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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,

v.

NOVELL, INC., a Delaware corporation,

Defendant.

Case No. 2:04CV00139

**NOVELL'S OPPOSITION TO SCO'S
RENEWED MOTION FOR
JUDGMENT AS A MATTER OF
LAW OR A NEW TRIAL**

Judge Ted Stewart

AND RELATED COUNTERCLAIMS.

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I. INTRODUCTION

With SCO's consent, even its insistence, the following primary question was put to the jury:¹

“Did the amended Asset Purchase Agreement transfer the UNIX and UnixWare copyrights from Novell to SCO?” (Dkt. No 846.)

The jury's unanimous, unequivocal answer to that basic question was: “No.”

After having first lost on summary judgment, then contending in the Tenth Circuit that it should be given the chance to present its claims to a jury in order to obtain from the jury (rather than the Court) an answer to the foregoing question, and having had full opportunity to present its best case to the jury, SCO now asks the Court to reject and turn aside the jury's verdict because SCO does not like the answer. Judge Kimball found in favor of Novell on summary judgment, the Tenth Circuit reversed that ruling with respect to transfer of the UNIX and UnixWare copyrights, but acknowledged that Novell had “powerful arguments” on its side, and now a jury of twelve Utah citizens has found unanimously that the amended Asset Purchase Agreement did *not* transfer the copyrights from Novell to SCO. *See The SCO Group, Inc. v. Novell, Inc.*, 578 F.3d 1201, 1215 (10th Cir. 2009) (“We recognize that Novell has powerful arguments to support its version of the transaction, and that, as the district court suggested, there may be reasons to discount the credibility, relevance, or persuasiveness of the extrinsic evidence that SCO presents.”). In light of that history, SCO's assertion that the jury's verdict is unreasonable and overwhelmingly against the weight of the evidence is ludicrous.

Rule 50 of the Federal Rules of Civil Procedure allows a court to grant judgment as a matter of law only if the evidence is “so overwhelmingly preponderant in favor of the movant [in

¹ *See* March 25, 2010 Jury Instruction Conference Tr. at 46:24-25 (SCO agreeing to the verdict form as is). Indeed, Novell objected that this approach would prevent the jury from addressing the other elements of the slander of title claim. (*Id.* at 47:1-48:4.) The Court stated that the jury would need to make the initial determination of copyright ownership in order to perform its responsibility. (*Id.* at 48:5-9.) *See also* March 2010 Trial Tr. at 2632:2-5 (SCO's counsel stating in closing argument: “The very first question will be did the amended Asset Purchase Agreement transfer [] UNIX and UnixWare copyrights from Novell to SCO. I would like to address that question at the outset.”).

this instance, SCO] as to permit no other rational conclusion.” *Snyder v. City of Moab*, 354 F.3d 1179, 1184 (10th Cir. 2003). Likewise, Rule 59 gives a court discretion to grant a new trial only if the jury verdict is “clearly, decidedly, or overwhelmingly” contrary to the evidence. *M.D. Mark, Inc. v. Kerr-McGee Corp.*, 565 F.3d 753, 762 (10th Cir. 2009). SCO has failed to demonstrate that the jury’s verdict was irrational or “clearly, decidedly, or overwhelmingly” contrary to the evidence. If anything, the evidence overwhelmingly supports the jury’s verdict.

SCO’s motion ignores testimony that contradicts its position, including former SCO CEO Darl McBride’s admission that copyrights were not required for SCO’s UNIX and UnixWare software businesses, and SCO General Counsel Ryan Tibbitts’s admission that SCO itself attempted to sell its software business while excluding the copyrights. SCO asks the Court to make credibility determinations that the jury has already made, weigh evidence that the jury has already considered and weighed, and draw all inferences in favor of SCO. As this Court has noted, however, it is inappropriate for a trial court to do so in considering a Rule 50 Motion. *See* Dkt. 838 at 3; *see also Guides, Ltd. v. Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065, 1074 (10th Cir. 2002) (stating that for Rule 50(b) motion, courts construe all inferences in favor of nonmoving party and “refrain from making credibility determinations or weighing the evidence.”).

SCO also relies on a parade of witnesses with limited knowledge and memory, many of whom have an admitted financial bias towards SCO. By contrast, Novell relied at trial on the governing language of the Asset Purchase Agreement *and its amendments*, and the testimony of the individuals who actually negotiated and drafted that language (including Tor Braham, the primary drafter of the APA, and Allison Amadia, the primary drafter of Amendment No. 2). The jury plainly decided that the language of the amended Asset Purchase Agreement supported Novell’s position, Novell’s witnesses were more credible, and Novell’s other evidence was more probative. There is no basis whatsoever for second-guessing those determinations.

SCO’s disagreement with the jury’s verdict cannot justify judgment as a matter of law or a new trial. Instead, SCO must establish that the jury’s verdict was entirely contrary to the

evidence. Here, SCO was able to present the evidence that it wished at trial. The jury was able to carefully consider that evidence—as well as the evidence Novell was permitted to present—over two days of deliberations before rendering its verdict. Because SCO has not met its burdens under Rules 50 or 59, its motion should be denied.

II. SCO IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW

A. Legal Standard.

Judgment as a matter of law is warranted only if the evidence points but one way and is susceptible to “no reasonable inferences supporting the party opposing the motion,” such that the evidence is “so overwhelmingly preponderant in favor of the movant as to permit no other rational conclusion.” *Snyder v. City of Moab*, 354 F.3d 1179, 1184 (10th Cir. 2003); *Strickland Tower Maintenance, Inc. v. AT&T Communications, Inc.*, 128 F.3d 1422, 1426 (10th Cir. 1997). When ruling on a motion for judgment as a matter of law, the court does not weigh the evidence, pass on the credibility of the witnesses, or substitute its conclusions for that of the jury. *Minshall v. McGraw Hill Broad. Co., Inc.*, 323 F.3d 1273, 1279 (10th Cir. 2003) (quoting *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 549 (10th Cir. 1999)). In fact, the Supreme Court has held that “although [a] court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe.” *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 151 (2000).

