

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

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

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

Attorneys for Plaintiff, The SCO Group, Inc.

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

<p>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.</p>	<p>SCO'S MEMORANDUM OF POINTS AND AUTHORITIES ON THE LIMITATIONS ON NOVELL'S TRIAL TESTIMONY IMPOSED BY NOVELL'S OWN PRIVILEGE OBJECTIONS</p> <p>Civil No. 2:04 CV-00139</p> <p>Judge Ted Stewart</p>
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Plaintiff, The SCO Group, Inc. (“SCO”), respectfully submits this Memorandum of Points and Authorities on the Limitations on Novell’s Trial Testimony Imposed by Novell’s Own Privilege Objections.

BACKGROUND

Novell has advised SCO that it plans to call two attorneys, former Novell General Counsel Joseph LaSala and Novell Associate Counsel Gregory Jones, on March 22, 2010. In addition, Novell has identified among its “will call” witnesses former attorneys David Bradford, Tor Braham, Allison Amadia, and Aaron Alter, as well as other witnesses who will testify concerning communications they had with Novell attorneys about issues in this litigation. SCO submits the following points and authorities concerning the limitations that should apply to the examinations of Novell witnesses.

Novell cannot elicit communications between or among Novell, Ms. Amadia, or Messrs. Bradford, Braham or Alter, where Novell blocked inquiry into these communications at deposition by assertion of privilege. Novell also cannot elicit communications involving Messrs. LaSala or Jones, where Novell also blocked inquiry into these communications on the same grounds. Even in those instances in which Novell’s assertion of privilege did not preclude any and all testimony on a particular communication or subject matter, the assertion reflects that SCO was not permitted fully to explore the communication or subject matter.

In addition to the numerous objections Novell asserted over discrete topics,¹ Novell asserted objections – and therefore at trial should not be permitted to elicit communications on – the following issues:

¹ SCO has collected and submits in Appendix A the numerous topics on which Novell asserted privilege objections just during the depositions of Messrs. LaSala, Jones, and Alter.

1. Novell communications with outside counsel regarding APA negotiations. During SCO's 30(b)(6) deposition of Mr. Jones, Novell asserted near the outset of the deposition that "as a general matter" it had not "waived the question of privileged communications between its outside counsel and the employees of Novell with respect to the negotiation of the APA." (May 10, 2007 Jones Dep. (Ex. 1) at 14-15.) At the same time, Novell asserted that such communications reflected on a chart and declaration it submitted during the deposition "would be communications that are not privileged." Id. at 15. The following colloquy took place during the same deposition:

Q: Do you or your counsel regard those discussions with [Mr. Braham] as privileged ones in which I can't ask about the nature of the discussions?

A: Yeah, he's – I would say that the information that's available in the declaration that he filed is obviously not privileged. Anything beyond that information I think would be privileged communication.

Q: If he was describing to you Novell's intent under the APA on an issue that he hadn't addressed in his declaration? I don't understand how that's privileged. Maybe we can just come at it when it comes up.

A: Yeah, I would generally regard it as privileged.

(Id. at 87-88 (emphasis added).) Novell cannot elicit testimony concerning its communications with outside counsel where Novell repeatedly and selectively blocked SCO from obtaining testimony on all such communications.

2. Discussions between Wilson Sonsini and Novell regarding the transfer of UNIX and UnixWare copyrights. During the Rule 30(b)(6) deposition of Mr. Alter, who was representing the law firm of Wilson Sonsini, counsel for SCO inquired concerning discussions between

SCO expects to state objections during trial when Novell seeks to elicit testimony on topics identified in this Appendix.

Novell and its outside counsel in 1995 “regarding the prospects of retaining intellectual property in UNIX and UnixWare” under the APA. (April 27, 2007 Alter Dep. (Ex. 2) at 45.) Mr. Alter was instructed not to answer except with respect to the declaration Mr. Braham had submitted in this case. Id. at 45-47. SCO counsel then asked:

Q: Did Wilson Sonsini ever tell, other than Mr. Bradford, anyone from Novell that the copyrights in UNIX and UnixWare would not transfer?

Mr. Parnes: I’ll instruct not to answer on the ground of attorney-client privilege.

Id. at 48. Novell cannot now elicit testimony concerning any communication it may have had with Wilson Sonsini (including Messrs. Braham and Alter) concerning the transfer or retention of UNIX and UnixWare intellectual property. See also id. at 13 (interposing general privilege objection over the nature of Mr. Bradford’s discussions with Wilson Sonsini).

3. Communications among Novell in-house counsel about this litigation. During Mr. LaSala’s Rule 30(b)(6) deposition, Novell defined the scope of the inquiry it would permit by again asserting a broad privilege claim while selectively disclosing communications within the claim:

Ted, just so the record is clear, a few of the people that Mr. LaSala has mentioned are lawyers in the company.

