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**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,</p> <p style="text-align: center;">Plaintiff/Counterclaim-Defendant,</p> <p>vs.</p> <p>NOVELL, INC., a Delaware corporation,</p> <p style="text-align: center;">Defendant/Counterclaim-Plaintiff.</p>	<p><b>SCO'S MEMORANDUM IN SUPPORT OF ITS RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, FOR A NEW TRIAL</b></p> <p>Civil No. 2:04 CV-00139</p> <p>Judge Ted Stewart</p>
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Plaintiff/Counterclaim-Defendant, The SCO Group, Inc. (“SCO”), respectfully submits this Renewed Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial.<sup>1</sup>

### **PRELIMINARY STATEMENT**

The jury verdict in this case is the type for which Rule 50(b) and Rule 59 exist. The jury simply got it wrong: The verdict cannot be reconciled with the overwhelming evidence or the Court’s clear instructions regarding the controlling law. The jury answered “no” to the single question: “Did the amended Asset Purchase Agreement transfer the UNIX and UnixWare copyrights from Novell to SCO?” We do not know whether the verdict resulted from misapprehension of the jury instructions, confusion about the meaning of prior judicial decisions that Novell read into the record for the ostensible purpose of challenging SCO’s damages theory, Novell’s persistent efforts to focus the jury on the old language of the Asset Purchase Agreement (“APA”) which was replaced by a binding amendment, or other factors.

Whatever the explanation for the verdict, the evidence demonstrated that ownership of the UNIX and UnixWare copyrights is required for SCO to exercise the complete ownership rights in the UNIX and UnixWare technologies (including the source code) it acquired under the APA, and that the amended APA provides that such copyrights were transferred. That record compels judgment as a matter of law for SCO under Rule 50(b). At a minimum, the verdict is clearly against the substantial weight of the evidence, necessitating a new trial under Rule 59.

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<sup>1</sup> These motions and SCO’s Proposed Findings on its claim for specific performance all relate to the ownership of the UNIX and UnixWare copyrights. SCO believes the appropriate order of consideration is for the Court first to decide the Rule 50(b) motion which, if granted, would set aside the jury determination on ownership of the copyrights as a matter of law; if that were not granted, to consider SCO’s alternative motion for a new trial under Rule 59; and if neither of these post-trial motions were granted, to determine SCO’s claim for specific performance to receive transfer of the UNIX and UnixWare copyrights at this time.

Amendment No. 2, together with the APA, means that SCO acquired the copyrights “required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies.” The Tenth Circuit’s opinion supports that reading, and at trial the chief negotiator and sole drafter of the Amendment for Novell admitted it. There is no reasonable interpretation of Amendment No. 2 to the contrary. For a variety of reasons, it stretches reason beyond the breaking point to characterize the Amendment as merely “affirming” that SCO had received some sort of “license” under the APA. In the hundreds of pages of agreements, press releases, SEC filings, letters, and other contemporaneous documentation, there is not one word of a license from Novell to SCO for use of the UNIX and UnixWare copyrights.

The evidence further demonstrated beyond any reasonable dispute that the UNIX and UnixWare copyrights were required for SCO to exercise its full ownership rights with respect to the UNIX and UnixWare technologies. The evidence in SCO’s favor on this obvious point is overwhelming. The UNIX and early UnixWare technology lies at the heart of SCO’s subsequent versions of UnixWare, including the current version of UnixWare. Without copyright ownership SCO cannot assert rights or bring suit to protect that technology against misuse by third parties, and without the ability to protect the technology, SCO cannot maintain its UNIX business or exercise the full ownership rights to exploit, develop, and defend the core UNIX source code. While SCO could physically continue to sell its UnixWare and OpenServer products without copyright ownership, SCO could not fully maintain its UnixWare business without the ability to enforce the copyrights in the core UNIX technology.

In addition, SCO indisputably acquired “[a]ll of Seller’s claims arising after the Closing Date against any parties relating to any right, property or asset included in the Business.” (APA Schedule 1.1(a), Item II.) SCO thus acquired, among other claims, all of the claims, which

Novell otherwise would have, relating to the use or misuse of the UNIX and UnixWare source code – including all copyright claims concerning that source code. The law requires that SCO own the UNIX and UnixWare copyrights to prosecute such claims.

At a minimum, the verdict is clearly against the weight of the evidence. While there was some evidence by Novell witnesses to the contrary, the significantly more substantial and more persuasive evidence was that in the sale of a software business and source code, the parties did not agree that the seller could withhold the copyrights reflecting ownership of that source code. The business negotiators agreed that the parties intended for SCO to acquire the copyrights, and the course of performance after the APA was signed confirms that intent. An exclusion of the copyrights in the original APA nevertheless resulted, from either a mistake (negotiators who understood the exclusion to refer solely to Novell’s NetWare copyrights) or a last-minute, overzealous decision between Novell’s general counsel and its outside counsel (who admitted that they never asked the business negotiators whether any such exclusion was part of the deal). Regardless, Amendment No. 2 replaced the exclusion, and it did not merely preserve a status quo in which SCO had acquired some sort of “license.”

## **ARGUMENT**

### **I. SCO IS ENTITLED TO JUDGMENT AS A MATTER OF LAW**

Rule 50 requires that the verdict be set aside if there was not a “legally sufficient evidentiary basis” for a “reasonable jury” to have reached that verdict. Fed. R. Civ. P. 50(a)(1). Rule 50 is satisfied where the “evidence points but one way,” Wagner v. Live Nat’l Motor Sports, Inc., 586 F.3d 1237, 1244 (10th Cir. 2009), or “the evidence so overwhelmingly favors the moving party as to permit no other rational conclusion,” Shaw v. AAA Eng’g & Drafting, 213 F.3d 519, 529 (10th Cir. 2000); see, e.g., Vanmeveren v. Whirlpool Corp., 65 Fed. Appx. 698, 700-01 (10th Cir. 2003); J.I. Case Credit Corp. v. Crites, 851 F.2d 309, 311-16 (10th Cir.

1988). At the close of all the evidence, SCO moved for judgment on its claim to copyright ownership under Rule 50(a) on the grounds that ownership of the copyrights was required for SCO to exercise its rights in connection with its acquisition of the UNIX and UnixWare technologies, and now renews the motion under Rule 50(b) because the verdict cannot be squared with the overwhelming evidence and the law.<sup>2</sup>

**A. SCO Acquired the Copyrights Required to Exercise SCO's Ownership Rights in the UNIX and UnixWare Technologies It Acquired.**

The only reasonable interpretation of Amendment No. 2 – an interpretation that Novell's own negotiator of the Amendment adopted at trial – is that SCO acquired all copyrights “required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies.”