B. The Jury’s Verdict That the Amended Asset Purchase Agreement Did Not Transfer Copyright Ownership Is Reasonable and Supported by the Evidence.

The jury was presented at trial with two competing interpretations of the Novell—Santa Cruz transaction. SCO argued that the deal was essentially an acquisition of the entire UNIX and UnixWare business, transferring all relevant assets, including copyright ownership. Novell, on the other hand, presented evidence that the final deal was more limited, with Novell transferring the UnixWare business to Santa Cruz but retaining substantial rights in the UNIX licensing business, including continued ownership of the existing UNIX and UnixWare copyrights and the undisputed right to receive UNIX royalties. The jury was presented with

extensive documentary and testimonial evidence supporting Novell’s interpretation of the Novell—Santa Cruz transaction, and it is flatly wrong for SCO to assert otherwise.²

1. The Asset Purchase Agreement Established That Santa Cruz Was Novell’s Agent.

As Judge Kimball found, Section 4.16(b) of the Asset Purchase Agreement (“APA”) created an agency relationship whereby SCO (as Santa Cruz’s successor) was acting as Novell’s agent to collect SVRX royalties. (Order at 90, Dkt. No. 377 (“SCO does not dispute the agency relationship created by the APA.”).) Darl McBride, SCO’s former CEO, conceded this point at trial. (March 2010 Trial Tr. at 1075:16-1078:22.) The provisions of Section 4.16(b) were purposefully placed in the APA to avoid any doubt that Novell had “complete rights to control what happened with the UNIX business.” (*Id.* at 2353:21-2354:8.) If SCO did not act as SCO was supposed to as Novell’s agent, Novell could step in and take action itself. This agency relationship demonstrates that the deal was more complicated than a full acquisition of the UNIX business. If the deal had been a full acquisition, Santa Cruz would be simply a buyer, not an agent, and Novell would have no need to control what happened with the UNIX business.

Consistent with the foregoing, Alok Mohan, CEO of Santa Cruz in 1995 when the APA was executed, characterized the deal with Novell in an email to all Santa Cruz employees on September 19, 1995, explaining that Santa Cruz became “the owner of the UnixWare product line” but would merely “manage the licensing business for UNIX prior to UnixWare 1.0 (SVRx).” (Trial Ex. 163 at 1.) This is not the sort of language that describes an acquisition of

² SCO argues that various APA provisions must be interpreted in accordance with statements plucked out of the text of the Tenth Circuit opinion. (*See, e.g.*, Motion at 6, 9, 10, 12, 13, 21, 19 n.13.) The purpose of a Rule 50(b) motion is to determine whether the jury verdict was supported by the evidence presented at trial. *See, e.g., Martin v. Howard Univ.*, 2006 U.S. Dist. LEXIS 72303, at *17-18 (D.D.C. Oct. 4, 2006). The Tenth Circuit opinion is not evidence on factual questions of ownership, nor does it contain binding conclusions on copyright ownership issues. The Tenth Circuit was careful to state: “We take no position on which party ultimately owns the UNIX copyrights or which copyrights were ‘required’ for Santa Cruz to exercise its rights under the agreement. Such matters are for the finder of fact on remand.” *The SCO Group, Inc. v. Novell, Inc.*, 578 F.3d 1201, 1219 (10th Cir. 2009). If SCO believed the jury needed to interpret a particular provision in light of the Tenth Circuit opinion, the appropriate measure would have been to seek corresponding jury instructions.

the entire UNIX business. Mr. Mohan's email succinctly describes that there were two businesses—the forward-looking UnixWare product line and the existing UNIX business—and while Santa Cruz would own the forward-looking UnixWare product line after the APA, Santa Cruz would only manage the UNIX licensing business for Novell.

This agency relationship, along with other provisions in the APA such as the Excluded Assets Schedule, demonstrates why SCO's continued reliance on the broad definition of "Business" and the broad language "all rights and ownership" in the Asset Purchase Agreement is misplaced. (*See* Motion at 4-5.) It is undisputed, and was made abundantly clear through trial, that these broad introductory statements are explicitly limited in many ways. For example, in addition to copyrights, Novell retained all patents, certain royalties, and numerous other rights and assets as enumerated throughout the APA. The evidence on which the jury reasonably relied demonstrated that this transaction was not a full acquisition of a business and all related assets, but instead a carefully crafted purchase agreement that purposefully transferred only certain enumerated assets and rights.

2. The Retention of Copyrights Was Authorized by the Novell Board of Directors.

Novell's Board of Directors approved the APA with specific reference to its exclusion of all copyrights. (Trial Ex. Z3 at 2.)³ David Bradford, Secretary to the Board of Directors and General Counsel for Novell for nearly 15 years including at the time of the APA and Amendment No. 2, prepared the Board minutes. (March 2010 Trial Tr. at 2434:14-23.) He testified that Novell's Board of Directors approved the APA transaction with the proviso that Novell would retain all copyrights. (*Id.* at 2442:1-19.) If Amendment No. 2 had been intended to change this exclusion and to instead transfer copyright ownership, that would have been a

³ SCO attempts to minimize the import of the Novell Board meeting minutes by arguing that the Board's action "did not constitute negotiations of the agreement between the parties." (Motion at 19 (emphasis in original).) This argument is beside the point. SCO's entire case has rested on what the parties intended; in fact, this very argument in SCO's Motion falls under the heading "The Intent of the Negotiators and Principals Regarding the APA." The Board minutes reflect the intent of the actual party to the transaction—Novell—as opposed to the vague memories of select individuals within Novell reported 15 years later.

material change that would have required separate Board approval. Such approval was never sought or obtained. (*Id.* at 2037:11-25.) Thus, the Novell Board meeting minutes actually demonstrate that an Asset Purchase Agreement that purported to transfer copyrights to Santa Cruz would have been unauthorized.

