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**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
MOTION TO STAY TAXATION OF
COSTS**

Judge Ted Stewart

AND RELATED COUNTERCLAIMS.

Federal Rule of Civil Procedure 54 entitles Novell to its costs. SCO moves to stay taxation of costs. SCO has filed this motion once before—essentially verbatim—in a request to stay costs pending its earlier appeal in 2008. (See SCO’s Motion to Stay Taxation of Costs, Dkt. No. 575.) This Court denied SCO’s motion, then stating, “[T]he court does not believe that a party’s speculation as to the possibility of the underlying judgment being reversed on appeal is a valid reason for delaying a determination of costs.” (Mar. 13, 2009 Order Denying SCO’s Motion to Stay Taxation of Costs, Dkt. No. 591 [“Mar. 13 2009 Order Denying Stay”].) The only reason SCO provides in favor of such a stay is the same reason it provided the first time it filed this motion: the possibility that things will turn out differently for SCO on appeal. As before, this Court should deny SCO’s motion.

SCO’s only cited support for its motion is *How v. City of Baxter Springs*, Nos. 04-2256 & 04-2256 JWL, 2006 U.S. Dist. LEXIS 23951 (D. Kan. Apr. 26, 2006), the same inapposite case it cited in 2008, in which the court, *on an uncontested motion*, stayed costs pending appeal. A subsequent case considering *How* concluded that *How* should be limited to unopposed stay requests. See *Maytag Corp. v. Electrolux Home Prods., Inc.*, No. C 04-4067-MWB, 2006 U.S. Dist. LEXIS 89383, at *5 (N.D. Iowa Dec. 11, 2006). Examining the caselaw on staying costs, the *Maytag* court concluded that “the consensus seems to be that the court must have some valid reason for not awarding costs at the customary stage of the proceedings.” *Id.* at *5; *see also* Fed. R. Civ. P. 54(d) (creating presumption in favor of costs award). In *How*, the “valid reason” was the consensus of the parties, a consensus not present here. In *Maytag*, the offered “valid reason” was the same as SCO offers—the possibility of reversal on appeal. *Id.* at *6. The *Maytag* court explicitly rejected that argument:

The possibility that the underlying judgment might be reversed, with the result that the award of costs must also be reversed, is simply too speculative to outweigh the benefit of the trial court conducting a review of the bill of costs while the case is still fresh. The marginal difficulties of vacating an award of costs, upon which *Maytag* also relies, simply do not justify a stay based on the losing party’s speculation that it might do better on appeal. Finally, the court notes that far more judicial resources have been expended to resolve the parties’ dispute over whether or not to stay the taxation of costs than could possibly have been saved by

delaying the taxation of costs to a later date, so that Maytag's judicial economy argument also is not persuasive. Therefore, the court will deny Maytag's motion to stay the taxation of costs.

Maytag, 2006 U.S. Dist. LEXIS 89383 at *7-8 (internal citation omitted). Other courts have consistently agreed with the *Maytag* court and declined to stay costs pending resolution of an appeal—including, as noted above, this Court in this case. (See Mar. 13 2009 Order Denying Stay; *Sensormatic Elecs. Corp. v. Tag Co. US*, No. 06-81105-CIV-HURLEY/HOPKINS, 2009 U.S. Dist. LEXIS 92208, at *2-3 (S.D. Fla. Oct. 2, 2009) [noting that courts often award costs during pendency of appeal, denying motion to stay adoption of report and recommendation as to bill of costs].)

As before, there are at least three compelling reasons to deny this motion. First, as the *Maytag* court noted and this Court agreed, it makes sense for this Court to review and determine costs while the facts of the case are fresh. (Mar. 13 2009 Order Denying Stay at 2; *Maytag*, 2006 U.S. Dist. LEXIS 89383 at *7; see also *Le Moine v. Combined Comms. Corp.*, No. 95 C 5881, 1996 U.S. Dist. LEXIS 10838 (N.D. Ill. 1996) [expressing preference for review of costs while case is fresh].)

Second, it avoids the possibility of piecemeal appeals, as “[w]ith prompt taxation, any appeal from the award of costs [can] feasibly be consolidated with the pending appeal on the merits, thereby enhancing judicial efficiency.” *Singleton v. Dep’t of Corr. Educ.*, No. 1:03CV00004, 2003 U.S. Dist. LEXIS 17834, at *4-5 (W.D. Vir. Oct. 3, 2003); see also Mar. 13 Order Denying Stay at 2; *Holley v. Giles County*, No. 1:03-0071, 2005 U.S. Dist. LEXIS 44372, at *6 (M.D. Ten. Sept. 12, 2005) (denying motion to delay assessment of costs pending appeal); *Epcon Gas Sys. v. Bauer Compressors, Inc.*, No. 98-CV-75392, 2001 U.S. Dist. LEXIS 12665, at *3-4 (E.D. Mich. Mar. 26, 2001) (recommendation that motion for stay of bill of costs pending appeal be denied.)

Third, establishing costs is necessary for Novell to supplement its claim in the Bankruptcy Court.

For the reasons outlined above, Novell requests that the Court deny SCO's Motion to Stay Taxation of Costs.

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Respectfully submitted,

By: /s/ Sterling A. Brennan

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