SCO acquired the “Business” of developing, licensing, and supporting UNIX and UnixWare software products, including the sale of both source and binary code licenses. (Ex. 1 (APA), Recital A.) The APA effectuated that asset transfer by specifying a schedule of transferred assets, Schedule 1.1(a) (the Assets Schedule), and a schedule of excluded assets, Schedule 1.1(b) (the Excluded Assets Schedule). (*Id.* § 1.1(a).)

The Assets Schedule covers copyrights by providing for the transfer of “All rights of ownership” in, among other things, the source code for all then-extant versions of UNIX and UnixWare. While the language of the Excluded Asset Schedule originally excluded all

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<sup>2</sup> On March 26, 2010, the day the jury received the case, the Court denied SCO's Rule 50(a) motion as “moot.” While that would have been true of a motion directed to Novell's slander of title claim, SCO's Rule 50(a) motion was directed to SCO's claim relating to copyright ownership (the sole question on which the jury returned a verdict). The motion may now be renewed under Rule 50(b). If granted, the motion would then require a new trial limited to whether slander of title occurred and whether (and to what extent) SCO suffered damages.



copyrights from the transferred assets, that language was replaced by Amendment No. 2. Item I of Schedule 1.1(a) identifies the full scope of the transferred assets as consisting of:

All rights and ownership of UNIX and UnixWare, including but not limited to all versions of UNIX and UnixWare and all copies of UNIX and UnixWare (including revisions and updates in process), and all technical, design, development, installation, operation and maintenance information concerning UNIX and UnixWare, including source code, source documentation, source listings and annotations, appropriate engineering notebooks, test data and test results, as well as all reference manuals and support materials normally distributed by Seller to end-users and potential end-users in connection with the distribution of UNIX and UnixWare, such assets to include without limitation the following:

Item I then proceeds to identify by name or reference all UNIX and UnixWare source code products and binary products.

As the Tenth Circuit recognized in its decision remanding the case for trial, the specific, catch-all phrase “All rights and ownership of UNIX and UnixWare” includes the copyrights of UNIX and UnixWare – the core intellectual property on which the UNIX and UnixWare licensing business depends. The SCO Group, Inc. v. Novell, Inc., 578 F.3d 1201, 1213-14 (10th Cir. 2009). A transfer of “all right, title and interest to computer programs and software can only mean the transfer of the copyrights as well as the actual computer program or disks.” Shugrue v. Cont’l Airlines, Inc., 977 F. Supp. 280, 286 (S.D.N.Y. 1997) (emphasis added); see also ITOFCA, Inc. v. Megatrans Logistics, Inc., 322 F.3d 928, 931 (7th Cir. 2003) (transfer of “all assets” to a business includes copyrights); Relational Design & Tech., Inc. v. Brock, No. 91-2452-EEO, 1993 WL 191323, at \*6 (D. Kan. May 25, 1993) (transfer of “all rights” in a program includes copyrights). In addition, the “without limitation” language makes clear that the list of Items that follow in the Assets Schedule is non-exhaustive. Where copyrights are one of the “rights and ownership” of UNIX and UnixWare covered by Item I of Schedule 1.1(a), such copyrights need not have been expressly included under the intellectual property subheading in

Item V of the Schedule. When Novell and SCO agreed to remove the language excluding copyrights from the APA by executing Amendment No. 2, the effect was that copyrights were included under “rights and ownership” in the Assets Schedule, as the Tenth Circuit indicated. SCO, 578 F.3d at 1213-14 (“[A]ny change to the set of Excluded Assets in Schedule 1.1(b) necessarily implicated those copyrights actually transferred under Schedule 1.1(a).”).

The inclusion of copyrights in the sale of the source code is logical. Indeed, it is difficult to comprehend that a party would or could transfer “all rights and ownership of” source code while retaining the copyrights. In a licensing arrangement, the licensor does not transfer all rights and ownership of the source code. Here, where Novell sold “all” ownership, it logically follows that the copyright ownership would be included in the sale. This common-sense proposition is reflected in the testimony of numerous witnesses, addressed below, who spoke to what they saw as the obvious inclusion of copyrights in the sale of the UNIX and UnixWare source code. Indeed, the only alternative interpretation that Novell offered at trial – that Amendment No. 2 “affirms” that SCO obtained a “license” to copyrighted material that SCO requires – finds no support in the plain language. As the Tenth Circuit observed: “Whatever the Amendment means, it refers to the ownership of copyrights, not to licenses.” SCO, 578 F.3d at 1216 (emphasis added).

With respect to the extrinsic evidence, moreover, Novell’s own chief witness for and negotiator of Amendment No. 2 ultimately acknowledged that copyrights that are required for SCO to exercise its rights in the UNIX and UnixWare technologies it had acquired were transferred, not licensed, to SCO. Alison Amadia confirmed on cross-examination that “if there are copyrights that are required for SCO to exercise its rights, like the UNIX and UnixWare

trademarks, they were transferred.” (2177:15-18 (emphasis added).)<sup>3</sup> Ms. Amadia’s testimony is consistent with Novell’s official position, as expressed in a press released dated June 6, 2003, that the ownership of required copyrights “did transfer” to SCO under the amended APA. (Ex. 97 (emphasis added).)<sup>4</sup>

Meanwhile, SCO’s negotiator and general counsel Steve Sabbath testified that “the intent was clearly to me that all the copyrights for the UNIX and UnixWare were to be transferred to Santa Cruz Operation” and that the Excluded Asset Schedule was intended to exclude the Netware copyrights. (900:23-901:9.) Mr. Sabbath further testified that SCO “bought the UNIX business from Novell, all copyrights pertaining to that business came with the product. Amendment Number 2 was meant to confirm that.” (911:6-14.) Even Ms. Amadia acknowledged that Mr. Sabbath told her that the copyrights had been excluded as a result of a “typographical error in the original APA” that required correction. (2184:25-2185:1.)<sup>5</sup>

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<sup>3</sup> Indeed, to give Amendment No. 2 a contrary interpretation the jury would had to have ignored the evidence – as to which there is no contrary evidence – that the Amendment confirmed the transfer of the UNIX and UnixWare trademarks by referring to them as ones “required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies.” (2176:5-24 (Amadia); 2177:25-218:18 (Amadia).) Where Amendment No. 2 changes the APA to make no distinction between trademarks and copyrights, and where Novell admitted that the trademarks referenced in Amendment No. 2 were not being licensed, but were in fact transferred, no reasonable juror could conclude that the same language used to describe the copyrights could mean something different.