The Novell Board meeting minutes also demonstrate why SCO's argument that the copyright exclusion was "a mistake . . . or a last-minute, overzealous decision between Novell's general counsel and its outside counsel" is untenable. (Motion at 7.) SCO's witness Robert Frankenberg confirmed and verified the accuracy of the minutes for the September 18, 1995 Board meeting at which the APA was approved with explicit reference to the exclusion of UNIX and UnixWare copyrights, and acknowledged that he reviewed the APA's Excluded Assets schedule in connection with the transaction. (March 2010 Trial Tr. at 102:16-18, 147:10-25.) SCO's witness Ty Mattingly agreed that, before they executed the APA, the lawyers and businesspeople at Santa Cruz had the opportunity to read the Included Assets and Excluded Assets schedules. (*Id.* at 344:20-24.) SCO's witness Burt Levine even made comments on the draft schedules and crossed out an item immediately above the copyright exclusion in Schedule 1.1(b), all while leaving that exclusion intact. (*Id.* at 531:22-537:23; Trial Ex. X3.)

Amendment No. 1 provides additional evidence supporting the jury's determination that the retention of copyright ownership was both intended and authorized by Novell. Three months after the initial signing, after careful review by both sides, the parties executed a lengthy clean-up amendment, titled Amendment No. 1. (Trial Ex. T5.) Amendment No. 1 did not add copyrights to the Included Assets that would be transferred, nor did it remove copyrights from the Excluded Assets that would not be transferred. (*Id.*) SCO's witness Mr. Frankenberg agreed that "even after the Board meeting that was held at which the Asset Purchase Agreement was approved, after [he] and other members of the Board had a chance to thoroughly review the [APA], and even after Mr. Sonsini [senior partner of the Wilson Sonsini law firm and member of Novell's Board] and Mr. Bradford, the legal advisors, apprised the Board about what was contained in the agreement and even after a nearly three-month period to review it, neither

Novell nor Santa Cruz Operation chose to include UNIX copyrights in the [APA] when Amendment No. 1 was executed.” (March 2010 Trial Tr. 153:12-154:23.)

3. Novell Intentionally Retained Copyright Ownership to Address Significant Business Concerns.

Tor Braham, the Wilson Sonsini attorney who was the primary draftsman of the APA, testified unequivocally that the copyright exclusion was negotiated and agreed upon at the direction of Novell. (*Id.* at 2363:19-23.)⁴ Mr. Braham and Mike DeFazio, former head of the UNIX and UnixWare business at Novell, agreed that the copyright exclusion was designed to protect Novell’s interests. Mr. Braham testified that Novell’s concerns included its important interest in retaining the UNIX business, possible SCO bankruptcy, and a strategic concern that Microsoft was monopolizing the area. (*Id.* at 2364:3-15, 2425:16-2426:15.) Mr. DeFazio added that the retention of copyrights was crafted to “bulletproof” Novell’s financial asset stream. (*Id.* at 2311:7-17.)

Similarly, Novell’s witness James Tolonen, Novell’s CFO during the relevant time, testified that copyrights were purposefully excluded (1) as part of an overall strategy to retain ownership of the original software, (2) because Santa Cruz was relatively small and could not afford to pay Novell the entire value for all UNIX and UnixWare-related rights and assets, and (3) because Novell was concerned about the long-term viability of Santa Cruz and wanted to ensure Novell’s rights would not be brought into question if Santa Cruz was acquired by a competitor. (*Id.* at 2021:24-2023:18.) Mr. Tolonen made several presentations to the Novell Board describing the APA process, and SCO’s witness Mr. Frankenberg confirmed that he relied on Mr. Tolonen’s recommendations and advice. (*Id.* at 124:15-125:2, 2025:7-2026:10.)

SCO’s argument that the inclusion of copyrights in the sale was “logical” is irrelevant. (*See* Motion at 6.) The inclusion of patents may also have been logical, but they were expressly

⁴ Mr. Braham was praised by SCO’s own witnesses. Ty Mattingly testified that Mr. Braham was “the main guy,” “entrusted,” and would better know what was actually written in the final version of the agreement. (March 2010 Trial Tr. at 716:10-14, 755:10-15.) Duff Thompson stated that he had confidence in Novell’s outside counsel, which included Tor Braham. (*Id.* at 290:8-9.)

excluded from the sale, as were copyrights. Regardless of whether a particular course of action would have been “logical” in a simpler deal or full-out acquisition, there were a multitude of reasons for Novell to retain copyrights in this complicated transaction that ultimately led Novell to do so.

4. Copyright Ownership Was Not Required for Santa Cruz to Exercise Its Rights with Respect to the Acquisition of UNIX and UnixWare Technologies.

With respect to Amendment No. 2, it is a simple matter to “disregard all evidence favorable to [SCO] that the jury is not required to believe” as required by the Supreme Court, because SCO presented no evidence on the interpretation of Amendment No. 2. *See Reeves*, 530 U.S. at 151. SCO presented no testimony to show that its current interpretation of Amendment No. 2 was intended at the time of the Amendment’s execution; no testimony to rebut the sworn testimony of Novell’s witnesses who negotiated, drafted, and signed Amendment No. 2; and no evidence that at the time Amendment No. 2 was signed SCO required ownership of any specific copyrights to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies under the APA. With this dearth of evidence, SCO cannot meet the Rule 50 standard that requires showing that the evidence is “so overwhelmingly preponderant in favor of [SCO] as to permit no other rational conclusion” because, if anything, the evidence on the meaning and effect of Amendment No. 2 is overwhelmingly preponderant in favor of *Novell*.

a. Novell’s Witnesses Confirmed That Amendment No. 2 Did Not Transfer Copyright Ownership.

