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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 FOR LEAVE
TO EXAMINE OTHER WITNESSES
ON PRIOR RULINGS**

Judge Ted Stewart

AND RELATED COUNTERCLAIMS.

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

On Thursday, March 18, 2010, the Court permitted Novell to cross-examine SCO's expert, Dr. Christine A. Botosan, regarding prior rulings made in this case by Judge Kimball; but instructed that those rulings should not be "raised again with any other witnesses" without leave. (Tr. at 1465:12-14.) Tomorrow (Monday, March 22), SCO will conclude its case by presenting testimony from Ryan Tibbits, and Novell will begin presenting its own case by calling Joseph LaSala to testify. Novell now moves for leave to cross Mr. Tibbits and examine Mr. LaSala with respect to the rulings already addressed in Novell's cross-examination of Dr. Botosan.

As explained below, Novell has located several additional relevant authorities not previously cited to or by the Court, including three Tenth Circuit opinions. Those cases characterize prior judgments and the like as hearsay with respect to findings made therein, but also hold that such rulings can be admitted for non-hearsay purposes unless their probative value is substantially outweighed by the risk that the jury will give undue weight to their hearsay findings. Because Novell seeks to introduce evidence of and relating to prior rulings for classically non-hearsay purposes, and the risk of prejudice is minimal, its motion should be granted.

II. LEGAL PRINCIPLES

The introduction of prior rulings into evidence implicates two evidentiary rules: the hearsay rule, as embodied in Federal Rule of Evidence ("Rule") 802; and Rule 403's provision that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." *See generally Greycas, Inc. v. Proud*, 826 F.2d 1560, 1567 (7th Cir. 1987) (affirming admission of a prior judgment).

Considering first the hearsay aspect, when offered to prove the truth of findings reported therein, a prior ruling "is hearsay. It is an out-of-court written statement by a judge ... offered to prove the truth of the matter asserted." *Herrick v. Garvey*, 298 F.3d 1184, 1191 (10th Cir. 2002);

accord United States v. Boulware, 384 F.3d 794, 806 (9th Cir. 2004) (“A prior judgment is therefore hearsay to the extent that it is offered to prove the truth of the matters asserted in the judgment”) (reversing for failure to admit a prior judgment); *Greycas*, 826 F.2d at 1567 (“civil judgments are said not to be usable in subsequent proceedings as evidence of the facts underlying the judgment; for as to those facts, the judgment is hearsay”). As explained below, Novell does not offer the rulings for the hearsay purpose of proving any findings stated therein.

Where a prior ruling is offered for a non-hearsay purpose, exclusion might still be proper under Rule 403(a) because there is the “possible problem ... that the jury might be confused as to the proper weight to give such evidence.” *Johnson v. Colt Indus. Operating Corp.*, 797 F.2d 1530, 1534 (10th Cir. 1986) (finding harmless error in admission of a judicial opinion). With respect to this inquiry, “the concern ... center[s] on whether the jury would construe the opinions as *resolving* by judicial declaration *key disputed factual issues* in the case.” *Personnel Dept., Inc. v. Prof'l Staff Leasing Corp.*, 297 Fed. Appx. 773, 787 (10th Cir. 2008) (unpublished) (affirming admission of summary judgment and judicial opinion). As explained below, under the unique circumstances here presented, that risk is minimal and does not substantially outweigh the rulings’ probative value.

III. ARGUMENT

A. The Prior Rulings Are Offered for Non-Hearsay Purposes

Novell does not offer evidence relating to prior rulings to prove the truth of any of the findings articulated therein, i.e., for any hearsay purpose. In particular, Novell does not offer the rulings as evidence that the APA, as amended, did not transfer copyrights. As this Court has already instructed the jury, Judge Kimball’s rulings are not relevant to that issue. (*See* Tr. at 1498:20-24.) As this Court has already ruled, with respect to copyright ownership (and related issues of contract interpretation), “the real evidence in this case is not the summary judgment

ruling or the Tenth Circuit’s decision, but the evidence used in making those decisions.” (Dkt. 763 at 4.)

