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*Attorneys for Defendant and Counterclaim-Plaintiff Novell, Inc.***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. 2:04 CV00139

**NOVELL'S RESPONSE TO SCO'S
OBJECTION TO NOVELL'S
DESIGNATION OF TESTIMONY OF
MICHAEL DEFAZIO**

Judge Ted Stewart

SCO moves to exclude certain testimony of former Novell executive Michael DeFazio regarding his understanding that the APA was not intended to transfer copyrights to Santa Cruz. SCO argues that Mr. DeFazio's testimony lacks foundation because he was not involved in discussions specifically concerning the transfer of copyrights. SCO's objection is baseless. As a lead negotiator of the APA transaction, Mr. DeFazio has ample foundation to testify regarding the intent and understanding of the parties concerning the APA. The Court has already ruled that such testimony is permissible. His testimony is not based solely on his reading of the APA, but on his extensive involvement in the APA transaction. Virtually none of the business witnesses called by SCO could recall specific discussions regarding copyright transfer, yet they were all permitted to testify as to their understanding of the APA deal. That is precisely the testimony that Mr. DeFazio offers.

SCO's objection to Mr. DeFazio's testimony should be overruled for four reasons:

(1) As a senior Novell executive in 1995 and a lead negotiator of the APA transaction, Mr. DeFazio has substantial foundation to testify regarding the intent behind the APA. Mr. DeFazio was the Executive Vice President of Novell's UNIX systems group in 1995. (Ex. A (DeFazio Dep.) at 198:18-199:15, 211:25-212:04.) Along with Ed Chatlos, Mr. DeFazio was Novell's primary negotiator of the business deal underlying the APA. (*Id.* at 282:24-283:03.) Mr. DeFazio was present at the meetings between Novell and Santa Cruz when the deal was discussed, and was involved in working on the details of the transaction within Novell. (*Id.* at 213:13-214:18.) As he explained in his deposition, "I spent essentially all of my time subsequently working in one way or another aspects of that deal. . . . [T]his was my prime job in that period." (*Id.*) Mr. DeFazio's testimony regarding the copyright transfer language of the APA is not based solely on his reading of the document, as SCO erroneously contends, but on his extensive involvement with the APA transaction.

(2) The Court has already ruled that the testimony of APA negotiators and executives concerning the intent underlying the APA is allowed. (Order on Novell's Motions in Limine 12 to 19, Dkt. 717.) The Court permitted the testimony of Messrs. Frankenberg, Thompson,

Mattingly, and Michels regarding “the intent and understanding of the parties concerning the APA.” (Dkt. 717 at 6-9.) The Court concluded that these witnesses had sufficient personal knowledge concerning the APA based on their high-level involvement in the business negotiations. (*Id.*) Mr. DeFazio’s involvement in the negotiations was even more extensive – he attended all of the initial meetings and worked with Mr. Chatlos on the subsequent implementation of the deal. (DeFazio Dep. at 213:13-214:18, 282:24-283:03.) Accordingly, he is well-qualified to testify regarding his understanding of the APA.

(3) Numerous witnesses called by SCO at this trial have testified to their understanding of the APA’s intent concerning copyright transfer, despite having no recollection of specific discussions on the subject. This includes Novell executives Robert Frankenberg and Duff Thompson, SCO executives Alok Mohan and Jim Wilt, and even Mr. DeFazio’s co-negotiator, Ed Chatlos. (Trial Tr. at 179:25-180:3 (Frankenberg); 303:22-304:10 (Thompson); 487:12-25 (Mohan); 442:17-24 (Wilt); 367:1-3 (Chatlos).) Mr. Thompson, for instance, testified as follows:

Q. And is it also true, isn't it, that you do not recall any specific discussion leading up to the execution of the APA in September 1995 about copyright ownership; correct?

A. I do not recall parsing out copyright ownership as separate and apart from the rest of the business.

(*Id.* at 303:22-304:10.) Similarly, Mr. Mohan testified:

Q. Did anyone from Novell at the time of the Asset Purchase Agreement ever say to you or any representative of Santa Cruz that SCO, after the transaction, would own the Unix copyrights?

A. Again, the same answer. No one from – that I work with from Novell, which would be limited people, Frankenberg and Duff Thompson, they did not speak to copyrights, so they did not tell me that they'd kept it. They did not tell me they'd given it to us. So it's neither in nor out.

(*Id.* at 487:12-25.) Despite having no memory of specific discussions regarding copyright transfer, these witnesses were still permitted to testify regarding their understanding of the overall APA transaction. Mr. DeFazio’s testimony falls into the same category.

(4) The Court's ruling excluding certain witnesses from testifying regarding Amendment No. 2 has no bearing on Mr. DeFazio's testimony. The reason for the exclusion was that the witnesses had no involvement whatsoever with the negotiation or drafting of Amendment 2. (Dkt. 717 at 4-9.) Novell is offering Mr. DeFazio's testimony solely on the APA, with which he had substantial involvement. Contrary to SCO's assertion, his testimony is not based solely on his reading of the agreement, but also on his personal knowledge of the negotiation and implementation of the deal.

For the foregoing reasons, Mr. DeFazio's testimony that the APA was not intended to transfer copyrights to Santa Cruz should be admitted.

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Respectfully submitted,

By: /s/ Sterling A. Brennan
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