<sup>4</sup> Novell subsequently tried to change its position and argued that Amendment No. 2 gave SCO the right to acquire copyrights if it could demonstrate that such copyrights were required. (Ex. 105.) That revised position is one basis for SCO’s alternative claim for specific performance.

<sup>5</sup> Ms. Amadia’s testimony about what Mr. Sabbath told her at the time is consistent with Mr. Sabbath’s deposition testimony as opposed to the IBM declaration that Mr. Sabbath stated did not accurately reflect his testimony. (927:14-25 (Sabbath); 928:19-929:2 (Sabbath)), and that is not affirmative evidence in any event.

The testimony of the only other Novell witness on Amendment No. 2, James Tolonen, cannot support a contrary result. Mr. Tolonen did not participate in the drafting or negotiation of the language, and while Mr. Tolonen expressed the view that he did not intend Amendment No. 2 to transfer copyrights, that absolutist view cannot be squared with the plain language of the Amendment. Nor can it be reconciled with what the Tenth Circuit stated:

Although Amendment No. 2 did not purport to amend Schedule 1.1(a), this does not mean that the balance of assets transferred to SCO remained unchanged. The transaction was structured such that SCO would acquire “all of Seller’s right, title and interest in and to the assets . . . identified on Schedule 1.1(a),” but that “the Assets to be so purchased not include those assets (the ‘Excluded Assets’) set forth on Schedule 1.1(b).” Schedule 1.1(a), in turn, provided that SCO would receive “[a]ll rights and ownership of UNIX and UnixWare . . . including all source code,” a broad set of assets limited only by Schedule 1.1(b). As a result, any change to the set of Excluded Assets in Schedule 1.1(b) necessarily implicated those copyrights actually transferred under Schedule 1.1(a).

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Whatever the Amendment means, it refers to the ownership of copyrights, not to licenses.

SCO, 578 F.3d at 1213-14, 1216 (emphasis added).

Novell further argued that Amendment No. 2 must not concern any transfer of copyrights because the Amendment is merely a “promise to sell,” because it did not have a separate Bill of Sale, or because the Amendment was “effective” as of the date of the APA. Those arguments could not reasonably or properly support the verdict. The Tenth Circuit’s opinion rejects these arguments, holding that the parties did not need to execute a separate bill of sale to satisfy Section 204(a) of the Copyright Act, SCO, 578 F.3d at 1213-14, and dismissing the idea that the date of Amendment No. 2 deprives it of its obvious role in modifying the assets being transferred through the APA. Id. By the end of trial Novell sought to refashion these contentions as

“contract” arguments, but they are no more tenable as such. There is no requirement in the law for a separate bill of sale to make effective an amendment to schedules of assets being transferred. See id.

Under Novell’s interpretation, in short, the relevant language of Amendment No. 2 serves no substantive purpose at all. It is unreasonable as a matter of law for the Court to permit the jury to interpret Amendment No. 2 in a way that gives it no meaning beyond the terms of the unamended APA.

**B. The Copyrights Are Required for SCO to Exercise Its Ownership Rights in The UNIX and UnixWare Technologies It Acquired.**

In remanding for trial, the Tenth Circuit pointed to the importance of copyright ownership for SCO to protect the value of the assets it had acquired under the APA:

SCO indisputably acquired certain assets under the APA. SCO’s claim, as we understand it, is that copyrights are necessary to protect the value of the assets themselves, and are therefore necessary to prosecute seller’s claims “relating to any . . . asset” included in the Business. Novell has not explained, for instance, what recourse SCO had under Novell’s theory of the transaction if a third party had copied and attempted to resell the core UNIX assets Santa Cruz received in the deal.

SCO, 578 F.3d at 1218 n.4. Now, after trial, there is still no cogent explanation from Novell as to how SCO could protect its property against third parties that “copied and attempted to resell the core UNIX assets Santa Cruz received in the deal.” Id. That failure renders the jury verdict on copyright ownership unsustainable.

If SCO does not own the copyrights, it cannot enforce them in court. Davis v. Blige, 505 F.3d 90, 98 (2d Cir. 2007) (owner of a copyright has the exclusive right to bring suit to enforce the copyrights); Silvers v. Sony Pictures Entmt., Inc., 402 F.3d 881, 885 (9th Cir. 2005) (copyright owner cannot transfer its accrued copyright infringement claims without also transferring the copyrights); 1 Copyright Throughout the World § 19:29 (2009); Copyrights and

Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity, 3 J. High Tech. L. 1 (2003); 3 Patry on Copyright § 7:2 (2010) (explaining that “copyright is not just a bundle of rights; it is also the ability to enforce those rights”); accord Jury Instruction No. 34A.<sup>6</sup> More importantly, whatever the particular “license” theory Novell means to support, it offered no argument that it gives SCO the right to bring claims to enforce the copyrights, and there would be no support in the law for that argument.

In addition, the substantial, unrefuted testimony is that SCO required the ability to enforce the copyrights in order to exercise its ownership rights in the specific UNIX and UnixWare technologies listed in the Assets Schedule and acquired through the APA, the touchstone under Amendment No. 2. Given the technological reality of UnixWare’s development and ancestry, without copyright ownership, SCO does not have the right to enforce in court the copyrights at issue in the UNIX and UnixWare technology, and thus to protect the core technology in UnixWare. The evidence included the unequivocal testimony of witnesses who have been involved in the various aspects of the UNIX and UnixWare business, including former Novell and current SCO UNIX Contracts Manager William Broderick (666:9-21; 667:16-668:6); Santa Cruz General Counsel Steven Sabbath (913:1-15; 914:17-915:5); former SCO CEO Darl McBride (997:11-23); former Novell and current SCO UNIX Product Manager & OEM Relations Manager John Maciaszek (1686:25-1687:24); and former Santa Cruz Manager of Law and Corporate Affairs Kimberlee Madsen (780:23-24; 802:23-803:1; 865:16-21; 866:18-21; 875:7-14; 884:21-885:21). There is no support in the evidence that a software company that

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<sup>6</sup> Novell’s former General Counsel took the position that SCO acquired only an “implied license,” and Novell chose not to assert any contrary theory. (1975:14-22.) Ms. Amadia, for example, acknowledged that with an implied license, SCO cannot enforce the UNIX and UnixWare copyrights in court. (2157:8-12.)

owns and licenses source code need not protect that underlying source code and intellectual property as part of its business.<sup>7</sup>