Novell’s witnesses testified that the “required for” language of Amendment No. 2 was not intended to transfer copyright ownership in view of the underlying purposes and structure of the APA. Jim Tolonen (again, Novell’s CFO at the time of both the APA and Amendment No. 2 and signer of Amendment No. 2) and Allison Amadia, the former in-house attorney who represented Novell in the negotiation and drafting of Amendment No. 2, both testified that the “required for” language in Amendment No. 2 was not intended to transfer the UNIX copyrights. (March 2010 Trial Tr. at 2036:15-22; 2038:1-3; 2119:21-2120:6; 2123:2-13.)

The purpose of Amendment No. 2 was to affirm that SCO had the right to use the UNIX and UnixWare technologies to manufacture UnixWare and to make modifications to it. (*Id.* at 2128:9-12.) Ms. Amadia confirmed that, under the APA, SCO would own the copyrights in any derivative works it created based on the UNIX technology, and could enforce those rights. (*Id.* at 2157:21-22.) SCO did not, however, acquire the rights from Novell to license the underlying UNIX code or to enforce copyrights in that code. (*Id.* at 2158:1-14.)

In fact, Ms. Amadia initially received a draft of Amendment No. 2 from Mr. Sabbath that would have revised Schedule 1.1(b), but Novell rejected the proposed language because Novell did not want to alter the APA to transfer the UNIX copyrights to SCO. (*Id.* at 2120:3-14.) Mr. Sabbath's proposed revision of Schedule 1.1(b), had it been accepted, would have excluded "[a]ll copyrights and trademarks, except for the copyrights and trademarks owned by Novell as of the date of this Amendment No. 2, which pertain to the UNIX and UnixWare technologies and which SCO has acquired hereunder." (Trial Ex. T34 at 1.) But Ms. Amadia told Mr. Sabbath that Novell would not alter the original APA to transfer copyright ownership, and she further said that she could only modify the language to "affirm the rights that [Santa Cruz] acquired in terms of license grants and rights to use the technology." (March 2010 Trial Tr. at 2120:23-2121:4.) Ms. Amadia prepared such a revision, and her revised language became the final language of Amendment No. 2. (*Id.* at 2121:3-2123:5.)

Ms. Amadia also testified that, if she were drafting an amendment to the APA under which the copyrights transferred, she "would have definitely amended Schedule 1.1(a), which listed the Included Assets," but she did not do that. (*Id.* at 2160:21-24.) Likewise, Mr. Tolonen agreed that the way to transfer the copyrights would have been to include them on the schedule of Included Assets. (*Id.* at 2037:18-25.) This did not occur.

SCO takes quotes from Novell's witness Allison Amadia out of context to argue that her testimony is consistent with its position that copyright ownership transferred. But Ms. Amadia was clear in her testimony that she was not discussing the transfer of copyright ownership, but

instead the transfer of certain copyright rights.⁵ (*See, e.g., id.* at 2160:3-7 [“whatever *copyright rights* Santa Cruz needed in order to exercise the rights it was given . . . they would have *those rights.*”] [emphasis added], 2122:3-7 [“Q: Did anyone at Novell ever suggest to you that in connection with amendment number two that Novell ought to transfer *ownership* of UNIX copyrights to Santa Cruz Operation? A: No, no one did.”] [emphasis added].) SCO’s attempt to use the testimony of Steve Sabbath, former General Counsel at Santa Cruz, to contradict Ms. Amadia’s testimony is belied by the fact that, as discussed in more detail below, Mr. Sabbath (1) earlier executed a declaration under penalty of perjury conflicting with his later testimony, (2) testified that he had no memory of the negotiation of the relevant portion of Amendment No. 2, and (3) admitted that he would not be able to contradict Ms. Amadia regarding whether he stated the copyrights were specifically excluded from the APA. (*Id.* at 924:17-925:5, 933:13-21.)

b. SCO’s Own Witnesses Testified That the Copyrights Were Not Required.

SCO and its witnesses presented vague rhetoric at trial to argue that copyright ownership is always required for a software business, with SCO claiming in closing argument that a software business without the copyrights is “a car without an engine” or “a house without a roof.” (*Id.* at 2636:10-17.) But this hyperbole was defeated by the admissions of SCO’s own witnesses.

(i) SCO CEO Darl McBride.

Darl McBride, CEO of SCO from 2002 to 2009 and the architect of the SCOsource licensing program, admitted that SCO could in fact run its software business without owning the UNIX copyrights. (*Id.* at 1225:2-1226:10.) Indeed, Mr. McBride even issued a statement to the SEC and the investing public stating as much. (Tr. Ex. R45 at 6.) He also confirmed at trial that the UNIX copyrights were not required for SCO to run its UnixWare and OpenServer software business, because SCO could “run [its] business . . . without the copyrights, just like HP, IBM,

⁵ SCO’s argument that Amendment No. 2 must not have excluded *copyright* ownership because it included the *trademarks* UNIX and UnixWare is similarly misguided. The trademarks UNIX and UnixWare were explicitly listed as Included Assets even in the original APA.

all of the other licensees of UNIX can run their businesses as well.” (March 2010 Trial Tr. at 1225:24-1226:1.)⁶ Mr. McBride characterized UnixWare and OpenServer as “branches off this tree,” and agreed that prior to the APA, Santa Cruz had sold OpenServer without owning the UNIX copyrights. (*Id.* at 1057:15-20, 1058:3-10.) He further admitted that SCO could develop and sell its UnixWare products without ownership of the UNIX copyrights. (*Id.* at 1231:11-19.)

