WORKMAN | NYDEGGER A PROFESSIONAL CORPORATION
Sterling A. Brennan (Utah State Bar No. 10060; E-mail: sbrennan@wnlaw.com)
David R. Wright (Utah State Bar No. 5164: E-mail: dwright@wnlaw.com)
Kirk R. Harris (Utah State Bar No. 10221; E-mail: kharris@wnlaw.com)
Cara J. Baldwin (Utah State Bar No. 11863; E-mail: cbaldwin@wnlaw.com)
1000 Eagle Gate Tower
60 E. South Temple
Salt Lake City, Utah 84111
Telephone: (801) 533-9800
Facsimile: (801) 328-1707

MORRISON & FOERSTER LLP
Michael A. Jacobs (Admitted *Pro Hac Vice;* E-mail: mjacobs@mofo.com)
Eric M. Acker (Admitted *Pro Hac Vice;* E-mail: eacker@mofo.com)
Grant L. Kim (Admitted *Pro Hac Vice*; E-Mail: gkim@mofo.com)
Daniel P. Muino (Admitted *Pro Hac Vice*; E-Mail: dmuino@mofo.com)
425 Market Street
San Francisco, California 94105-2482
Telephone: (415) 268-7000
Facsimile: (415) 268-7522

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. 2:04CV00139 **NOVELL'S MOTION TO STRIKE TESTIMONY THAT IS INCONSISTENT WITH UNAMBIGUOUS CONTRACT LANGUAGE** Judge Ted Stewart
AND RELATED COUNTERCLAIMS.	

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Parol evidence regarding the meaning of a written contract is admissible only to resolve ambiguities appearing therein. *Winet v. Price*, 4 Cal. App. 4th 1159, 1165, 6 Cal. Rptr. 2d 554 (1992).

> The decision whether to admit parol evidence involves a two-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine "ambiguity," i.e., whether the language is "reasonably susceptible" to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is "reasonably susceptible" to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract.

Id. "[T]he threshold determination of 'ambiguity' (i.e., whether the proffered evidence is relevant to prove a meaning to which the language is reasonably susceptible) is a question of law," for the Court. *Id.* Absent ambiguity, and conflicting parol relevant to the resolution thereof, the final interpretation of the contract is likewise a question of law for the Court. *Id.* at 1166.

The Tenth Circuit has ruled that the APA, as amended, is ambiguous in exactly one respect, viz.: "the contractual language of Amendment No. 2 concerning the transfer of copyrights is ambiguous." *SCO Group, Inc. v. Novell, Inc.*, 578 F.3d 1201, 1210 (10th Cir. 2009). To date, the APA, as amended, has not been found ambiguous in any other respect. However, testimony regarding the proper interpretation of *other* terms of the APA has also been elicited and provisionally received.

The Court was required to provisionally receive *all* of the parol SCO had to offer before making the legal determination whether the contractual language is susceptible to SCO's proposed interpretations. *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 39-40, 442 P.2d 641 (1968). SCO finally presented its last witness, Jack Messman, today. Now that all of SCO's parol has been provisionally received, Novell asks the Court to

rule that the relevant terms of the APA are not susceptible to the interpretations urged, and to strike and instruct the jury not to consider the testimony thereby rendered superfluous.

II. SUMMARY OF TESTIMONY SOUGHT TO BE STRICKEN

SCO's counsel informed the jury in his opening statement that SCO would elicit testimony from Robert Frankenberg, Duff Thompson, Edward Chatlos, Burt Levine, and Ty Mattingly "that it was the intent of Novell to sell the entire business" (Tr. at 14:24-25), and the resulting transaction indeed "*was* the sale of the entire business" (Tr. at 15:9-10 [emphasis added]). SCO delivered on this promise. (*See, e.g.*, Tr. at 90:2-4 [Frankenberg], 241:24–242:3 [Thompson], 351:20-22 [Chatlos], 518:19 – 519:1 [Levine], 676:12 – 677:4 [Mattingly].) SCO also elicited such testimony from several other witnesses, including Douglas Michels (Tr. at 497:5-10), Steve Sabbath (Tr. at 899:15-16), and John Maciaszek (Tr. at 1671:12-14). This is the first category of testimony targeted by the instant motion.