As a technological matter, the evidence was undisputed that the UNIX and early UnixWare technology lies at the heart of SCO's current version of UnixWare. The source code of the versions of UnixWare that SCO acquired in 1995 (and built its business around licensing in the ensuing years) consists almost entirely of prior "UNIX" source code (1732:1-11 (Nagle), 1781:21-26 (Nagle)), and the current version of UnixWare that SCO sells still consists in significant part of that "UNIX" source code (1784:20-22 (Nagle)). UnixWare was a "version of UNIX is – [that] was essentially rebranded and some cosmetic and a few minor features added to it to create UnixWare 2.0. UnixWare 2.0 is almost entirely UNIX System V release 4.2." (1732:1-11 (Nagle).) Thus, "90, 95 percent" of UnixWare was older UNIX code that existed prior to the APA. (1782:6 (Nagle).) UnixWare is not simply a separate, stand-alone version or block of UNIX that can be detached from the UNIX code and run on its own; it is the latest release of UNIX. Neither the early version of UnixWare nor the latest version of UnixWare would work if the "UNIX" source code were removed. (1784:7-22 (Nagle).) All of this testimony went unrebutted.

In addition to requiring copyright ownership to protect the intellectual property contained within UNIX and UnixWare, SCO also requires the copyrights to facilitate certain types of source code licensing, which was an indisputable portion of the UNIX and UnixWare business

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<sup>7</sup> SCO's need to bring copyright enforcement actions does not turn on the existence of the SCOSource program whose demise Novell focused on at trial. Mr. Tibbitts explained that if SCO "could not protect" the "core intellectual property" in UnixWare, then "this venerable UNIX business that has been around for many years that many customers around the world are using would simply die off, and we have got to have that intellectual property to protect those crown jewels." (1845:21-1846:1.)

SCO acquired. Such source code licensing was historically part of the UNIX and UnixWare business; SCO's business included entering into new source code licenses, as contemplated by the APA; and the copyrights were needed for such licensing to occur, as there was nothing in the APA which granted a license for such activity. (2543:21-2544:3 (Frankenberg); 241:19-242:3 (Thompson); 666:9-21 (Broderick); 667:16-668:6 (Broderick); 503:9-11 (Michels); 504:6-7 (Michels); 442:15-443:6 (Wilt); 912:21-913:6 (Sabbath); 914:17-915:5 (Sabbath).)

The record contains many examples of the need for SCO's copyright ownership. After the parties executed Amendment No. 2, for example, SCO took the position in a formal petition against Microsoft Corporation in the European Union that SCO had acquired the UNIX copyrights and was the UNIX copyright holder. (Ex. 127 §§ 3.4, 4.9.) Copyright ownership was part and parcel of SCO's petition, and there can be no reasonable question that bringing the petition was part of SCO's pursuit and maintenance of its UNIX-based business.<sup>8</sup> The same is true for the settlement agreement that resolved the dispute. (Ex. 199, Recital B.)

Even if SCO could physically continue to sell certain of its UnixWare and OpenServer products without copyright ownership, as Mr. McBride suggested, Amendment No. 2 requires Novell to transfer the UNIX and UnixWare copyrights if they are required for SCO to exercise any of its ownership rights in connection with the UNIX and UnixWare business it acquired.<sup>9</sup>

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<sup>8</sup> While the petition against Microsoft is clear course of performance evidence that SCO had acquired the copyrights, the petition is also probative evidence that SCO required ownership of the copyrights to exercise its rights in connection with its UNIX and UnixWare business.

<sup>9</sup> Mr. Tibbitts testified about a proposed deal, in connection with SCO's Chapter 11 reorganization proceedings, where SCO would have sold certain aspects of the UNIX product business, but kept other aspects, including IP licensing rights and SCO's legal claims based on the unauthorized use of the UNIX and UnixWare technologies. (1850:20-1851:18.) Because the law requires ownership of the UNIX and UnixWare copyrights in order to pursue the claims SCO would have kept, the proposed deal contemplated that the copyrights would remain with SCO until it completed prosecuting those claims. That deal was thus consistent with the reading



Novell presented no evidence that SCO's acquisition of the UNIX and UnixWare business was limited to creating a merged product, or limited to the business of selling binary versions of UNIX, a business that Santa Cruz could already operate as a UNIX licensee prior to the APA. While it is true that Novell retained the right to receive certain royalties and reserved certain rights to protect that royalty stream, this does not transform the APA into a licensing arrangement whereby SCO could develop and market only UnixWare and serve as an agent to collect royalties. Even with respect to such royalties, moreover, the APA is clear that legal title to the royalties transferred to SCO. (Ex. 1 (APA) § 1.2(b).)

In addition, among the "rights and ownership" in UNIX and UnixWare that SCO acquired are all of Novell's claims relating to the UNIX and UnixWare source code. Item II of the Assets Schedule identifies "All of Seller's claims arising after the Closing Date against any parties relating to any right, property or asset included in the Business" as having transferred to SCO. SCO thus acquired all of the claims, which Novell otherwise would have, relating to the use or misuse of the UNIX and UnixWare source code. (See id. Schedule 1.1(a), Items I.A-D, II, IV.) Ownership of the copyrights is required to prosecute such claims.<sup>10</sup> A copyright owner cannot transfer its copyright claims without also transferring the copyrights. Silvers v. Sony Pictures Entmt., Inc., 402 F.3d 881, 885 (9th Cir. 2005).

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of Amendment No. 2 that SCO, as the party who indisputably acquired those claims under the APA, required ownership of the UNIX and UnixWare copyrights.

<sup>10</sup> Novell's suggestion in its Proposed Findings of Facts and Conclusions of Law (at 35) that there are no such "claims" is flatly wrong. The evidence at trial, for example, showed claims SCO pursued post-closing against Microsoft (807:3-811:20 (Madsen); Ex. 127 §§ 3.4, 4.9; Ex. 199 Recital B), expressly referring to ownership of copyrights. The copyright claims relating to alleged Linux infringement are another obvious example.

Novell presented no evidence at trial from which a reasonable jury could reach a contrary conclusion.<sup>11</sup> Novell presented no evidence at all that in order to bring copyright claims relating to the UNIX and UnixWare source code, SCO's ownership of the copyrights somehow was not "required."