1. The Prior Rulings Are Relevant to whether Novell Caused SCO to Lose Sales

Instead, Novell offers evidence relating to the rulings for various non-hearsay purposes. The first is to challenge SCO’s damages theory, as propounded by SCO’s expert Dr. Botosan; and its underlying premise that any loss of sales between May 28, 2003 and October 31, 2007 is attributable to Novell’s assertion of ownership. The prior rulings constitute powerful evidence that from June 9, 2004 to October 31, 2007, there were other factors—Judge Kimball’s rulings—to explain third-party purchasing decisions. In this context, the Court has already held that the prior rulings and Dr. Botosan’s failure to take them into account are relevant and may be considered by the jury in evaluating her analysis.

By the present motion, Novell seeks leave to cross-examine SCO’s last witness, Mr. Tibbits, with respect to the same rulings, for essentially the same reasons. Based on his prior deposition testimony, it is expected that Mr. Tibbits will testify that SCO lost various customers as a result of Novell’s alleged slander, including the United States Department of Defense.¹ In his deposition, Mr. Tibbits was asked:

Do you recall anything specific about the discussions of the copyright ownership issue with the Department of Defense?

He answered:

¹ SCO’s counsel also emphasized the Department of Defense in SCO’s opening statement:

I put just a few of them up here, contracts that couldn’t be reached. Morgan Stanley, for instance, said they refused to meet with SCO until SCO provided, among other things, documents or information that disproved press reports that questioned SCO’s claim of ownership of the relevant UNIX code. Cause, effect. Action, cause, effect. Ford, same thing. Sherwin Williams, same thing. Merrill Lynch, Hewlett Packard, Google, even the United States Department of Defense.

(Tr. at 41:16-24.)

Yeah. I remember him asking about it and what the status was, and I think he asked when and how will that get resolved? And again, I think the lawsuit had been filed at that point but I'm not certain of that. And so we would just say, "Well, we have to see the litigation through." That was it. I think that was when Novell had filed the first motion to dismiss, but I'm not certain of that. So we were kind of in limbo waiting to have either that heard or ruled upon.

The ruling on the motion for which SCO and apparently the Department of Defense were waiting is the June 9, 2004 ruling referenced in Novell's cross-examination of Dr. Botosan. Novell should be permitted to explore that ruling with Mr. Tibbits, as well.

2. The Prior Rulings Are Relevant to Novell's State of Mind

In addition to proving that Novell's statements caused SCO to lose sales, SCO must also prove that Novell's statements were made with constitutional malice. By its present motion, Novell also seeks leave to introduce such evidence to defeat constitutional malice, as part of its examination of Mr. LaSala. The prior rulings are relevant in two ways to whether Novell's statements were published with reckless disregard for their truth. First, the rulings are directly probative of scienter, to the extent that Novell's representatives acted with knowledge of them. Second, the rulings are circumstantial evidence of scienter because the fact that they were made proves, or at least strongly supports, the objective reasonableness of Novell's assertion of ownership, *see, e.g., Abbott Labs. v. Sandoz, Inc.*, 532 F. Supp. 2d 996, 999 (N.D. Ill. 2007) (dismissing claim for *willful* patent infringement because the Federal Circuit had ruled that a substantial question as to the validity of the patent was raised in another case); and objective reasonableness is in turn probative of whether the allegedly slanderous statements were published with constitutional malice, *see, e.g., St. Amant v. Thompson*, 390 U.S. 727, 732, 88 S. Ct. 1323 (1968) (recognizing inherent probability as a factor relevant to constitutional malice).

