SCO Grp v. Novell Inc Doc. 810

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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 RENEWED MOTION REGARDING PRIOR DISTRICT COURT RULINGS** Judge Ted Stewart
AND RELATED COUNTERCLAIMS.	

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In its ruling on Novell's Motion to Allow Evidence Responding to SCO's Allegation that Novell's Slander Continues "To This Very Day," the Court stated:

> The Court believes that the questions that were asked and the statements that were made in opening were unwise and inappropriate, but did not bring enough attention to the jury that it justif[ies] opening up the Court's prior ruling on denying the opportunity for prior Court rulings to be introduced. The Court is concerned primarily with the fact that it would be very difficult to present to the jury in a fair and accurate fashion the legal history of this case. And to do so would, I think, become ultimately very confusing to the jury and would be very prejudicial, and the probative value to the defendants would be minimal. *The Court will, however, state that plaintiffs had better be very, very careful not to come close to the line again because this ruling could be revisited.* And, secondly, the Court will try to make sure that in the jury instructions it gives to the jury that it is very, very clear to the jury that any issue of, say, scienter, has to focus on that period of time when the statements, allegedly evidencing malice, took place.

(Tr. March 15, 2010 at 775:7-776:1; emphasis added.)

Notwithstanding this admonition, SCO has, with its damages case, once again crossed the line. Dr. Pisano offered testimony about a "but for" world that continues to the end of 2007, well after the time period when Novell first made the allegedly slanderous statements, and well into the period in which Novell had obtained favorable Court rulings. And although SCO decided, at the last minute, to instruct Dr. Botosan not to offer testimony on her "event study," she nonetheless calculated damages amounting to tens of millions of dollars for the same periods.

In offering this testimony, SCO opened the door to cross-examination about actual events that occurred during the damages period, including the Court's earlier rulings. The Court's ruling this morning that Novell did not have the option of cross-examination using those rulings was made before SCO put on its damages case. Now that SCO's experts have testified, however, the prejudice to Novell if it is not permitted such cross-examination is palpable.

Novell therefore renews its motion that it be allowed to challenge SCO's damages case with evidence of what happened in the real world, namely, the favorable rulings Novell actually obtained.

I. SCO'S DAMAGES CALCULATIONS OPENED THE DOOR TO THE DISTRICT COURT RULINGS

Dr. Pisano's "but for" hypothetical world turned on two assumptions: that SCO owns the copyrights and that Novell did not make the allegedly slanderous statements. Based on surveys of Linux users' interest in indemnification, Dr. Pisano calculated a "market penetration" for SCOsource "right to use" licenses in the "but for" world, as compared with the extremely low market penetration in the real world. Dr. Pisano claimed that by relying on these surveys, he had necessarily factored in the likelihood that, even in the "but for" world, some Linux users might not have taken RTU licenses. But he acknowledged that one would want to take account of all events in the real world to test the reliability of that conclusion.[1]

Dr. Pisano's surveys were taken before Novell had received its first favorable district court ruling in mid-2004, but his "market penetration" calculations extended well past that date, stopping not in mid-2004 or even the end of 2004, but rather toward the end of 2007. In other words, Dr. Pisano projected a market penetration well past the initial period following Novell's statements, well past the date of the surveys he relied on, and even past the date of a district court ruling that strongly favored Novell on the question of copyright ownership. Yet he did not factor those decisions into his analysis. Nor did he factor in Novell's favorable August 2007 summary judgment ruling into his calculation of market penetration in 2007.

Dr. Botosan made the same "but for" assumptions. She relied on projections of SCOsource's likely success that were made by SCO and third parties in 2003, as compared with SCO's actual SCOsource revenues. She too testified for the period 2003 through the end of

[1] Because tomorrow is the last opportunity to cross-examine a SCO damages expert, Novell is filing this motion without the benefit of today's trial transcript.

2007, and her testimony quantified damages through the end of 2007. Certain of Dr. Botosan's damages calculations, moreover, explicitly relied on Dr. Pisano's market penetration analysis. She too apparently did not take into account the impact of the district court rulings on the projected success of the SCOsource campaign.

The jury thus has now heard evidence of between $100M and $250M in damages that SCO allegedly suffered from Novell's statements. But that evidence is premised on a demonstrable falsity: that Novell obtained no favorable district court rulings during the claimed damages period that also could have contributed to customer reluctance to take SCOsource licenses.

II. BY CLAIMING SUCH DAMAGES, SCO HAS REVERSED THE CALCULUS OF PROBATIVE VALUE OVER PREJUDICE

In the Court's ruling cited above, the Court earlier concluded that the prejudicial effect of informing the jury of prior Court rulings outweighed their probative value in view of the limited impact of the "to this day" statements to which Novell pointed. Now that SCO has quantified damages, however, the prejudicial effect of not informing the jury of those rulings is overwhelming.