## **II. IN THE ALTERNATIVE, SCO IS ENTITLED TO A NEW TRIAL**

A party's Rule 50(b) motion may include "an alternative or joint request for a new trial under Rule 59." Fed. R. Civ. P. 50(b). The decision whether to grant a new trial under the Rule lies within the broad discretion of the trial judge. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 433 (1996) (the authority of trial judges to grant new trials "is large"). Indeed, as the Supreme Court has explained, the authority to grant new trials "is confided almost entirely to the exercise of discretion on the part of the trial court." Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980). Accordingly, decisions to grant a new trial have been deemed "virtually unassailable on appeal." Children's Broadcasting Corp. v. Walt Disney Co., 357 F.3d 860, 867 (8th Cir. 2004).

SCO moves, in the alternative, for a new trial on the lower, Rule 59 standard that the verdict was against the weight of the evidence presented at trial. A district court may grant a new trial "for any reason for which a new trial has theretofore been granted in an action at law in federal court," Fed. R. Civ. P. 59(a), including specifically "on the grounds that the jury verdict is against the weight of the evidence." Black v. Heib's Enters., Inc., 805 F.2d 360, 363 (10th Cir. 1986); Brown v. McGraw-Edison Co., 736 F.2d 609, 616 (10th Cir. 1984). "The inquiry

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<sup>11</sup> To the contrary, Novell's former General Counsel Mr. LaSala admitted both generally that "the agreements speak to what copyrights SCO requires in order to exercise its rights under the agreement" and specifically that "SCO has the rights to bring claims to protect its business." (1976:25-1977:7.)

focuses on whether the verdict is clearly, decidedly or overwhelmingly against the weight of the evidence.” Black, 804 F. 2d at 362.

A district court therefore may weigh evidence and consider the credibility of witnesses when exercising its broad discretion to determine whether a new trial is warranted. Tanberg v. Sholtis, 401 F.3d 1151, 1160 (10th Cir. 2005); see, e.g., Caruolo v. John Crane, Inc., 226 F.3d 46, 54 (2d Cir. 2000) (“Unlike a motion for judgment as a matter of law, a motion for a new trial may be granted even if there is substantial evidence to support the jury’s verdict.”); Giles v. Rhodes, 171 F. Supp. 2d 220, 229 at n.5 (S.D.N.Y. 2001) (trial judge may consider “credibility and the weight of the evidence”). In addition, after a long and complicated trial such as this, a trial judge should be especially vigilant in examining the verdict. See, e.g., Siemens Med. Solutions USA, Inc. v. Saint-Gobain Ceramics & Plastics, Inc., 615 F. Supp. 2d 884, 899 (N.D. Iowa 2009).

**A. SCO Acquired the UNIX and UnixWare Copyrights.**

SCO’s request for a new trial incorporates not only all of the points set forth in Section I above, but also the overwhelming weight of the evidence, summarized below, that a transfer of copyrights was intended.

**1. The Intent of the Negotiators and Principals Regarding the APA.**

A total of ten witnesses – including multiple witnesses from each of the SCO and Novell sides of the transaction – testified to their intent and understanding that Novell had sold and Santa Cruz had acquired the UNIX and UnixWare copyrights under the APA:

- Novell President and CEO Robert Frankenberg. Mr. Frankenberg testified that it was the intent at the beginning of the transaction, throughout the transaction, and when the transaction closed, to sell the copyrights in UNIX and UnixWare and to exclude the NetWare copyrights because Novell was retaining the Netware business. (176:9-177:3; 2558:17-2559:7.) He also testified that no other member of his board of directors had the authority to negotiate a deal apart from what the executives had

- negotiated across the table from SCO. (178:4-11.) And he testified that Messrs. Tolonen, Bradford, and Braham had no authority to decide whether copyrights would be part of the deal, as the deal had already been negotiated with SCO before those individuals even began their involvement in the process of documenting the deal. (2541:18-2542:4.)
- Novell Senior Vice President Duff Thompson. Mr. Thompson testified that Novell told SCO that it was selling all of the UNIX and UnixWare business “lock, stock and barrel, the whole thing” including the copyrights. (230:15-231:13.) He further testified that he never asked the attorneys documenting the deal from Novell’s end to change the deal so that the UNIX and UnixWare copyrights would be retained. (233:1-15.)
  - Novell Senior Director and Chief Negotiator Ed Chatlos. Mr. Chatlos testified that he participated in the face-to-face negotiations with SCO, including weekly travel from New Jersey to California for three months. (351:2-7.) He testified that “the deal with SCO was to include the copyrights” for UNIX and UnixWare and to exclude the copyrights for the Netware business that Novell was not selling, and that he understood Schedule 1.1(b)’s original exclusion of copyrights to be referring to the NetWare copyrights. (352:5-17; 359:20-362:3.) He further testified that holding back the UNIX and UnixWare copyrights would have been inconsistent with the directives he was given by Mr. Thompson and the directives and authority given to the lawyers documenting the deal. (354:16-355:5.) Mr. Chatlos also testified that the deal he negotiated included the UNIX and UnixWare copyrights and that changing the deal to exclude the copyrights “would have been unethical.” (354:16-355:5.)
  - Novell Vice President of Strategic Relations Ty Mattingly. Mr. Mattingly testified that during the months of negotiations that he attended, no one from Novell ever suggested that Novell was retaining the UNIX and UnixWare copyrights and that the copyrights the parties intended to withhold were the Netware copyrights for the Netware business that Novell was retaining. (677:5-13; 690:18-22.)
  - Novell In-House Counsel Burt Levine. Mr. Levine was involved in review of the very asset schedules that originally included language excluding copyrights. He testified that that language did not reflect Novell’s intent and that, under the APA, SCO “obtained a full right, title and interest in ownership” in UNIX and UnixWare that “would automatically convey the copyright along with the rest of the business assets.” (522:3-14.) Indeed, he characterized the idea that Novell would sell the business while withholding the copyrights as not being “ethical.” (521:17-522:2.)
  - Santa Cruz President and CEO Alok Mohan. Mr. Mohan testified that the deal “absolutely” included the UNIX copyrights as part of the business that SCO was acquiring. (461:19-462:9.) Like Novell’s own witnesses, he testified that SCO’s understanding was that it was acquiring the business “lock, stock, and barrel.” (464:4-19.) He testified that no one from Novell ever said to him prior to the execution of the APA that Novell intended to retain any UNIX or UnixWare copyrights. (467:24-468:6.)

