Brent O. Hatch (5715)
bhatch@hjdlaw.com
Mark F. James (5295)
mjames@hjdlaw.com
HATCH, JAMES & DODGE, PC
10 West Broadway, Suite 400
Salt Lake City, Utah 84101
Telephone: (801) 363-6363
Facsimile: (801) 363-6666

David Boies (admitted pro hac vice)
dboies@bsfllp.com
Robert Silver (admitted pro hac vice)
rsilver@bsfllp.com
Edward Normand (admitted pro hac vice)
enormand@bsfllp.com
BOIES SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504
Telephone: (914) 749-8200
Facsimile: (914) 749-8300

Stuart Singer (admitted pro hac vice)
ssinger@bsfllp.com
Sashi Bach Boruchow (admitted pro hac vice)
sboruchow@bsfllp.com
BOIES SCHILLER & FLEXNER LLP
401 East Las Olas Blvd.
Suite 1200
Fort Lauderdale, Florida 33301
Telephone: (954) 356-0011
Facsimile: (954) 356-0022

Attorneys for Plaintiff, The SCO Group, Inc.

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 MEMORANDUM IN OPPOSITION TO NOVELL'S MOTION TO EXAMINE OTHER WITNESSES ON PRIOR RULINGS** Civil No. 2:04 CV-00139 Judge Ted Stewart

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Plaintiff, The SCO Group, Inc. ("SCO"), respectfully submits this Memorandum in Opposition to Novell's Motion to Examine Other Witnesses on Prior Rulings.

INTRODUCTION

This is Novell's sixth attempt to put before the jury what this Court has already acknowledged to be confusing and prejudicial material related to snippets of Judge Kimball's reversed decisions in this case.[1] The Court rejected Novell's requests on all but one of the prior attempts. The Court's decision to reject Novell's requests is correct. In fact, the Tenth Circuit has held that the admission of prior opinions like this is "error." Johnson v. Colt Indus. Oper. Corp., 797 F.2d 1530, 1533 (10th Cir. 1986).

In response to Novell's fifth attempt, the Court carved out a narrow exception to allow limited reference to the prior decisions only for the purpose of cross-examining Dr. Botosan with respect to the relationship of her "but-for" world to the real world.[2] Now, having been granted

---

[1] Novell has repeatedly sought to introduce Judge Kimball's rulings to the jury through requests in its pretrial brief, motions in limine, request for judicial notice, renewed request for judicial notice, request regarding SCO's opening the door, and requests to permit questioning of Dr. Botosan.

[2] Despite Novell's representations that a predicate would be laid relating the prior rulings to the October 2003 Deutsche Bank forecast upon which Dr. Botosan relied, Novell never did lay such a predicate. The Court had warned:

> "I do want to add some clarification to my ruling allowing you to question this witness about the prior court decisions of Judge Kimball. I want to make it clear to you that it is based upon your representation to the Court that you can prove its relevance through Dr. Botosan's analysis. If the Court deems that you simply have raised the existence of those prior court decisions in an effort to bring it to the jury's attention without it being relevant at all, in other words, if you ask her about them and she convincingly explains why it is totally irrelevant to her analysis, then the Court will deem that to be an unwise decision on your part."

Novell used the opportunity to simply read to the jury selected portions of Judge Kimball's overruled decisions rather than use the existence of litigation developments in the real

that opportunity, Novell wants to throw the door open to extensive use of these reversed and irrelevant decisions. The Court's consistent rejection of Novell's attempts to do so was correct, SCO has relied on the Court's rulings with respect to this issue, and it would be highly prejudicial to reverse course – because of Novell's supposed identification of additional authority that it failed to identify on its previous five applications regarding this same issue,[3] or for any other reason – and to allow these decisions to be used.

ARGUMENT

I. THE COURT HAS CORRECTLY DECIDED THAT THE PRIOR DECISIONS ARE NOT ADMISSIBLE

The Court's decisions denying Novell's requested relief four successive times remains correct for several reasons.

A. The Judicial Opinions Novell Seeks To Introduce Are Not Relevant.

First, the prior decisions have little or no probative value with respect to Novell's state of mind at the time it made its slanderous statements because the decisions were not written until after Novell made its slanderous statements. Novell initially slandered SCO's title on May 28, 2003, and the last slanderous statement at issue (that Novell "still own[s] UNIX") occurred in March 2004.[4] (Docket No. 115 ¶ 37.) SCO's claims thus concern the state of Novell's scienter in 2003 and early 2004, when all of Novell's slanderous statements were made. Each of these

---

world to cross Dr. Botosan. It appears that Novell's objective was simply to get before the jury the prejudicial portions of those reversed decisions for reasons largely unrelated to Dr. Botosan's damages analysis.