In the event the jury finds for SCO on liability, over $100M in damages rides on the question whether the jury accepts SCO's damages calculations. And SCO's damages calculations are fundamentally flawed in their underlying assumptions, because they fail to take into account what actually happened – which was that the Linux community learned in mid-2004 that there was a strong likelihood that Novell was right on the merits of its UNIX copyright ownership contentions and it learned in 2007 that Novell had in fact prevailed on that issue. At the very least, the jury should be informed of those rulings so that jurors can judge for themselves whether the damages calculations are reliable.

Proof of the relevance of the district court rulings can be seen in the following hypothetical: suppose instead of learning of favorable Court rulings, the Linux community had learned that the district court had issued rulings strongly favoring SCO's position. Plainly, given the assumptions and opinions offered by SCO's experts, actual SCOsource licenses would have trended upwards, mitigating the claimed adverse impact of Novell's statements. Indeed, SCO predicted as much at the time. Here is technology writer Maureen O'Gara, quoting SCO CEO Darl McBride:

> SCO CEO Darl McBride blames Novell for SCO's negligible license fees. He says it's muddied the waters and given prospective licensees pause by claiming that SCO doesn't own the IP. IBM's propaganda isn't helping either, he said.
>
> SCO is hoping for a break in the logjam when the courts decide whether or not SCO's slander suit against Novell should proceed.
>
> McBride said the judge promised a decision "in a few days" at a hearing earlier this week.

"SCO Can't Sell Linux Licenses Worth a Damn," Linux World, June 11, 2004 (Novell Exhibit W28 at SCO1628081).

But that is not what happened. Instead, the Linux community learned of rulings that favored Novell. One article at the time headlined: "Judge Stings SCO in Novell Spat over Unix rights," PC Pro, June 11, 2004 (Id. at SCO 1628110). Plainly, the Court's ruling had an impact on SCOsource penetration – even apart from any "slanderous" out-of-court statements Novell might have made. Dr. Pisano acknowledged as much when he said he would want to know about any real world events that actually transpired – even though he blinded himself to pertinent district court rulings.

III. ONCE AGAIN, SCO BROUGHT THIS ON ITSELF

SCO's abandonment of Dr. Botosan's event study does not alter the prejudice/probative value analysis. Apparently, in abandoning the study, SCO thought it was abandoning expert

testimony on "causation," and that meant that prior Court rulings were no longer relevant to its experts' testimony. But SCO was plainly on notice that Novell would seek to introduce evidence of the prior court rulings if SCO pursued its anticipated damages claim. Novell raised the "door opening" implications of SCO's anticipated damages testimony on March 16. To be sure, *one component* of Novell's argument pointed to the event study. But Novell also pointed to the periods for which SCO was claiming damages as separately and independently raising door opening concerns:

> Now, moving to the other side, the lost profits analysis, they are seeking multi-millions of dollars of damages, more than $50 million of damages in 2007 alone. In that year Judge Kimball issued his summary judgment ruling. We don't need to wait until 2007. In 2004 Judge Kimball ruled on a motion to dismiss that the asset purchase agreement did not transfer copyrights, and that it was highly unlikely that amendment number two met the writing requirement for transfer of ownership of a copyright.
>
> Now, whether or not that ultimately proved to be correct or not, that was in the marketplace. Dr. Botosan is going to present to this jury events in the marketplace and make prognostications. So as long as they are going to put on expert witnesses who are going to testify as to what happened in 2004, 2005, 2006 and 2007, and seek multi-millions of dollars of damages on the premise of how the market would have reacted, what was the state of mind of people in the market for causation, and what was the state of mind of potential licensees, Novell has every right then to look at all of the events, other events that would have occurred in those same periods. They will open the door if they present this testimony, Your Honor.

(Tr. March 16, 2010, 985:17-986:13)

Regardless of the event study, causation lay at the heart of both Dr. Pisano and Dr. Botosan's testimony. Both assumed that in the "but for" world, Novell did not make the allegedly slanderous statements. Plainly, therefore, they pointed to Novell's statements as the cause of the failure of SCOsource in the real world. Abandoning the event study is of no moment.

IV. NOVELL SHOULD THUS BE PERMITTED TO CROSS-EXAMINE DR. BOTOSAN USING MARKETPLACE INFORMATION ON THE DISTRICT COURT RULINGS

Because the relevant issue is what the marketplace understood about the implications of the district court rulings in Novell's favor, Novell proposes to cross-examine Dr. Botosan on the reliability of her damages opinions in view of Judge Kimball's rulings.

Novell acknowledges that the jury may wonder, in the wake of this evidence, why they are sitting jury service. Novell proposes that they be told the following after Dr. Botosan's testimony ends:

> Ladies and Gentlemen: You may be wondering why, in view of the evidence you have heard of prior court rulings, you have been called to jury service on the issues in this lawsuit. SCO appealed the district court rulings that you have heard about, and the Court of Appeals determined that a jury should decide the issues in this case. That is why you are here.

DATED: March 17, 2010

Respectfully submitted,

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