- Santa Cruz Vice President of Business Development Jim Wilt. Mr. Wilt testified that it was his “intent on behalf of SCO to acquire, through the APA, Novell’s entire UNIX and UnixWare business, including the UNIX and UnixWare source code and all associated copyrights” and that he believed that Novell’s intent was to sell those assets and rights as well. (445:21-446:5.) He testified that if Novell had ever said that it was retaining the UNIX and UnixWare copyrights that would have been “extremely remarkable and probably would have ended the negotiations.” (443:7-19.)
- Santa Cruz Assistant Negotiator Kimberlee Madsen. Ms. Madsen testified that it was SCO’s intent to acquire the UNIX and UnixWare copyrights as part of the business and that it was her understanding and belief after the transaction was completed that SCO had acquired those copyrights. (783:3-784:4; 788:24-789:5; 814:24;815:3.) She also testified that Mr. Seabrook’s report to the SCO board of directors never suggested that Novell had retained any UNIX or UnixWare copyrights. (788:5-8;788:20-23.) She further testified that no one from Novell had ever said that Novell would retain any UNIX or UnixWare copyrights. (783:3-784:4.) She further testified that during the 1996 dispute with Novell concerning its conduct with respect to IBM, Novell never asserted that it had retained ownership of the UNIX and UnixWare copyrights. (802:3-7.)
- SCO General Counsel Steve Sabbath. Mr. Sabbath testified that “the intent was clearly to me that all the copyrights for UNIX and UnixWare were to be transferred to Santa Cruz Operation” and that the Excluded Assets Schedule was intended to exclude the Netware copyrights. (900:23-901:9.) He further testified that when SCO “bought the UNIX business from Novell, all copyrights pertaining to that business came with the product. Amendment Number 2 was meant to confirm that.” (911:6-14.)
- Santa Cruz Founder and Vice President Doug Michels. Mr. Michels testified that “of course” SCO bought the UNIX and UnixWare copyrights and that, had any of his executives suggested otherwise, he would have “laughed them out of [his] office.” (501:1-18.)

Novell continued to argue through trial that much of the foregoing testimony was irrelevant and inadmissible, but that is contrary to the Tenth Circuit’s decision, SCO, 578 F.3d at 1210-18, and this Court’s rulings on motions in limine. (Order on Defendant’s Motions in Limine 12 to 19, Docket No. 717.)

To be sure, Novell presented pieces of evidence at trial to support its version of events, but that evidence cannot overcome the overwhelming evidence in SCO’s favor.

The Existence of Amendment No. 2. Novell presented testimony regarding the intent of Tor Braham and highly equivocal testimony from David Bradford that the original exclusion of copyrights in the APA was intentional. The problem with that position – even putting aside the evidence that they lacked the authority to exclude the copyrights – is simply that the language of Amendment No. 2 indisputably replaced, as a matter of law, the old language in the Excluded Assets Schedule of the APA. SCO, 578 F.3d at 1210-11. The new language controls this Court’s interpretation of the deal. Id. If Braham and Bradford’s testimony had truly reflected the intent of the parties to the APA, Amendment No. 2 would not exist.

The Forthright Negotiator Rule. As noted above, Ms. Amadia conceded on cross-examination that Novell “transferred” to SCO – not licensed – “copyrights that are required for SCO to exercise its rights” in connection with its acquisition of the UNIX and UnixWare business. (2178:11-18; 2176:13-21; 2148:18-23; 2177:25-2178:3.)

Even if the Court were to focus solely on Ms. Amadia’s initial testimony that she intended that Amendment No. 2 would only affirm that there was some sort of license (testimony that she recanted at trial), that view must be rejected because of “the forthright negotiator rule” of contract interpretation, which the Tenth Circuit has explained:

Where the parties assign different meaning to a term, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made . . . (a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

Flying J Inc. v. Comdata Network, Inc., 405 F.3d 821, 837 (10th Cir. 2005) (citing Restatement (Second) of Contracts § 201(2)). Under this rule, Amendment No. 2 must be interpreted in accordance with the meaning attached by SCO (Mr. Sabbath), since Ms. Amadia knew or at least

“had reason to know” that Mr. Sabbath intended the Amendment to confirm that the UNIX and UnixWare copyrights were transferred to SCO. Indeed, Ms. Amadia admitted that she understood that Mr. Sabbath’s understanding was that “the purpose of the Amendment was to clarify that the UNIX and UnixWare copyrights had transferred,.” (2169:17-2179:1.)<sup>12</sup> Rather than refuse to make any change to the language of the APA or propose language expressly affirming the grant of a license, Ms. Amadia drafted language that removed the copyright exclusion. She claimed to have done so in order to avoid a confrontation with Mr. Sabbath. But this is exactly what the “forthright negotiator” rule addresses, and Novell should therefore be bound to the interpretation that Mr. Sabbath held that Amendment No. 2 fixed the “clerical error” (2140:2-3; 2184:25-2185:1; 2140:20) that had existed in the APA, and confirmed the transfer of the copyrights.<sup>13</sup>

Meeting of the Novell Board of Directors. Notwithstanding Novell’s heavy focus on the Novell board of directors, their action did not constitute negotiations of the agreement between the parties. Of course, the language at issue in the board’s resolution excluding copyrights (taken directly from the old language in the APA) was replaced by Amendment No. 2. Moreover, the only term sheet provided to the directors did not even make the directors aware of the fact that copyrights were being retained – while identifying other assets (like patents) that

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<sup>12</sup> Ms. Amadia’s testimony is therefore consistent with Mr. Sabbath’s testimony that the parties understood that copyrights were to transfer and that a declaration provided to IBM’s counsel, to the extent it was inconsistent, did not accurately reflect his testimony. (927:14-25 (Sabbath); 928:19-929:2 (Sabbath).)

<sup>13</sup> There is no evidence that Mr. Sabbath believed the final language of Amendment No. 2 had a meaning different than the language he had initially proposed. Indeed, the Tenth Circuit specifically acknowledged, citing Mr. Sabbath’s testimony, that the SCO could have found “the final language equally sufficient for its purposes, given its insistence that all the UNIX copyrights were required for it to exercise its rights under the deal.” SCO, 578 F.3d at 1216.

were being retained. (Ex. 754; 678:3-681:18 (Mattingly); 2450:6-2451:1 (Bradford); 2470:10-2471:1 (Bradford).)<sup>14</sup> The minutes of the meeting of the Santa Cruz board did not reflect that there was any actual discussion of any retention of copyrights. (Ex. 29; 784:23-788:23 (Madsen).) Mr. Frankenberg further testified that if an exclusion of the UNIX copyrights had been discussed at the Novell meeting, he would have remembered that because the exclusion would be “ludicrous” and that was not the intent of the deal. (2543:12-2544:6.) There is no legal requirement that the Novell board subsequently approve the terms of Amendment No. 2, duly signed by a Novell officer, in order for that Amendment to be binding on the parties.