It probably is clear, but I just want to make certain on the record that what Mr. LaSala spoke to them about is gathering non-privileged information that would be responsive to the topics, as opposed to privileged information that would be divulged here.

We are not waiving any privilege of conversations he may or may not have had with in-house lawyers with respect to issues in the litigation.

(May 16, 2007 LaSala Dep. (Ex. 3) at 8 (emphasis added).) Novell thus should not be permitted to offer trial testimony concerning communications among its in-house counsel about the litigation.

It should also be noted that during discovery Novell withheld on privilege grounds over 100 documents concerning negotiations of the APA and related materials. (See Ex. 4.) Dating back to June 2007, prior to the original trial scheduled in this case, SCO sought to meet and confer with Novell on this issue, noting the “two principal bases on which Novell has waived any claim of such attorney-client or work-product privilege.” (June 28, 2007 Letter from E. Normand to K. Brakebill (Ex. 4) at 2.) SCO identified instances in which Novell had repeatedly waived any privilege claim by eliciting and relying on the testimony of its former officers and attorneys. (Id. at 1-2.) In response, including with respect to the specific issue of the “Negotiation of the APA or amendments concerning copyright transfer or §4.16(b) rights,” Novell declared: “We do not agree that any waiver has occurred.” (July 17, 2007 Letter from D. Melaugh to E. Normand (Ex. 4) at 1 (emphasis added).) When SCO sought to reinstate the meet and confer prior to this trial, Novell reiterated that it “does not agree that the testimony of Novell’s former employees effected a waiver of the privilege with respect to these documents.” (February 1, 2010 Email from E. Normand to D. Muino (Ex. 4); March 3, 2010 Letter from D. Muino to E. Normand (Ex. 5) at 1.) Novell cannot now present testimony that falls within the privilege it has consistently asserted.

The same issue arises with respect to Novell's internal communications in late 2002 and early 2003 regarding the conversations that were occurring between SCO representatives and Novell representatives at that time. Novell’s internal communications are reflected in several e-mails. But Novell has redacted portions of at least three of those e-mails, marked as SCO Exs.

563, 564, and 565 (attached hereto as Exs. 6, 7, and 8). The redactions appear to relate to the remainder of the e-mails, which discuss Novell's internal communications about the communications with SCO, and thus bear on the issue of what Novell believes had actually been said between the parties, and SCO has not found any entry on Novell's privilege log for those redactions. Accordingly, where SCO has not been permitted to review the full scope of Novell's internal communications reflecting on the substance of Novell's communications with SCO in 2002 and 2003, Novell should not be permitted to have witnesses testify to its communications with SCO during that period.

ARGUMENT

The case law makes clear that Novell cannot properly offer trial testimony or other evidence on the very subject matters it foreclosed from discovery.²

First, as the Court noted in considering Novell's objections to the proposed testimony of SCO General Counsel Ryan Tibbitts, a witness may not testify on matters closed to cross-examination during the witness's deposition based on a privilege objection. Engineered Prods. Co. v. Donaldson Co., Inc., 313 F.Supp.2d 951, 1023 (N.D. Iowa 2004) (because of invocation of attorney-client privilege at deposition, parties were permitted at trial "to present documents and testimony formerly protected by attorney-client privilege only to the extent that those issues were explored" at the deposition); Galaxy Computer Servs., Inc. v. Baker, 325 B.R. 544, 559 (Bankr. E.D. Va. 2005) (after invoking privilege at deposition, attorney may only testify at trial within the scope of her deposition).

Second, the law makes clear that a party cannot use the privilege as both a sword and shield by selectively waiving the privilege. See, e.g., Engineered Prods., 313 F. Supp. 2d at 1023

² Indeed, Novell itself recognizes this controlling authority in its Motion to Preclude SCO from Calling Troy Keller as a Witness, dated March 21, 2010.

(party may not use privilege as a shield at deposition and then a sword at trial). Accordingly, the Court should not permit Novell to proffer testimony on the subject matters over which Novell consistently claimed privilege in this case during its examinations of Messrs. LaSala and Jones, as well as Novell's subsequent witnesses.

CONCLUSION

For the reasons stated above, SCO respectfully submits that the Court should impose the foregoing limitations on examination of Novell's witnesses on the subject matters that Novell previously withheld from deposition and document discovery on privilege grounds.

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.

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 OF POINTS AND AUTHORITIES ON THE LIMITATIONS ON NOVELL'S TRIAL TESTIMONY IMPOSED BY NOVELL'S OWN PRIVILEGE OBJECTIONS 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