As detailed in Novell's Motion to Allow Evidence Responding to SCO's Allegation that Novell's Slander Continues "To this Very Day" (Dkt. 790), SCO three times in its opening statement and at least once in its presentation of evidence charged Novell with continuing its

slander “to this very day.” That put at issue Novell’s state of mind throughout the pendency of this litigation. The Court denied Novell’s earlier motion because it determined that the statements and evidence presented during the first week of trial “did not bring enough attention to the jury [to] justify opening up the Court’s prior ruling ... denying the opportunity for prior Court rulings to be introduced.” (Tr. at 775:8-12.) By the end of the second week of trial, that changed. By presenting expert opinions augmented by demonstratives that were prepared and kept in view of the jury throughout Dr. Botosan’s testimony, of damages from lost license sales running through October 31, 2007, SCO has now clearly brought enough attention to the continuing slander aspect of its case to justify permitting Novell to make a full response. Thus, as Novell begins the presentation of its own evidence, it should be permitted to respond to SCO’s allegations by presenting *all* of the information available to its representatives as they made statements in Novell’s behalf, including the contents of Judge Kimball’s June 9, 2004 and August 10, 2007 orders.

Moreover, as circumstantial (rather than direct) evidence of scienter, the probative value of the prior rulings is entirely independent of whether the allegedly actionable statements were made before or after those rulings issued. Thus, e.g., Judge Kimball’s ruling in August 2007 that Novell did own the copyrights is evidence that Novell’s assertions in 2003 and 2004 were objectively reasonable, which is in turn probative of whether those assertions were made with constitutional malice.

If “it ... make[s] no difference ... whether the judgment is erroneous then the judgment is not being offered as hearsay at all.” *Greycas*, 826 F.2d at 1567. That is the case, here. Novell seeks to introduce evidence relating to the prior rulings for the classically non-hearsay purpose of proving state of mind. Thus “the significance of [the] offered statement[s] lies solely in the fact that [they were] made, no issue is raised as to the truth of anything asserted,

and the statement[s] [are] not hearsay.” See Advisory Comm. Notes to 1972 Proposed Rule 801(c).

B. The Probative Value of the Rulings Is Not Substantially Outweighed by any Danger of Unfair Prejudice

The risk of prejudice from the introduction of judicial rulings arises “because of the imprimatur that has been stamped upon them by the judicial system.” *Herrick*, 298 F.3d at 1192. Here, that risk does not outweigh the probative value of the prior rulings because, by instructing the jury that the Tenth Circuit reversed, the Court has already stripped Judge Kimball’s rulings of whatever overly-influential imprimatur they might otherwise have had. Consistent application of the presumption that jurors are overawed by judicial pronouncements leads ineluctably to the conclusion that any influence exerted by Judge Kimball’s rulings is at least balanced, and probably overmatched, by the contrary influence of the Tenth Circuit’s reversal.

Moreover, the influence that judicial opinions are presumed to have with the lay public weighs at least as heavily in favor of admission as against because Novell’s point in referencing the opinions is to show that there have been powerful factors influencing (1) the decisions of the purchasing public, apart from Novell’s naked assertion of ownership, and (2) Novell’s own actions, apart from any supposed malice. Because exclusion under Rule 403 is proper only if the risk of prejudice outweighs the probative value, substantially, and the influential character of prior judicial rulings weighs as heavily on both sides of the scale, the presumption of influence actually strengthens the case for admission (rather than exclusion).

Finally, any risk of prejudice has already been substantially accepted because the jury has already been exposed to the rulings. Any marginal prejudice arising from subsequent reference to the rulings, now that they have already come in for one purpose, cannot substantially outweigh the probative value they have for the other critical non-hearsay purposes identified above.

C. Any Residual Concerns Are more Properly Addressed by Instruction and Redaction, rather than Exclusion

In *Johnson*, Colt Industries was sued for design defects in its “famous Colt ‘six-shooter’, first produced ... in 1873,” which “expose the user to a hazard known as ‘drop-fire’,” i.e., accidental discharge if the gun is dropped. 797 F.2d at 1532. The plaintiff introduced a prior judgment against Colt Industries for similar injury caused in a similar accident involving the same gun model, which was admittedly relevant “to impeach the credibility of [Colt’s] officer who testified to not being aware of any drop-fire related law suits” and “in showing ... indifference toward a known risk.” *Id.* at 1534. The entire panel agreed that the prior judgment was relevant, and thus presumptively admissible, for the non-hearsay purposes of proving “primary negligence” and “indifference toward a known risk.” *Id.* Two members of the panel nevertheless concluded the opinion should have been excluded because there was a risk that the jury “might be confused into believing that the opinion’s findings are somehow binding in the case at bar” and “evidence of the [prior] accident and the subsequent successful lawsuit ... could ... have been adduced in another form.” *Id.* The two judges who considered admission of the prior opinion to be error concluded it was harmless. *Id.* at 1535.

