration, each of which is relevant to challenge a particular area of Ms. Madsen's understanding to which she testified.

<b>Area of Madsen Testimony</b>	<b>Ex. Y23 Portion Novell Intended to Use in Cross-Examination</b>
<p>Santa Cruz acquired UNIX and UnixWare businesses.</p>	<p>“Initially, Santa Cruz was interested in purchasing both of [the UNIX and UnixWare] businesses. However, the royalty stream associated with the UNIX System V software licensing business led to a total valuation for both businesses that Santa Cruz could not afford. Therefore, Santa Cruz proposed that Novell retain the legacy UNIX System V licensing business and Santa Cruz purchase only the UnixWare business. Under this proposal, Santa Cruz would administer the collection of royalties under the UNIX System V license agreements and pass through these royalties to Novell for a fee.” (Ex. Y23 ¶ 10).</p>
<p>Santa Cruz acquired all right, title, and interest, including copyrights.</p>	<p>“Under the Asset Purchase Agreement, Novell retained significant UNIX-related assets following the sale. For example, Schedule 1.1(b) of the asset purchase agreement provided that much of the UNIX System V intellectual property would not be transferred to Santa Cruz by listing the following items as “Excluded Assets”: V. Intellectual Property: A. All copyrights and trademarks, except for the trademarks UNIX and UnixWare. B. All Patents.” (Ex. Y23 ¶ 11). “It is my understanding, based upon my review</p>

	<p>of Plaintiff’s amended complaint, that Plaintiff claims to have acquired all right, title and interest in and to UNIX System V operating system source code, software and sublicensing agreements, together with copyrights, additional licensing rights in and to UNIX System V, and claims against all parties breaching such agreements. I understand that Plaintiff also claims to control the right of all UNIX vendors to use and distribute UNIX System V. I believe that these claims are incorrect. As described above in relation to the Related Agreements and Amendment No. 2, Novell retained certain rights under the UNIX System V licensing agreements, as well as certain UNIX System V intellectual property as described above.”</p> <p>(Ex. Y23 ¶ 29).</p>
<p>Section 4.16B must be read in a more limited fashion than its plain language dictates in light of the intent of the agreement.</p>	<p>“Although Amendment No. 1 made several changes to Section 4.16, it did not impose any new limits on Novell’s ability, at its sole discretion, to amend, modify, supplement or waive any rights under, or assign any rights to, the legacy UNIX System V license agreements in any manner or respect. Furthermore, I am not aware of any provision in the Asset Purchase Agreement, or any amendment thereto, that imposed on Novell any obligation to preserve the confidentiality of the UNIX System V source code for the benefit of Santa</p>

	<p>Cruz.” (Ex. Y23 ¶ 13).</p>
<p>Copyrights were required for the business and essential to the transaction.</p>	<p>“As discussed above, the fundamental business deal reflected in the Asset Purchase Agreement was that Santa Cruz would acquire Novell’s UnixWare business and Novell would effectively retain the legacy UNIX System V licensing business. My understanding was that the language in Amendment No. 2 quoted above was intended to implement this business deal with respect to copyrights and trademarks. So far as I know, neither Santa Cruz nor Novell ever identified the specific copyrights or trademarks for which a transfer of ownership was ‘required’ for Santa Cruz to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies. I do not know whether Novell ever executed an instrument of assignment to transfer ownership of specific copyrights or trademarks to Santa Cruz, nor do I know whether such an instrument was required in order to effect the transfer.” (Novell Ex. Y23 ¶ 26).</p> <p>“I believe that Santa Cruz assigned little, if any, of the value of the acquisition to any copyrights that it might have acquired from Novell.” (Novell Ex. Y23 ¶ 28).</p>

**B. Testimony of Steven Sabbath**

In addition to its questioning of Ms. Madsen as detailed above, Novell intended to read to the jury portions of the 2003 declaration of Mr. Sabbath as prior inconsistent statements to impeach the videotaped deposition testimony that was shown to the jury by SCO. Used for this purpose, the statements are not hearsay under Federal Rule of Evidence 801(d)(1)(A). ¶¶ 10, 11, 12, 13, 23, 26, 28, and 29 of the attached Novell Ex. Y23 would have been read to the jury. Each of these paragraphs was stated in a declaration by Mr. Sabbath under penalty of perjury and directly conflicts with the videotaped deposition testimony of Mr. Sabbath presented to the jury by SCO.