Mr. McBride testified only that SCO was only unable to “run [its] business for the licensing side” without the copyrights. (*Id.* at 1226:2-3.) He asserted that the copyrights were needed for SCO’s new business of licensing—and, if necessary, suing—Linux users. (*Id.* at 1226:1-10.) But SCO presented no evidence that suing Linux users was part of the “rights” transferred under the APA. Rather, even SCO’s witnesses testified that the APA was intended to enable Santa Cruz to develop a new version of UnixWare that could compete with Microsoft Windows. (*Id.* at 91:7-13; 92:20-93:1 (Robert Frankenberg); 224:23-225:25 (Duff Thompson); *see also* 429:2-10 (Jack Messman).)

(ii) SCO General Counsel Ryan Tibbitts.

Ryan Tibbitts, SCO’s in-house corporate counsel from 2003 to the present, acknowledged at trial that SCO was recently involved in a proposed transaction whereby SCO would sell its UNIX-related business to a third party, yet still retain all of its copyrights. (*Id.* at 1850:20-1851:18.) Mr. Tibbitts testified that someone could buy and operate SCO’s product business and not receive the UNIX copyrights. (*Id.*) Under the proposed deal, SCO would have retained only its intellectual property business, which Mr. Tibbitts acknowledged was a new business. (*Id.* at 1859:8-20 [SCOsource was launched as a new “licensing line” in 2003].)⁷ Moreover, neither Mr. Tibbitts nor anyone else for SCO testified as to precisely which

⁶ As SCO’s witness William Broderick explained, licensees executed licensing agreements and software agreements, which allowed a licensee to create a flavor of UNIX, and sublicensing agreements that allowed a licensee to market the flavored UNIX product. (*Id.* at 583:4-17).

⁷ Dr. Christine Botosan, one of SCO’s damages experts, also testified that the SCOsource licensing program was a new “product” for SCO for which there was no “previous history” to look at. (*Id.* at 1447:5-8; 1448:3-5; 1449:8-11; 1453:20-24.)

copyrights SCO purportedly required. SCO provides some further background on this deal in a footnote in the present motion, but cannot hide from the fact that in a complicated transaction, SCO considered selling aspects of a software product business while retaining the related copyrights, just as Novell did in the transaction with Santa Cruz in 1995. (*See* Motion at 12 n.9.)

c. SCO Did Not Require Ownership of the UNIX Copyrights to Protect Its Own Intellectual Property.

SCO also argues, as it did throughout the trial, that it needs ownership of UNIX copyrights in order to protect its own intellectual property rights. This is simply not true. Both SCO's witness Mr. Sabbath and Novell's witness Ms. Amadia testified that Santa Cruz (and thus subsequently SCO) would own the copyrights to the new code it created and could use those copyrights to protect that code against infringement. (March 2010 Trial Tr. at 933:2-7; 2157:21-22.) Mr. Sabbath also acknowledged that Santa Cruz (and subsequently SCO) would not need anything more than a license to create derivative works based on the UNIX source code. (*Id.* at 939:3-18.) As the owner of the copyrights in its own software, SCO was able to protect itself against infringement of that code, and did not require ownership of the UNIX copyrights to do so.⁸

Consistent with Mr. McBride's testimony discussed above, SCO's witness Kim Madsen testified that for 12 years prior to the APA, Santa Cruz successfully distributed the OpenServer flavor of UNIX and developed a substantial business around that flavor without owning the copyrights in the underlying UNIX code. (*Id.* at 816:19-817:1, 817:7-14, 869:10-14.) Ms. Madsen agreed that through the APA, Santa Cruz acquired another flavor of UNIX: UnixWare. (*Id.* at 869:15-19.) This testimony supports Novell's position on the APA, with

⁸ SCO's argument that the majority of UnixWare is older UNIX code is both misleading and irrelevant. SCO's witness Andrew Nagle acknowledged that he had no estimate of the amount of code Santa Cruz and SCO contributed to the UnixWare product, and would not be surprised if Santa Cruz and SCO had added seven million lines of code on top of the seven million lines of code that existed in 1995. (*Id.* at 1773:10-21.) Regardless, whether the portion of code created by SCO makes up 10% or 50% of the product, it is undisputed that SCO owns the copyrights in the code *it creates* and can protect those rights without owning the UNIX copyrights.

which the jury agreed: the APA gave Santa Cruz the rights to develop UnixWare, another flavor of UNIX, along with the right to manage Novell's UNIX licensing business, a 5% administrative fee, and certain other enumerated rights and physical assets, none of which required ownership of the existing UNIX and UnixWare copyrights, as Santa Cruz would naturally own the copyrights in what it created going forward.

d. SCO Presented No Credible Witnesses Regarding Amendment No. 2.

The only two witnesses presented by SCO who had any involvement in Amendment No. 2—Kim Madsen and Steve Sabbath—had nothing to say with respect to the negotiation and interpretation of Amendment No. 2. Mr. Sabbath did not recall the relevant paragraph in Amendment No. 2, did not recall negotiating it, did not know who would have negotiated it, and could not recall focusing on that provision prior to signing Amendment No. 2. (*Id.* at 924:17-925:5.) Despite this lack of memory, he executed a declaration in 2004 stating his belief that Amendment No. 2 was intended to confirm that SCO would obtain ownership of the UNIX copyrights under the APA (*Id.* at 910:16-24), but also admitted executing an earlier declaration that conflicted with much of his later testimony, including statements acknowledging that Novell retained UNIX System V intellectual property and that SCO's claims were incorrect. (*Id.* at 927:4-928:18.)