SCO's counsel also advised the jury that the SVRX license royalty stream was part of the consideration paid by SCO to Novell (Tr. at 18:15-21), and SCO has elicited testimony to the same effect (*see, e.g.*, Tr. at 182:17-22). That is the second category of testimony targeted by this motion.

Finally, SCO has elicited testimony that the APA did not license any rights to SCO. (*See, e.g.*, Tr. at 242:5-15.) This is the last category of targeted testimony.

III. ARGUMENT

Section 1.1(a) of the APA (Ex. A1) begins: "On the terms … set forth in this Agreement, Seller will sell … to Buyer and Buyer will purchase … all of Seller's right, title and interest in and to the assets … relating to the Business (collectively the 'Assets') identified on Schedule 1.1(a) hereto." That section then concludes: "Notwithstanding the foregoing, the Assets to be so purchased shall not include those assets (the 'Excluded Assets') set forth on Schedule 1.1(b)." That is, the APA promises to sell *only* the assets that are (1) enumerated in Schedule 1.1(a) *and*

(2) not excluded by Schedule 1.1(b). That is something far different than a promise to sell the "entire business," and it is not susceptible to the interpretation urged by SCO's witnesses. Therefore testimony that Novell sold the entire business should be stricken, the jury should be instructed to disregard it, and the jury should be instructed that Novell promised to sell only the Assets identified in Schedule 1.1(a) (rather than the entire business).

SVRX royalties, in turn, are among the "Excluded Assets" identified in Section VIII of Schedule 1.1(b) to the APA, which as noted above are specifically and expressly excluded from the Assets being transferred by Section 1.1(a) of the APA. Because the SVRX royalties were never transferred to SCO, they cannot have been paid over by SCO to Novell. Even more telling, Section 1.2(a) expressly provides: "as *full payment* for the transfer of the Assets by Seller to Buyer, at the Closing Buyer shall assume the Assumed Liablities and issue to Seller 6,127,500 shares [emphasis added]." The APA expressly defines SCO's "full payment," and that payment does not include SVRX royalties. SCO's testimonial evidence describing SVRX royalties as consideration paid to Novell cannot be reconciled with the express language of the APA and should be stricken, and the jury should be instructed (1) to disregard such testimony and (2) that SVRX royalties are not part of what SCO paid Novell.

Finally, whether the APA licenses any rights to SCO is, again, a question of contract interpretation for the Court in the absence of ambiguity and conflicting parol. Section 1.2(b) of the APA provides: "Buyer agrees to make payment to Seller of additional royalties retained by Seller … on account of Buyer's future sale of UnixWare products," as "identified in detail on Schedule 1.2(b) hereto." Schedule 1.2(b), in turn, provides that "Royalties shall be paid on sales of the following products by Buyer …: (i) UnixWare (ii) Eiger (iii) MXU (iv) White Box [and] (v) any derivative, upgrades, updates or new releases of (i) through (iv) above." These provisions unambiguously authorize—i.e., *license*—SCO to make and distribute copies, and prepare derivative works. Testimony that the APA does not grant any licenses should be stricken,

and the jury should be instructed (1) to disregard such testimony and (2) that the APA does grant licenses to make and distribute copies, and prepare derivative works.

IV. CONCLUSION

"The parol evidence rule, as is now universally recognized, is not a rule of evidence but one of substantive law. It does not exclude evidence for any of the reasons ordinarily requiring exclusion, based on the probative value of such evidence or the policy of its admission. . . . Extrinsic evidence is excluded because it cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing itself." *Estate of Gaines*, 15 Cal. 2d 255, 264-265, 100 P.2d 1055 (1940); *see also Casa Herrera, Inc. v. Beydoun*, 32 Cal. 4th 336, 343, 83 P.3d 497 (2004) (citing and quoting *Gaines*). Novell respectfully requests that the Court strike and instruct the jury to disregard parol testimony urging interpretations to which the language of the APA is not susceptible because such testimony is incompetent and thus irrelevant to prove the interpretations in support of which it is offered.

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Respectfully submitted,

By: /s/ Sterling A. Brennan
WORKMAN NYDEGGER

MORRISON & FOERSTER LLP

Attorneys for Defendant and
Counterclaim-Plaintiff Novell, Inc.