<b>Sabbath Deposition Testimony Displayed by SCO</b>	<b>Ex. Y23 Portion Novell Intended to Use to Impeach</b>
<p>“We were buying the entire business, including the intellectual property.” (Sabbath 2-12-07 20:5-9)</p> <p>“[C]opyrights were going with the assets.” (Sabbath 2-12-07 24:24).</p>	<p>“Santa Cruz proposed that Novell retain the legacy UNIX System V licensing business and Santa Cruz purchase only the UnixWare business.” (Ex. Y23 ¶ 10).</p> <p>“Under the Asset Purchase Agreement, Novell retained significant UNIX related assets following the sale. For example, Schedule 1.1(b) of the Asset Purchase Agreement provided that much of the UNIX System V intellectual property would not be transferred to Santa Cruz . . .” (Ex. Y23 ¶ 11).</p> <p>“It is my understanding . . . that Plaintiff claims to have acquired all right, title and interest in and to UNIX System V operating system source code, software and sublicensing agreements, together with copyrights,</p>

	<p>additional licensing rights in and to UNIX System V, and claims against all parties breaching such agreements. I understand that Plaintiff also claims to control the right of all UNIX vendors to use and distribute UNIX System V. I believe that these claims are incorrect. As described above in relation to the Related Agreements and Amendment No. 2, Novell retained certain rights under the UNIX System V licensing agreements, as well as certain UNIX System V intellectual property as described above.”</p> <p>(Ex. Y23 ¶ 29).</p>
<p>Agreed with 2004 declaration in which he stated, “I understand that IBM has argued that Section 4.16(b) of the APA gave Novell the right to require Santa Cruz to waive any breach of the intellectual property protections provided in the SVRX licenses. That argument is contrary to the intent of paragraph 4.16(b) as I understood it.”</p> <p>(Sabbath 2-12-07 67:9-25).</p>	<p>“Section 4.16(b) of the Asset Purchase Agreement included the following language providing that Novell would have the right, at its sole discretion, to amend, modify, supplement or waive any rights under, or assign any rights to, the UNIX System V license agreements . . . . Since Novell would be retaining the right to receive the royalties under the UNIX System V licenses, it was agreed that Novell also would retain certain rights to control the contractual relationships with the licensees.”</p> <p>(Ex. Y23 ¶ 12).</p> <p>“Although Amendment No. 1 made several changes to Section 4.16, it did not impose any new limits on Novell’s ability, at its sole discretion, to amend, modify, supplement or</p>

	<p>waive any rights under, or assign any rights to, the legacy UNIX System V license agreements in any manner or respect.”</p> <p>(Ex. Y23 ¶ 13).</p> <p>“Furthermore, since the process set out in Amendment No. 2 applies only in the context of a royalty buy-out, Novell has the right, at its sole discretion, to direct Plaintiff to amend, modify, supplement or waive any rights under, or assign any rights to, any ‘SVRX Licenses,’ as defined in the amended Asset Purchase Agreement, without complying with the process set out in Amendment No. 2 (and, if Plaintiff fails to do so, to take such action on Plaintiff’s behalf) . . .”</p> <p>(Ex. Y23 ¶ 23).</p>
<p>Confirmed that he reviewed and approved 2004 declaration in which he stated that “Amendment Number 2 was intended to confirm, among other things, the parties’ intent that SCO would obtain ownership of the UNIX copyrights under the APA.”</p> <p>(Sabbath 2-12-07 208:20-209:5).</p>	<p>“Novell would effectively retain the legacy UNIX System V licensing business. My understanding was that the language in Amendment No. 2 quoted above was intended to implement this business deal with respect to copyrights and trademarks. So far as I know, neither Santa Cruz nor Novell ever identified the specific copyrights or trademarks for which a transfer of ownership was ‘required’ for Santa Cruz to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies.”</p> <p>(Ex. Y23 ¶ 26).</p> <p>“I believe that Santa Cruz assigned little, if</p>

	any, of the value of the acquisition to any copyrights that it might have acquired from Novell.” (Ex. Y23 ¶ 28).
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DATED: March 15, 2010

Respectfully submitted

By: /s/ Sterling A. Brennan

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