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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 **OPPOSITION TO SCO'S LETTER TO THE COURT OF MARCH 15, 2010, REGARDING ADMISSION OF DEPOSITION TESTIMONY FROM THE IBM CASE** Judge Ted Stewart
AND RELATED COUNTERCLAIMS.	

By letter dated March 15, 2010 ("Letter"), SCO requested that the Court allow SCO to introduce at trial in *this* case deposition testimony that was given by SCO witnesses in *another* case. Because Novell was not a party to the other case and was not represented at the depositions, SCO's request should be denied.

I. ARGUMENT

Nearly a year before SCO commenced *this* action, by suing Novell, SCO commenced a separate action, *SCO Group, Inc. v. IBM*, No. 2:03-CV-294 (the "IBM Action"), by suing IBM. SCO now seeks to have deposition testimony given by three SCO salesmen in the IBM Action introduced into evidence against Novell in this case. Novell objects because deposition testimony given in another action is inadmissible hearsay. Fed. R. Evid. 801(c), 802.

SCO claims that the IBM depositions are admissible pursuant to Federal Rule of Civil Procedure 32(a)(8), which provides: "A deposition lawfully taken … in any federal … court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action." But Novell is not and never has been a party to the IBM Action, so to avail itself of this rule SCO must show that IBM was Novell's "representative[] or successor[] in interest."

Instead of addressing the standard prescribed by the rule it invokes, SCO instead cites *Minyen v. American Home Assurance Co.*, 443 F.2d 788, 791 (10th Cir. 1971) for the proposition that "testimony adduced in a prior suit may be admissible in a subsequent suit even if the parties are not identical, so long as the issues are so similar that the party-opponent in the prior case had the same interest and motives in his cross-examination that the present opponent has." The *Minyen* standard has since been incorporated into the Federal Rules of Evidence, which were first enacted three years after *Minyen* and which limit admission under the *Minyen* standard to cases where the witness is unavailable. Fed. R. Evid. 804(b)(1). Because SCO does not pretend its salesmen are unavailable, *Minyen* is inapposite.

Even if *Minyen* prescribed the applicable standard, SCO has not satisfied it. Essentially, SCO argues that because IBM and Novell have claimed a joint defense privilege, IBM's interest and motives in cross-examination must have been the same as Novell's. As SCO correctly states in the concluding paragraph of its Letter, IBM and Novell assert a joint defense privilege because there are "overlapping issues." But "overlapping issues" does not translate into "the same interest and motives." To the contrary, as underscored by the allegation SCO emphasizes from its second amended complaint against Novell, IBM and Novell have interests and motives that are in some respects divergent and even antagonistic. As SCO reports on page 2 of its Letter, SCO alleges in its second amended complaint in the IBM Action that "IBM … induced … Novell to take the position that Novell owned the copyrights." If IBM induced Novell, then Novell might have a right to indemnity from IBM against any resulting liability to SCO.

With respect to the specific depositions at issue, Novell may have attempted to rebut the element of special damages by eliciting cross-examination deposition testimony to establish certain of SCO's damages were attributable to actions taken by IBM, not Novell. Conversely, it may not be in the best interest of IBM to challenge testimony tending to implicate Novell, as such testimony could decrease IBM's liability.

The cases SCO cites do not support its position. *Minyen* affirmed a trial court ruling *excluding* a deposition. *Clay v. Buzas*, the only district court case cited by SCO that is within the Tenth Circuit, is similarly inapposite, analyzing the admissibility of deposition testimony against the party who was involved in the prior suit. 208 F.R.D. 636, 638 (D. Utah 2002). The cases cited by SCO from other districts and circuits do not apply this standard as broadly as SCO requests either. *See, e.g.*, *Aamco Transmissions, Inc. v. Marino*, 1991 U.S. Dist. LEXIS 10168, at *4-6 (E.D. Pa. July 22, 1991) (common interest and motive where parties against whom prior testimony was offered included officers of prior party); *Bankers Trust Co. v. Rhoades*, 108 B.R. 423, 430-31 (S.D.N.Y. 1989) (depositions admissible from prior suit against parties who were

shareholders of party in prior suit because issues in prior suit implicated party's officers and principal shareholders); *Miwon, U.S.A., Inc. v. Crawford*, 629 F. Supp. 153, 154 n.3 (S.D.N.Y. 1985) (testimony admitted in light of similarity of both parties and issues to those in prior case and no opposition by defendant).

If SCO wanted to use deposition testimony in *this* case for individuals who also gave depositions in its suit against IBM, it should have taken their depositions in this case with Novell's counsel present. Both parties did this with many other witnesses, including Michael Anderer, William Broderick, Edward Chatlos, Erik Hughes, Jeff Hunsaker, John Maciaszek, Darl McBride, Jack Messman, Andrew Nagle, Steven Sabbath, Chris Sontag, Blake Stowell, and Ryan Tibbitts. SCO should not be permitted to prejudice Novell in this trial due to its own failure to properly take depositions from certain individuals that it has now decided it wants to use in this case.

II. CONCLUSION

Because deposition testimony given in the IBM case by available witnesses is inadmissible hearsay in this case, SCO's request should be denied.[1]

DATED: March 16, 2010

Respectfully submitted,

By: /s/ Sterling A. Brennan
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[1] Use of deposition transcripts from another case to impeach a witness testifying at trial presents a different issue, not (yet) before the Court.