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Attorneys for Plaintiff, The SCO Group, Inc.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

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| <p>THE SCO GROUP, INC., by and through the Chapter 11 Trustee in Bankruptcy, Edward N. Cahn,</p> <p>Plaintiff/Counterclaim-Defendant,</p> <p>vs.</p> <p>NOVELL, INC., a Delaware corporation,</p> <p>Defendant/Counterclaim-Plaintiff.</p> | <p>SCO'S OBJECTION TO NOVELL'S DESIGNATION OF TESTIMONY OF MICHAEL DEFAZIO</p> <p>Civil No. 2:04 CV-00139</p> <p>Judge Ted Stewart</p> |
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SCO objects to two of the enumerated designations from Michael DeFazio's testimony on the grounds that Mr. DeFazio admitted that he lacks personal knowledge and has no foundation for asserting such views. Novell seeks to introduce two portions of Mr. DeFazio's deposition testimony regarding his belief that Novell retained the UNIX and UnixWare copyrights under the APA. (Dep. 323:15-324:18; 282:12-21.)¹ At deposition, Mr. DeFazio admitted that his understanding of the APA (and specifically the language of the Excluded Assets Schedule) is not based on discussions he had within Novell or with Santa Cruz, but rather on his reading of the contract and his observations of how the language "appeared" in the APA. At deposition, Mr. DeFazio testified:

Q. Was it your understanding that the APA at the time was intended to transfer the copyrights for UNIX to Santa Cruz?

A. No. The APA as it was written retained and my understanding was that the retention was as the way the team crafted the words to implement the goal of bulletproofing this financial asset stream. I was not involved in any discussions within Novell or certainly with Santa Cruz that talked about transferring the copyright or not transferring it. It just appeared this way in the APA and that's what was executed.

(Dep. 323:15-324:4 (emphasis added).)

This Court has consistently excluded similar testimony from SCO's witnesses whose opinions were based on their reading of portions of the APA, such as Amendment No. 2. For instance, the Court precluded Mr. Frankenberg from offering any testimony regarding Amendment No. 2 because "his testimony on Amendment No. 2 is based on his own reading of that agreement." (Docket No. 717 at 7 (emphasis added).) The Court held such "testimony is irrelevant, not based on personal knowledge, and will not help the trier of fact. Therefore, that testimony will be excluded." The Court similarly granted Novell's request to exclude such

¹ A copy of the testimony at issue is attached to this objection as Exhibit A.

testimony from Mr. Broderick, Ms. Acheson, Mr. Thompson, Mr. Mattingly, Mr. Michels, Mr. Chatlos, and Mr. Levine. (Id. at 4-10.)

By his own admission, Mr. DeFazio was not a party to “any discussions within Novell or certainly with Santa Cruz that talked about transferring the copyright or not transferring it.” His “reading of the APA” is thus the only basis for his opinions that the copyrights did not transfer to Santa Cruz.² As this Court has held, such testimony should be excluded as irrelevant, without foundation, without personal knowledge, and not helpful to the trier of fact.

SCO respectfully submits, for the foregoing reasons, that the Court should exclude the testimony at issue.

DATED this 21st day of March, 2010.

By: /s/ Brent O. Hatch
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² Mr. DeFazio’s testimony (at 324:05-18) that his views were also based on his not having been told that the parties had agreed to something contrary to what he reads the APA to say does not change the analysis. That testimony again invokes his reading of the APA, which, at bottom, remains the basis for his views regarding copyright transfer.

CERTIFICATE OF SERVICE

I, Brent O. Hatch, hereby certify that on this 21st day of March, 2010, a true and correct copy of the foregoing SCO's Objection to Novell's Designation of Testimony of Michael DeFazio was filed with the court and served via electronic mail to the following recipients:

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