Novell’s Outside Counsel. Similarly, even taking the testimony in isolation from Amendment No. 2, the evidence that Tor Braham, David Bradford, or James Tolonen intended in the fall of 1995 to retain the copyrights for Novell is insufficient. Mr. Frankenberg testified not only that he never intended to retain the UNIX or UnixWare copyrights for Novell (2558:17-2559:2), but also that to the extent anyone below him had determined to retain the UNIX and UnixWare copyrights for Novell, however well intentioned that decision may or may not have been, no such person had the authority to do so. (2559:3-7.) The stated purpose for excluding the copyrights—protecting Novell’s royalty rights—makes no sense because Novell had already “bulletproofed” those rights in Section 1.2(b) of the APA, and there was no explanation that copyright ownership was needed to enhance that protection. (2404:17-2406:16 (Braham).) Moreover, it does not appear that Novell ever expressly drew SCO’s attention to the copyright exclusion language that had been added in the schedule of excluded assets, which would explain why there was no forcible “pushback” from SCO on the point. Mr. Braham testified that he

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<sup>14</sup> David Bradford’s testimony was completely equivocal. He did not recall the issue until reviewing documents and then reviewed only an incomplete set of documents, not containing Amendment No. 2. (2434:24-2435:15; 2438:5-16; 2441:7-10; 2444:12-21; 2446:22-2447:12; 2461:12-24.)



could recall a discussion about “the entire schedule of excluded assets,” but that he did not actually know that he and any Brobeck lawyer ever discussed that exclusion. (2403:6-25.)

While he “thought the other side was talking about the copyright exclusion,” he did not recall the Brobeck attorney “mentioning that specifically.” (2428:23-2429:4.)<sup>15</sup> The absence of any direct negotiations over the copyright exclusion language in the original APA, coupled with the subsequent replacement of that language a year later in Amendment No. 2 and the testimony of ten witnesses on both sides of the transaction, requires finding that the verdict was against the weight of the evidence.

## **2. The TLA Reflects That Copyrights Transferred.**

Novell’s assertion (at 5 of its Proposed Findings of Fact and Conclusions of Law) that the Technology License Agreement (“TLA”) “did not grant Novell a license to any of the Excluded Assets because Novell retained them” begs the question. The TLA’s grant of a license back to the technology at the time of the APA would have been unnecessary had Novell retained the copyrights and simply granted SCO a license to use the technology.

The plain, undisputed terms of the TLA give Novell a license-back to use the “Licensed Technology,” and the “Licensed Technology” includes the then-existing and prior versions of UNIX and UnixWare source code. (Ex. 162 (TLA) § II.A; Ex. 1 (APA) § 1.6, Schedule 1.1(a) Item I.) The TLA thus gives Novell a license-back to use the UNIX and UnixWare source code

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<sup>15</sup> The evidence thus does not support Novell’s argument that SCO’s attorneys understood the copyrights to have been excluded from the deal. There is no evidence that the issue was ever discussed in the meeting of Santa Cruz’s board of directors, and there is no evidence that the outside attorneys for SCO ever discussed that particular exclusion with Novell’s outside attorneys. (2428:23-2429:4 (Braham).) One of Novell’s witnesses did take the position that SCO “had Brobeck, Phleger as their voice” in the negotiations of the APA (2358:13-21 (Braham)), and the evidence showed that the Brobeck law firm put its name to the SCO filing from early 1997 in which SCO expressly represented that it had acquired the UNIX copyrights and was the UNIX copyright owner. (Ex. 127 §§ 3.4, 4.9, signature block.)

in Novell's own products, subject to certain limitations. (Ex. 162 (TLA) § II.) If Novell had retained the UNIX and UnixWare copyrights, it would not have needed any license-back to use the UNIX and UnixWare source code in Novell's own products. (See 107:23-108:1 (Frankenberg); 847:4-7 (Madsen).) Indeed, the evidence showed that Novell itself thinks that it is reasonable to read the TLA as inconsistent with a reading of the APA under which the UNIX and UnixWare copyrights were retained. (1965:4-1966:4 (LaSala).) The TLA also identified SCO as the "owner" of the Licensed Technology. (Ex. 162 (TLA) § III.)

Novell has suggested that the license-back was necessary because it would permit Novell to use in its products the technology in the "Merged Product" that SCO was to develop after the execution of the APA. But the TLA gives Novell a license-back to much more than just the source code in the Merged Product; it gives Novell such a license for the existing UNIX and UnixWare source code itself. (Ex. 1 (APA) § 1.6, Schedule 1.1(a) Item I; Ex. 162 (TLA) § II.A.) Where the APA refers to the TLA and vice versa and the two agreements are obviously related agreements (Ex. 1 (APA) § 1.6; Ex. 162 (TLA) § I), it would be unreasonable to read the amended APA in a manner that renders it inconsistent with the unambiguous terms of the TLA.

### **3. The Parties' Course of Performance.**

In addition to the foregoing, a wealth of extrinsic evidence of the parties' course of performance prior to any litigation further demonstrated that SCO had acquired the UNIX and UnixWare copyrights. That course of performance is further compelling grounds for concluding that the parties intended for SCO to acquire the UNIX and UnixWare copyrights. The undisputed evidence at trial reflected the following facts of the parties' (and even third parties') "practical construction" of the amended APA:

- At Novell's direction, Novell's own engineers placed SCO copyright notices on source code for the existing versions of UnixWare – versions on which SCO had done

no work at all. (1727:19-25 (Nagle); 1733:9-25 (Nagle); Ex. 655; 1704:18-1705:7 (Maciaszek); 1723:14-20 (Maciaszek).) Novell also replaced the “Novell” copyright notice on the CD for the current version of the UnixWare product with a “Santa Cruz” copyright notice. (1725:1-1728:21 (Nagle); 1723:9-1736:17 (Nagle); Ex. 35.) Because SCO had done no additional work on UnixWare at the time Novell added the SCO copyright notices, these actions can only be understood as consistent with a change in ownership of the then-existing copyrights to UnixWare.