Ms. Madsen testified that she had only a general memory of the execution of Amendment No. 2, and did not have any specific recollection of discussions with Mr. Sabbath. (*Id.* at 802:14-22.) She “reviewed and commented” on the language of Amendment No. 2, and in response to a question asking whether she had a view in 1996 about what copyrights were “required” for Santa Cruz to operate its UNIX and UnixWare business, responded only: “We would have acquired all the copyrights.” (*Id.* at 802:17-803:1.)

e. SCO's Argument Regarding “All of Seller's Claims” Fails.

SCO claims that it needs the copyrights because the APA transferred to SCO “all of [Novell's] claims arising after the Closing Date against any parties relating to any right, property or asset included in the Business.” (Trial. Ex. A1, Schedule 1.1(a).) Amendment No. 2 refers to

copyrights “*required for* SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies [emphasis added],” but SCO made no showing that such “rights” include Novell’s “legal claims.”

Furthermore, SCO cannot prevail on such a theory suggested after the trial because it presented no evidence at trial that Novell has any “claims” that SCO is entitled to pursue. The only evidence SCO presented on this point at trial was testimony that the enumerated assets Novell actually sold to Santa Cruz included “legal claims that it would have against parties that were connected with the business.” (March 2010 Trial Tr. at 248:20-249:23 (Duff Thompson).) However, SCO did not carry its burden of establishing that there were any such Novell “legal claims.”⁹

III. SCO IS NOT ENTITLED TO A NEW TRIAL

A. Legal Standard.

As this Court has held, motions for a new trial under Rule 59(a) are “generally not regarded with favor and granted only with great caution. The party seeking to set aside a jury verdict must show either trial error which constitutes prejudicial error or that the verdict was not based on substantial evidence.” *P&G v. Haugen*, 627 F. Supp. 2d 1287, 1296 (D. Ut. 2008) (Stewart, J.) (denying motions for judgment as matter of law and new trial) (quoting *Smith v. Cochran*, 182 Fed. Appx. 854, 864 (10th Cir. 2006)). Put another way, new trial motions are granted to avoid “miscarriage of justice.” *Ruffin v. Fuller*, 2000 U.S. Dist. LEXIS 14619, at *2 (S.D.N.Y. Oct. 5, 2000) (citing *United States v. Landau*, 155 F.3d 93, 104 (2d Cir. 1998)). Where a new trial motion asserts that the jury verdict is not supported by the evidence, the verdict must stand unless it is clearly, decidedly, or overwhelmingly against the weight of the

⁹ SCO’s references to claims that it pursued post-closing against Microsoft and its allegations of copyright infringement against Linux users are not pertinent. (Motion at 13 n.10.) These are claims created by SCO, not Novell, and thus are not “Seller’s claims.” They are self-serving positions taken by SCO (in the Microsoft example, litigation-drawn hearsay) and only “expressly refer[] to ownership of copyrights” because SCO claimed to own the copyrights. Neither has any bearing on the negotiated terms of the APA.

evidence. *M.D. Mark, Inc. v. Kerr-McGee Corp.*, 565 F.3d 753, 762 (10th Cir. 2009) (internal citation omitted).¹⁰

B. The Jury’s Verdict Is Not “Clearly, Decidedly, or Overwhelmingly” Against the Weight of the Evidence.

SCO does not assert that there were any prejudicial errors on the part of the Court. Instead, SCO stands solely on the argument that the jury verdict is not supported by the evidence. SCO argues that the “overwhelming weight of the evidence” is that the UNIX copyrights were intended to be transferred. This is false, as demonstrated by the same evidence set out above with respect to SCO’s Rule 50 Motion. Novell presented key witnesses with knowledge of the APA and involvement in the final negotiation and drafting of its terms, and put forth the only witnesses who testified credibly as to the interpretation of Amendment No. 2. SCO did not point to any financial stake of those witnesses in the outcome of the trial.

In addition, the jury was reasonable in its determination that Novell’s witnesses and evidence were more credible than SCO’s witnesses and evidence. SCO’s evidence included its “total of ten witnesses” who testified as supposed support for SCO’s position. (Motion at 19.) SCO mistakes quantity of testimony with quality of testimony, a distinction that was not lost on the jury. Indeed, the jury was instructed—without objection by SCO—that numerosity of witnesses is not determinative. (*See* Jury Instruction No. 12 [“To prove by a preponderance of the evidence means to prove something is more likely so than not so. It does not mean the greater number of witnesses or exhibits.”]) SCO presented witness after witness with little or no

¹⁰ SCO suggests that new trial grants are “virtually unassailable” on appeal (Motion at 14). In fact, the Tenth Circuit has cautioned that, while the standard of review if a new trial motion is *denied* is narrow, “a more searching inquiry is required” if a trial court *grants* a motion for a new trial “because of the concern that a judge’s nullification of the jury’s verdict may encroach on the jury’s important fact-finding function,” particularly where, as here, the motion is on the ground that the verdict is against the weight of the evidence. *Evans v. Fogarty*, 241 Fed. Appx. 542, 550 (10th Cir. 2007) (reversing district court’s grant of new trial because there was sufficient evidence to support jury verdict) (quoting *Hutchinson v. Stuckey*, 952 F.2d 1418, 1421 (D.C. Cir. 1992)); *accord Holmes v. City of Massilon*, 78 F.3d 1041, 1047 (6th Cir. 1996). SCO ignores this distinction in the cases it cites. Indeed, nine of the ten cases it cites for its argument as to the deference granted a district court under Rule 59 involve denials, rather than grants, of motions for a new trial. (Motion at 14-15.)

knowledge of the negotiation and drafting of the specific language of the amended APA. SCO put forth absolutely no competent witness to explain the language of Amendment No. 2. Moreover, at least three out of the five SCO witnesses who testified live at trial had a direct financial stake in SCO prevailing.