[3] SCO shows below that Novell's new authority does not remotely support Novell's request, let alone change the analysis.

[4] The Court has already ruled that prior references to the statements on Novell's internet site did not put Novell's state of mind at issue post March 2004, and in reliance on that ruling, SCO has not made further reference to the continuation of Novell's posting on its internet site after its initial posting in December 2003.

statements predates all of the rulings Novell seeks to admit into evidence. Obviously judicial decisions in June 2004 or August 2007 cannot have any bearing on Novell's state of mind that preceded such decisions.

Second, the undisputed facts show that Judge Kimball's decisions in June 2004 and August 2007 could not reasonably be said to have probative value regarding the state of mind of Novell's executives even if Novell's subsequent slanderous statements had been at issue. Novell posted its statements in 2003 and has simply left them on its website, regardless of the ebbs and flows in the litigation cycle of this case. The 2004 excerpts from Judge Kimball appear in the context of a decision on remand and denying Novell's motion to dismiss SCO's slander of title claim. The 2007 summary judgment decision was reversed in August 2009, and even after the Tenth Circuit reversed that decision, Novell has left its statements up on its website. Thus, Novell's conduct is flatly inconsistent with its claim that it was influenced to publish its slanderous statements by Judge Kimball's decisions.[5] Opening the door to Novell introducing Judge Kimball's decisions so a witness can supposedly say "Yes, I relied on Judge Kimball's decisions" would then require cross-examination about the reasonableness of that result, the failure to change actions after the Tenth Circuit decision, and so forth. Doing so turns the trial into a trial over Judge Kimball's erroneous decisions rather than the underlying facts – precisely what this Court has ruled it would not permit. (See, e.g., Docket No. 763 at 4 ("As was stated by the Court previously, 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").) The Court should not change course mid-trial to permit this.

---

[5] Novell did not assert any defense based on the existence of positive rulings from this Court in its Answer to SCO's Second Amended Complaint and Counterclaims, dated more than a year after Judge Kimball's 2004 order denying SCO's motion to remand and refusing to dismiss SCO's slander of title claim, the first order at issue in the present motion.

Third, Novell's request is irrelevant (and would thus be particularly prejudicial) for the independent reason that Novell executives' understandings of the import of the judicial decisions is obviously filtered through counsel. Yet Novell has not pled an advice-of-counsel defense in the action, nor has Novell waived attorney-client privilege with respect to such issues. Both the assertion of that affirmative defense and the waiver of the privilege would be required for Novell to be permitted to assert reliance on the meaning of Judge Kimball's decisions.

B. The Judicial Opinions Novell Seeks To Introduce Have No Probative Value.

The prior rulings have no probative value with respect to the issue of customers with whom SCO had discussions, as there is no factual predicate that any customer's decision not to take a SCOsource license was impacted by any of those judicial rulings. Novell could have sought to develop such evidence, but it did not. Indeed, almost all of the specific customers at issue were lost before the judicial decisions were ever issued.[6] All of the customers were long gone, and the SCOsource program had been long dead, by the time of the 2007 summary judgment decision.

With respect to damages, the Court gave Novell extremely generous leeway – which Novell fully took advantage of – to cross-examine Dr. Botosan extensively about Judge Kimball's decisions and challenge her damages analysis. No further use of those decisions regarding damages is warranted. Certainly, the proposed revisiting of those decisions with Mr. Tibbitts and Mr. LaSala, who are not damages witnesses, cannot be based on any purported relevance to any evidence at trial or to any calculation of damages.

---

[6] In an abundance of caution, SCO will not question Mr. Tibbitts regarding his interactions with the Department of Defense.

Moreover, the record from Dr. Botosan's testimony is now clear that her damages analysis was based on an October 2003 forecast that predated the slander action and was unaffected by any decisions in the subsequent slander of title litigation. Dr. Botosan's only reliance on the "real world" was to deduct the actual amount of SCOsource license revenues during the relevant period from the overall lost revenues calculation. The fact that the damages period extends to 2007 due to Novell's actions in 2003 and 2004 does not make Novell's intent during that time relevant; the relevant element of SCO's claims is Novell's intent at the time it made the slanderous statements, not at the time or times that SCO suffered damages. (And, as noted, Novell's state of mind was hardly effected by judicial decisions, where its maintenance of its statements on its website did not change even after the Tenth Circuit reversed those rulings.)

C. The Judicial Opinions Novell Seeks To Introduce Are Highly Prejudicial to SCO.

While there is little or no probative value to these snippets of reversed decisions, they would be highly prejudicial.[7] On multiple occasions, this Court has made clear its view of the prejudice involved in elevating snippets of judicial opinions, holding that the relevance of such prior judicial opinions "is substantially outweighed by their prejudicial effect and their potential to confuse and mislead the jury under Fed. R. Evid. 403." (See, e.g., Docket No. 763 at 3; Docket No. 709 at 2 ("the Court finds that any relevance is substantially outweighed by the danger of unfair prejudice and confusion on these issues").) The cases Novell cites in its instant motion (addressed below) confirm the Court's reasoning. The prejudice is compounded in a case like this, where the judicial excerpts that Novell seeks to reintroduce have been reversed.