- The participants in the transition of the UNIX and UnixWare business from Novell to SCO – individuals who had not participated in the negotiations – understood SCO to have acquired the UNIX and UnixWare copyrights, including because no one ever suggested otherwise. (547:11-16 (Broderick); 1671:22-1672:18 (Maciaszek); 1676:17-20 (Maciaszek).) Novell presented no evidence that any such participants believed that Novell continued to own any such copyrights.<sup>16</sup>
- In sorting through the materials in its former offices to determine what to keep and what not to keep, moreover, Novell turned over to SCO the copyright registration certificates for UNIX and instructed its transition team to retain only materials pertaining to the businesses it was retaining, Netware and Tuxedo. (610:5-612:4 (Broderick).)
- In early 1996, Novell sent thousands of letters explaining that it had transferred to SCO Novell’s “existing ownership interest in UNIX System-based offerings and related products,” specifically identifying such products as including “All Releases of UNIX System V and prior Releases of the UNIX System” and “All UnixWare Releases up to and including UnixWare Release 2 (encompassing updates and upgrades to these releases as well.” (586:4-15 (Broderick); Ex. 580.) In one such letter, which was co-signed by Novell and SCO, Novell further explained that “Novell’s right as licensor under such agreements have been assigned to the Santa Cruz Operation” and that “the ownership of the UNIX operating system has been transferred from Novell, Inc. to the Santa Cruz Operation.” (Ex. 751; 1682:23-1684:10 (Maciaszek); 1684:24-1685:7 (Maciaszek).)<sup>17</sup>

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<sup>16</sup> In fact the only testimony regarding the transition meetings reflected that Novell representatives told SCO that Novell had sold UNIX and that the copyright notices had to be changed. (548:10-17 (Broderick); 1704:18-1705:7 (Maciaszek); 1723:14-1728:21 (Nagle); 1732:12-1737:13 (Nagle); 1775:15-1776:16 (Nagle).) There was no evidence that Novell ever told anyone in these meetings that Novell was retaining any UNIX or UnixWare copyrights.

<sup>17</sup> Novell argued at trial that these letters did not need to tell customers about Novell’s claimed copyright exclusion, but the evidence showed otherwise. In addition to the plain fact that Novell’s assertion of ownership transfer would have been inaccurate if Novell had retained the copyrights, such an exclusion would have been relevant to customers. Mr. Maciaszek testified, for example, that among the “things a customer does need to know” is “who can enforce the copyrights in the contracts” that SCO now owned. (1710:8-22.)

- In concert with these letters, Novell representatives visited OEM licensees, including in Europe, to reiterate the statements in those letters and personally inform the licensees that “SCO had acquired all ownership rights in the business,” without “any limitation ever.” (1678:4-16 (Maciaszek); 1680:22-1681:22 (Maciaszek); 1684:4-17 (Maciaszek).)
- Novell, SCO, and IBM engaged in a protracted dispute and negotiation throughout 1996 regarding the scope of Novell’s rights under the APA. SCO’s evidence showed that Novell never contended that it owned the copyrights during that dispute, and Novell presented no evidence to the contrary. (802:3-7 (Madsen).)
- During the dispute among the three corporations in 1996, even IBM took the position that SCO could protect itself through its ownership of the UNIX copyrights, asserting that “SCO is protected by copyright.” (Ex. 123.). SCO’s evidence showed that Novell never contended otherwise, and Novell presented no evidence to the contrary. (802:3-13 (Madsen).)
- Just months after Amendment No. 2 was signed, SCO, through the law firm that had represented SCO in connection with the Novell/SCO APA, took the position in formal litigation against Microsoft Corporation in the European Union that SCO had acquired the UNIX copyrights and was the UNIX copyright holder. (807:3-811:20 (Madsen); Ex. 127 §§ 3.4, 4.9.) Novell presented no evidence to call into question the nature of SCO’s assertions in that filing.
- In resolving the foregoing dispute, SCO entered into a settlement agreement with Microsoft in which SCO again stated that it had acquired the UNIX copyrights and was the UNIX copyright holder. (811:21-813:24 (Madsen).) The document states: “SCO has acquired AT&T’s ownership of the copyright in the UNIX System V Operating System Program.” (Ex. 199 Recital B.) Novell again presented no evidence to call into question the nature of SCO’s assertion in that settlement.

All of this evidence is particularly relevant here because the parties’ course of performance is the “best evidence” of the parties’ contractual intent. SCO, 578 F.3d at 1217.

**B. The Copyrights Are Required for SCO to Exercise Its Ownership Rights in the UNIX and UnixWare Technologies It Acquired.**

There was a surfeit of specific testimony, such as set forth above, concerning SCO’s need of the copyrights to run its UnixWare business. Mr. Frankenberg called it “ludicrous to think about selling software without selling the copyrights. If you don’t have the copyrights, you don’t have the ability to freely use what you bought.” (2543:21-2544:3.) Similarly, Mr. Thompson testified that “[i]t is hard for me to imagine any instance in which we are selling them the entire

business, to go forward with this business in the future, without giving them the underlying intellectual property rights that they needed to do so.” (241:19-242:3.) In a case where witnesses from both sides of the deal, with involvement in various aspects of the UNIX business, specifically testified that SCO required the UNIX and UnixWare copyrights to run its business and protect the intellectual property at the heart of that business, a jury verdict to the contrary simply cannot stand.<sup>18</sup>

### **CONCLUSION**

SCO respectfully submits, for the reasons stated above, that the Court should grant SCO’s motion for judgment as a matter of law or, in the alternative, grant SCO a new trial.

DATED this 27th day of April, 2010.

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<sup>18</sup> See, e.g., Broderick (666:9-21; 667:16-668:6) (SCO “would be out of business” if it couldn’t protect its software “through copyrights”); Michels (502:24-503:14) (copyrights “so essential” to a software business they are “like breathing oxygen”); Wilt (442:15-443:6) (copyrights “such a fundamental part of an asset purchase that if you didn’t have copyrights and such go along with it, there was no asset purchase”); Madsen (780:23-24; 802:23-803:1; 865:16-21; 866:18-21; 875:7-14; 884:21-885:21) (SCO “required all” the UNIX and UnixWare copyrights; copyrights “essential” to “protect and enforce [SCO’s] intellectual property rights” in UNIX); Sabbath (913:1-15; 914:17-915:5) (“you would need all the copyrights and binaries and source code”); McBride (997:11-23) (ownership of the UNIX copyrights “absolutely” “required for SCO’s business”); Maciaszek (1687:16-24) (“the copyrights are required to operate SCO’s business”); Tibbitts (1844:25-1845:18) (“copyrights are critical for us to run the business that was purchased from Novell in ‘95, both the SCOsource business and the right to protect that core UNIX intellectual property”).

**CERTIFICATE OF SERVICE**

I, Brent O. Hatch, hereby certify that on this 27th day of April, 2010, a true and correct copy of the foregoing **SCO'S MEMORANDUM IN SUPPORT OF ITS RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, FOR A NEW TRIAL** was filed with the court and served via electronic mail to the following recipients:

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