1. SCO's Witnesses Were Not Competent to Testify Regarding the Final Terms of the APA or Amendment No. 2.

SCO's "ten witnesses" were Robert Frankenberg, Duff Thompson, Ed Chatlos, Ty Mattingly, Burt Levine, Alok Mohan, Jim Wilt, Kim Madsen, Steve Sabbath, and Doug Michels. Despite SCO's insistence that "Amendment No. 2 . . . is the key to answering [the question of whether the amended asset purchase agreement transferred the copyrights from Novell to SCO]" (March 2010 Trial Tr. at 2632:6-7), none of these ten witnesses offered reliable testimony as to the intent, negotiation, or drafting of the relevant portion of Amendment No. 2.

Even with respect to the only subject on which all ten of the witnesses were able to testify—the original APA—their knowledge and credibility were suspect.

- Robert Frankenberg admitted that his belief that copyrights were not meant to be retained by Novell was "something in [his] mind" that was different than the words in the APA and that he "should have read more carefully or clearly or we might not have been here." (*Id.* at 2551:18-2552:2, 178:2-3.)
- Duff Thompson was not on the Novell Board of Directors, nor was he present at the Novell Board meeting where the APA was approved; he had decided to leave Novell before beginning work on this transaction; he was a member of the SCO Board that made the decision to file this lawsuit; and he admitted that he has a financial interest in this case. (*Id.* at 279:1-11, 280:5-11, 282:4-13, 285:14-22, 302:12-303:9.)
- Ed Chatlos was not at the Novell Board meeting in September 1995 when the APA was approved including the exclusion of copyrights, and does not know what was discussed; and his wife is an employee of SCO who could make money if SCO prevails in this lawsuit. (*Id.* at 374:8-375:11, 383:23-384:22.)

- Ty Mattingly acknowledged that he did not “write or craft” any provisions of the APA, did not participate in any “wordsmithing,” “did not make any contribution whatsoever to the terms or conditions” of the APA, that his “high-level strategy involvement” took place at least two to three weeks before the agreement was signed, and he did not remember who was present or what was said at the Board meeting at which the APA was approved. (*Id.* at 714:14-25, 715:1-5, 737:9-740:8.) Mr. Mattingly is also a SCO stockholder who owns over 9,000 SCO shares. (*Id.* at 701:12-20.)
- Burt Levine claimed that he would not have left intact the copyright exclusion in Schedule 1.1(b) of the APA, but then admitted when faced with his own handwriting that he had reviewed and commented extensively on drafts of Schedules 1.1(a) and 1.1(b), even crossing out the item directly above the copyright exclusion language, and did not add copyrights to the Included Assets or remove copyrights from the Excluded Assets. (*Id.* 531:22-537:23; Trial Ex. X3.)
- Alok Mohan’s involvement was “only at a high level”; he was not involved in the drafting of the APA or the “detail level of negotiations”; he did not participate in the meetings occurring between the respective parties drafting the document; and he agreed that when contract disputes arise, the contract is the best evidence of the parties’ rights and obligations under the deal. (March 2010 Trial Tr. 456:7-17, 473:2-13, 474:18-475:19.)
- Jim Wilt became less active as the negotiations progressed and had no recollection of anyone saying whether the copyrights would be included or excluded from the transaction. (*Id.* at 442:11-444:8.)
- Kim Madsen had no involvement in the drafting of the APA or Amendment No. 2, no specific memory of the intent or negotiation of Amendment No. 2, and

no specific recollections of discussions with Steve Sabbath about Amendment No. 2. (*Id.* at 802:17-22.)

- Steve Sabbath admitted executing a declaration that conflicted with much of his later testimony, including statements such as “Schedule 1.1(b) of the APA provided that much of the UNIX System V intellectual property would not be transferred to Santa Cruz” and that SCO’s claims were “incorrect . . . Novell retained certain rights under the UNIX System V licensing agreements as well as certain UNIX System V intellectual property.” (*Id.* at 927:4-928:18.) His explanations were, “I don’t have any skin in the game. I wasn’t that interested. Okay? I was being lazy,” and that the earlier declaration was “close enough for government work.” (*Id.* at 926:17-927:3, 928:19-929:2.)
- Doug Michels repeatedly emphasized his lack of knowledge about the APA and Amendment No. 2, stating “I have no memory specific to any specific agreement,” “I don’t even know what Amendment No. 2 is,” and “I didn’t read [the APA] then, and I haven’t read it recently. I’ve never read it through. I’m not a lawyer, and I have no comment about the Asset Purchase Agreement.” (*Id.* at 494:14, 511:15, 512:13-15.)

2. SCO’s Reliance on the “Forthright Negotiator Rule” Is Misplaced.

SCO’s reference to the “forthright negotiator rule” is a red herring. This doctrine resolves questions of contract interpretation against a party (“Party 1”) if, at the time the agreement was made, (a) Party 1 knows that Party 2 attaches a different meaning to the term, and Party 2 does not know of any different meaning attached by Party 1, or (b) Party 1 has reason to know the meaning attached by Party 2, and Party 2 has no reason to know of any different meaning attached by Party 1. *Flying J Inc. v. Comdata Network, Inc.*, 405 F.3d 821, 837 (10th Cir. 2005). The rule has no applicability here, as SCO has presented no evidence that Santa Cruz

attached a different meaning to the relevant portion of Amendment No. 2 at the time the agreement was made.¹¹

Even assuming the applicability of the “forthright negotiator rule,” Ms. Amadia’s testimony demonstrates that the elements of the doctrine fail with respect to both parties. At the time of the agreement, Novell (Party 1) had no reason to know that Santa Cruz (Party 2) believed that there was a disagreement as to the meaning of the term; Ms. Amadia believed that Mr. Sabbath was satisfied the amendment gave the assurance that Santa Cruz had the rights it needed to go forward. Conversely, Santa Cruz (Party 2) was made aware immediately by Novell (Party 1) that Novell would not execute an amendment that transferred copyright ownership, and Ms. Amadia explicitly rejected a draft amendment sent by Mr. Sabbath that seemed to be suggesting such a transfer. (Trial Ex. T34 at 1.)