[7] The Court should note that the grounds noted by Judge Kimball in 2004 for believing the APA did not transfer copyrights – that the APA and Amendment No. 2 did not satisfy the writing requirement of Section 204 of the Copyright Act and the APA should be interpreted separately from Amendment No. 2 – were both expressly rejected by the Tenth Circuit.

Moreover, the timing of Novell's motion introduces an added element of prejudice. SCO has legitimately relied throughout the trial on the Court's adhering to its repeated decisions regarding these issues. It would be greatly prejudicial now, in the last week of trial, for additional mention to be made of these rulings when Plaintiff's counsel, in reliance on this Court's rulings, did not address them in opening statements and throughout the first two weeks of trial (with the limited exception of Dr. Botosan's cross-examination noted above).

D. Novell's Reliance on Additional Authority Is Meritless.

Novell's three new Tenth Circuit cases do note remotely suggest a contrary outcome. In fact, two of the cases expressly conclude precisely what this Court concluded – that evidence of prior judicial decisions should not be admitted. In Novell's first case, Johnson v. Colt Indus. Oper. Corp., 797 F.2d 1530 (10th Cir. 1986), the Court first found "that the admission of the opinion was error." It then stated that the admission of judicial opinions presents "obvious dangers." The Court explained:

> "The most significant possible problem posed by the admission of a judicial opinion is that the jury might be confused as to the proper weight to give such evidence. It is possible that a jury might be confused into believing that the opinion's findings are somehow binding in the case at bar. Put most extremely, the jury might assume that the opinion is entitled to as much weight as the trial court's instructions since both emanate from courts."

797 F.2d at 1534. Novell's only takeaway from Johnson is that although the Tenth Circuit held "that the admissions of the opinion was error," it determined that the error was "harmless" in the context of that case, given other evidence in the record. Novell cannot seriously ask this Court to commit an error simply because it might later be deemed harmless by an appellate court.

Novell's second case, Herrick v. Garvey, 298 F.3d 1184 (10th Cir. 2002), is similarly unavailing. The Herrick Court held that evidence of a prior opinion in a related case was inadmissible, including under any hearsay exceptions that the proffering party sought to invoke.

In Personnel Dep't v. Profess. Staff Leasing Corp., 2008 WL 4698479 (10th Cir. 2008), Novell's third "new" case, the Court considered a different issue – the admissibility of decision that was good law (and had not been reversed) and that had been issued before the act in question – neither of which applies in our case. Even on those facts, the Court recognized that "the admission into evidence of prior judgments and judicial opinions might be problematic because juries would be likely to give undue weight to them." Id. at *12-*13.[8] In short, none of those cases remotely constitutes new authority supporting Novell's request.

CONCLUSION

SCO respectfully requests, for the reasons set forth above, that the Court should deny Novell's Motion for Leave to Examine Other Witnesses on Prior Rulings.

DATED this 21st day of March, 2010.

By: /s/ Brent O. Hatch
HATCH, JAMES & DODGE, P.C.
Brent O. Hatch
Mark F. James

BOIES, SCHILLER & FLEXNER LLP
David Boies
Robert Silver
Stuart H. Singer
Edward Normand
Sashi Bach Boruchow

Counsel for The SCO Group, Inc.

[8] Novell's reliance on Personnel Dep't fails for the additional reason that it is an unpublished decision that is cannot be relied on as controlling authority.

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 MEMORANDUM IN OPPOSITION TO NOVELL'S MOTION TO EXAMINE OTHER WITNESSES ON PRIOR RULINGS** was filed with the court and served via electronic mail to the following recipients:

Sterling A. Brennan
David R. Wright
Kirk R. Harris
Cara J. Baldwin
WORKMAN | NYDEGGER
1000 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111

Thomas R. Karrenberg
Heather M. Sneddon
ANDERSON & KARRENBERG
700 Bank One Tower
50 West Broadway
Salt Lake City, UT 84101

Michael A. Jacobs
Eric M. Acker
Grant L. Kim
MORRISON & FOERSTER
425 Market Street
San Francisco, CA 94105-2482

Counsel for Defendant and Counterclaim-Plaintiff Novell, Inc.

By: /s/ Brent O. Hatch
Brent O. Hatch
HATCH, JAMES & DODGE, P.C.
10 West Broadway, Suite 400
Salt Lake City, Utah 84101
Telephone: (801) 363-6363
Facsimile: (801) 363-6666