Judge McKay, concurring, stated that to address the risk of confusion “the trial court should have admitted it only after reducing its potential for prejudice through use of a limiting jury instruction or by editing the opinion.” *Id.* at 1538 (McKay, J., concurring). In *Personnel Department*, the entire panel approved the trial court’s implementation of Judge McKay’s approach.² In that case, after negotiations directed to plaintiff’s acquisition of defendant’s business broke down, plaintiff sued for breach of a letter of intent. 297 Fed. Appx. at 776. Several months later, after negotiations with another buyer broke down due to the pendency of plaintiff’s suit, defendant counterclaimed for tortious interference. *Id.* The defendant obtained

² Unpublished decisions by the Tenth Circuit “may be cited for their persuasive value.” 10th Cir. Rule 32.1(A).

summary judgment on plaintiff's claim for breach, and the case was transferred from Maryland to Colorado for trial of defendant's tortious interference counterclaim. *Id.* At trial, the defendant introduced both the order granting summary judgment on plaintiff's claim and a published opinion from an unrelated case "apparently reflect[ing] the well-settled law of Maryland concerning the non-binding nature of letters of intent." 297 Fed. Appx. at 786. Both "were expressly introduced into evidence as bearing on the mindset of [plaintiff] in bringing the breach of contract action and, more specifically, on whether [it] recklessly disregarded established Maryland law concerning the non-binding nature of letters of intent." *Id.* at 787. Citing McKay's concurrence, the entire panel held that admission was not error because "[t]he district court ... expressly limited the jury's consideration of the Maryland judicial opinions, particularly underscoring that the opinions did not control the jury's resolution of the key factual issue." *Id.* at 788.

Even *Johnson* recognized that a judicial opinion could be admitted "with detailed limiting instructions" "when no other form of evidence is available." 797 F.2d at 1534. That is precisely the case, here. Here it is not any of the facts reported in the prior rulings that matters but the facts that the prior rulings were made, and said what they said. Thus the proper remedy for any perceived risk of prejudice is not exclusion but "detailed limiting instructions" (and redaction).

To that end, the Court has already instructed the jury: "To the extent that language was just read to you from that 2004 decision pertains to the issues in this case, you are to disregard it." (Tr. at 1498:15-17.) The Court subsequently clarified: "as to the issues of contract interpretation, as you will be instructed by the court subsequently, you are to disregard the language you have just heard and rely only on those instructions that will be given to you by the court at the end of the case." (*Id.* at 1498:20-24.) The jury should not be instructed to disregard the rulings entirely unless they are irrelevant, and if they are irrelevant they should not be

admitted. The latter formulation of the Court’s instruction more accurately captures the nuance.

Accordingly, with respect to this evidence, the jury should be instructed either:

You may not consider this language in connection with your interpretation of the APA, as amended, or in deciding who owns the copyrights. You may consider this language in determining whether Novell’s statements were made with reckless disregard for their truth, and whether SCO was harmed by such statements.

Or, if SCO prefers an instruction that does not draw attention to the permissible uses of the evidence but only forecloses its impermissible use:

You may not consider this language in connection with your interpretation of the APA, as amended, or in deciding who owns the copyrights. You may consider it for any other purpose.

IV. CONCLUSION

Now that SCO has opened the door—first by accusing Novell of slander continuing “to this very day” and then by seeking damages for sales allegedly lost through October 31, 2007—and now that evidence of the prior rulings has already come in for one purpose, Novell should be permitted to introduce further evidence as direct and circumstantial evidence of scienter. Novell does not, has not, and will not seek to use the rulings for the hearsay purpose of proving ownership, but it should be permitted to use them for the non-hearsay purposes identified above.

DATED: March 21, 2010

Respectfully submitted,

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