SCO’s claim that Ms. Amadia knew Mr. Sabbath had a different view of the meaning of Amendment No. 2, and was thus allegedly not being a “forthright negotiator,” is a gross mischaracterization of her testimony. SCO accurately cites Ms. Amadia as agreeing that Mr. Sabbath expressed that “the purpose of the Amendment was to clarify that the UNIX and UnixWare copyrights had transferred,” but SCO inexplicably removes in its Motion the first part of this question, stating that this view was only “initially in the beginning of the discussions.” (Motion at 19, March 2010 Trial Tr. at 2169:20-2170:1.) Indeed, Ms. Amadia testified that “after he executed Amendment Number 2,” Mr. Sabbath “thought he got what he needed, which would clear license rights to go forward, to use the code, to develop it to, you know, own modifications to it, to do all of the things they intended to do to acquire the assets.” (March 2010 Trial Tr. at 2169:6-13.) Ms. Amadia further testified that Mr. Sabbath proposed a draft, and she subsequently had conversations with him about it, stating: “[W]e were not going to alter the

¹¹ In any event, the parties expressly agreed in the APA that they “waive[d] the application of any law, regulation, holding, or rule of construction providing that ambiguities in an agreement or other document will be construed against the party drafting such agreement or document.” (Trial Ex. A1 at 47-48 (Section 9.9).) Ambiguities thus cannot be construed against Novell on account of Ms. Amadia’s role as drafter of the final language of Amendment No. 2.

original A.P.A. in terms of the transfer of copyrights . . . That is when I said, well, we can modify this language to affirm the rights that you have acquired in terms of license grants and rights to use the technology.” (*Id.* at 2120:12-2121:4.) SCO’s attempt to misconstrue Ms. Amadia’s testimony speaks volumes about the merits of its arguments.

3. The Technology License Agreement Does Not Change the Intent of the APA or Amendment No. 2.

SCO’s reference to the TLA is another diversion that rightfully did not distract the jury. Mr. Sabbath testified that the TLA would grant Novell the right to license post-APA SCO-developed code in which SCO owned copyrights. (*Id.* at 933:3-12.) Joe LaSala, General Counsel of Novell from 2001 to 2008, similarly testified that the TLA gave Novell a license-back to all assets *conveyed* to SCO, as well as additional code to be developed by SCO. (*Id.* at 1964:8-22; 1984:6-1985:21.) In short, all that was licensed back to Novell under the TLA were the assets transferred under the APA. And because intellectual property other than copyrights and patents was transferred, and Novell had an interest in a license to post-APA SCO-developed code, the license-back provision and the TLA are not inconsistent with Novell’s retention of the UNIX copyrights.

4. SCO’s “Course of Performance” Evidence Does Not Trump the Terms of the Amended APA.

It was also reasonable for the jury to give lessened weight to SCO’s so-called “course of performance” testimony. SCO presented course of conduct evidence such as letters sent to customers after the APA, changes in copyright notices, and physical possession of the copyright registrations, but testimony from SCO’s own witnesses revealed that (1) the letters at issue were not meant to give customers all details, but merely convey that customers needed to deal with Santa Cruz going forward, (2) neither copyright notices nor copyright registrations demonstrate who owns the copyrights if they conflict with the underlying agreements, and (3) when the APA was finalized, UNIX staff and property simply remained in the same physical location in New Jersey. (*Id.* at 1706:14-19, 1778:21-1779:20, 641:19-642:3.)

Moreover, copyright notices were changed only on the then-current releases of UnixWare that Santa Cruz was taking over, and not older UNIX or UnixWare releases, the copyrights to which SCO claims transferred under the APA. Andrew Nagle, SCO's Senior Director of Product Development, confirmed that copyright notices were changed only on the current software version that Santa Cruz was going to release after the APA, and SCO did not go back to change copyright notices on older UnixWare or System V Release 4.2MP because it was SCO's understanding that ownership of copyrights in older code was established by the legal agreements, not the notices. (*Id.* at 1775:15-1776:16.)

5. SCO Presented No Evidence Regarding Which, If Any, Copyrights Were Required for It to Exercise Its Rights.

Finally, as set out in greater detail above, SCO presented no testimony as to what copyrights were allegedly required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies, or why such copyrights would be required. It presented a series of witnesses to make broad allegations that all copyrights would be required to run a software business. However, its own witnesses undercut that generalization—Mr. McBride admitted that copyright ownership was not required for SCO to run its software business and Mr. Tibbitts admitted that SCO contemplated selling its software business without the related copyrights—and the undisputed testimony on Amendment No. 2 was that Amendment No. 2 was not intended to transfer copyright ownership.

IV. CONCLUSION

After fighting for years to have its case heard by a jury, SCO now asks this Court to disregard the jury's verdict because SCO does not agree with the verdict. SCO has not shown that the evidence points but one way and is susceptible to no reasonable inferences supporting Novell. Nor has SCO shown that the jury's verdict is clearly, decidedly, or overwhelmingly against the weight of the evidence, a miscarriage of justice, or not based on substantial evidence. *See M.D. Mark, Inc.*, 565 F.3d at 762; *Snyder*, 354 F.3d at 1184; *P&G*, 627 F. Supp. 2d at 1296; *Ruffin*, 2000 U.S. Dist. LEXIS 14619, at *2. SCO's disagreement with the jury does not justify nullifying its verdict. Indeed, the weight of the evidence overwhelmingly supports the jury's

