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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

THE SCO GROUP, INC., by and through the Chapter 11 Trustee in Bankruptcy, Edward N. Cahn, Plaintiff/Counterclaim-Defendant, vs. NOVELL, INC., a Delaware corporation, Defendant/Counterclaim-Plaintiff.	**SCO'S MOTION TO ALLOW TESTIMONY OF INTENT PURSUANT TO FEDERAL RULE OF EVIDENCE 803(3)** Civil No. 2:04 CV-00139 Judge Ted Stewart

INTRODUCTION

SCO presents this motion to allow customer statements of intent regarding SCOsource licenses under the exception to the hearsay rule stated in Fed. R. Evid. 803(3).

ARGUMENT

When this issue was presented in Court on March 16, 2010, the Court cited United States v. Ledford, 443 F.3d 702 (10th Cir. 2006), as the basis for its understanding that customer statements of intent do not fall under the hearsay exception of Fed. R. Evid. 803(3). That rule excludes from the hearsay rule statements "of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." As set forth below, SCO submits that the Tenth Circuit's jurisprudence with respect to Rule 803(3) is in accord with decisions in the Second and Third Circuits that allow such testimony as evidence of the declarant's intent, plan or motive.

In Ledford, the Tenth Circuit held that to the extent a statement "goes beyond" the speaker's declaration of her emotional condition, it is not covered by Rule 803(3). 443 F.3d 702, 710; see McInnis v. Fairfield Cmtys., Inc., 458 F.3d1129, 1143-44 (10th Cir. 2006). Ledford and McInnis stand for the principle that, with respect to where statements include both a declaration of a particular emotion and the declarant's explanation as to why they possessed that emotion, the latter statement is not excluded by Fed. R. Evid. 803(3). See, e.g., McInnis, 458 F.3d 1129, 1143 (statements expressing emotions, such as "I hate to be in this predicament" are admissible under Rule 803(3), but statements that assert why the declarant possessed such emotions are not admissible).

The statements that SCO seeks to admit are not declarations of the "emotions" of customers. Rather, they are statements that regard the "intent" or "motives" of these customers. Unlike statements of emotion, statements of intent or motive inherently contain reasons behind

the particular state of mind. With respect to statements concerning intent, the Tenth Circuit has recognized such a distinction under Fed. R. Evid. 803(3). The Court has repeatedly held, including in the same year that Ledford and McInnis were decided, that "Rule 803(3) allows admission of an out-of-court statement to show a future intent of the declarant to perform an act." Allen v. Sybase, Inc., 468 F.3d 642, 656-57 (10th Cir. 2006) (citing United States v. Freeman, 514 F.2d 1184, 1190 (10th Cir.1975)); see Phillips v. Grady County Bd. of County Comm'rs, 92 Fed. Appx. 692, 696 (10th Cir. 2004); U.S. v. Pyron, 113 F.3d 1247 (Table) (10th Cir. 1997). Here, the statements of SCO's customers are being offered to show their intent to perform acts: to initially accept and then to reject SCOsource licenses. As such, they are admissible evidence pursuant to Fed. R. Evid. 803(3).

The Tenth Circuit has also held that the "present state of mind" exception applies to customer intent as measured by survey responses. Randy's Studebaker Sales, Inc. v. Nissan Motor Corp. in U.S.A., 533 F.2d 510, 520 (10th Cir. 1976). In that case, the court found that the answers to a four question customer service survey, along with written comments provided by customers, were "properly admitted to reflect the then existing state of mind of customers as to the quality of Randy's service." Id. Whether the evidence is sought to be introduced through a survey or through a witness testifying to conversations personally had with customers should not affect the applicability of Fed R. Evid. 803(3).

Tenth Circuit law is in agreement with that of other circuits that have directly addressed the issue of statements of customers regarding their reasons for not making a purchase. "Statements of a customer as to his reasons for not dealing with a supplier are admissible" for the "limited purpose" of establishing the motive for failing to engage in a transaction. Hydrolevel Corp. v. Am. Soc'y of Mech. Eng'rs, Inc., 635 F.2d 118, 128 (2d Cir. 1980) (quoting Herman

Schwabe, Inc. v. United Shoe Mach. Corp., 297 F.2d 906, 914 (2d Cir.), cert. denied, 369 U.S. 865 (1962)). While such statements would not be admissible to prove that Novell in fact made the slanderous statements or as evidence that sales were actually lost, they are properly admitted as evidence of the motives of potential SCOsource customers. See, e.g., Callahan v. A.E.V., Inc., 182 F.3d 237, 252 (3rd Cir. 1999) (distinguishing proper admission of customers' statements to show motive pursuant to Fed. R. Evid. 803(3) from improper reliance on such statements to prove fact of lost sales to defendant); U.S. Info. Sys., Inc. v. International Brotherhood of Elec. Workers Local Union No. 3, No. 00 Civ. 4763 RMB JCF, 2006 WL 2136249, *8 (S.D.N.Y. Aug. 1. 2006) (recognizing admissibility of customers' statements to show customers' motives for canceling contracts with plaintiff).

CONCLUSION

SCO respectfully requests, for the reasons set forth above, that the Court grant SCO's Motion to Allow Testimony of Intent Pursuant to Federal Rule of Evidence 803(3).

DATED this 17th day of March, 2010.

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CERTIFICATE OF SERVICE

I, Brent O. Hatch, hereby certify that on this 17th day of March, 2010, a true and correct copy of the foregoing SCO's Motion to Allow Testimony of Intent Pursuant to Federal Rule of Evidence 803(3) was filed with the court and served via electronic mail to the following recipients:

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