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Attorneys for Plaintiff, The SCO Group, Inc.

**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>SCO'S OBJECTIONS TO NOVELL'S BILL OF COSTS</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 its Objections to Novell’s Bill of Costs.

I. CONTROLLING LAW

As Novell acknowledges, the “[c]osts that may be taxed are specified in 28 U.S.C. § 1920.” (Docket No. 880 at 3.) Indeed, the case law makes clear that expenses not specifically authorized by that statute are not recoverable as costs. See, e.g., Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 441-42 (1987); Bee v. Greaves, 910 F.2d 686, 690 (10th Cir. 1990); Treaster v. Healthsouth Corp., 505 F. Supp. 2d 898, 903 (D. Kansas 2007) (“The court has no discretion to award items as costs that are not set forth in § 1920.”); Perry v. Taser Int’l Corp., Civil No. 07-cv-00901-REB-MJW, 2008 WL 4829850, at *1 (D. Colo. Nov. 4, 2008).

In addition, Novell has the burden to establish its entitlement to the costs it seeks. “[T]he burden is on the prevailing parties to establish the amount of compensable costs and expenses to which they are entitled.” English v. Colo. Dep’t of Corrections, 248 F.3d 1002, 1013 (10th Cir. 2001); Griffith v. Mt. Carmel Med. Ctr., 157 F.R.D. 499, 502 (D. Kan. 1994).

II. NOVELL’S IMPROPER COSTS

A. Professional Services Costs.

Novell seeks \$127,494.25 in unauthorized services costs under 28 U.S.C. § 1920(4). While the Court “has the discretion to award those costs specifically enumerated in section 1920,” the Court “may not tax as costs any items not included in the statute.” Davis v. Sailormen, Inc., No. 6:05-cv-1497-Orl-22JGG, 2007 WL 1752465, at *1 (M.D. Fla. June 15, 2007) (emphasis added). “The court has no discretion to award items as costs that are not set forth in § 1920.” Treaster, 505 F. Supp. 2d at 903 (citing Bee v. Greaves, 910 F.2d 686, 690 (10th Cir. 1990)).

1. Novell seeks \$72,832.50 for “trial presenter fees.” (Docket No. 880 at 8.) The invoice behind these costs reveals that they were for technology “consulting services” by Impact Trial Consulting, billing at \$195 an hour for 375 hours. (Docket No. 880-6 at 34-36.) Novell thus seeks to recover the labor costs of its trial consultant. Putting aside for a moment the facts that \$72,283.50 is an unreasonable amount and that Novell did not seek approval from the Court before incurring such exorbitant costs, Section 1920(4) “does not provide for the award of costs such as fees for professional services rendered.” Pehr v. Rubbermaid, Inc., 196 F.R.D. 404, 408 (D. Kansas). These costs thus must be disallowed simply because they are not included in the statute.

2. Novell also seeks \$21,936 for a “slide presentation for use in mock trial.” (Docket No. 880 at 8.) But the statute only authorizes costs related to actual trials, and Novell cites no authority for the taxation of any costs related to a “mock” trial. In fact, Section 1920(4) specifically limits costs to those “necessarily obtained for use in the case.” Costs associated with a mock trial are neither necessary to nor used in the case. In addition, the invoice behind these costs reveals that they were for “Professional Services” of employees billing between \$80 and \$330 an hour. (Docket No. 880-6 at 31.) The statute simply does not authorize taxation of labor costs, and Novell again fails to cite any authority supporting this request.

3. Novell also seeks \$8,583.25 for “graphics consultation.” (Docket No. 880 at 8.) The invoice behind these costs reveals that they were for consulting “services” by employees of Impact Trial Consulting billing for approximately 44 hours at \$195 an hour. (Docket No. 880-6 at 47.) As explained, the statute does not authorize taxation of such costs.¹

¹ Even if they were somehow found in the statute, the foregoing three categories of costs could not properly be taxed under the authority cited in these Objections because (1) Novell has failed to explain how they were reasonably necessary to the case, (2) the amounts of the costs are unreasonable, and (3) Novell did not seek the Court’s approval before incurring such exorbitant costs.

4. Novell also seeks \$15,657.50 and \$8,485 for “slide presentation graphics for trial.” (Docket No. 880 at 8.) The invoices behind these costs reveal that they were for the “Professional Services” of graphic designers billing at an hourly rate of \$160 to \$180 an hour. (Docket No. 880-6 at 42, 48.) As stated, the statute does not authorize taxation of costs for professional services.

In addition, even if these “slide presentation” costs could be deemed costs of exemplification for trial, they should be denied because Novell has not shown that they were “reasonably necessary” for trial. In Manildra Milling Corp. v. Ogilvie Mills, Inc., 878 F. Supp. 1417 (D. Kansas 1995), the court disallowed \$12,593 in exemplification costs for enlargements and transparencies, because they were “merely illustrative of expert testimony, other evidence, or argumentative matter” – just like the opening and closing slides that Novell used in this trial. Similarly, in Treaster the court concluded that costs for “blowing up and mounting trial exhibits also were not reasonably necessary in a trial courtroom equipped with an Elmo System,” as was also the case in the instant trial. 505 F. Supp. 2d at 905.

Finally, where the costs Novell seeks for its slide presentations at trial are well in excess of \$20,000, the Court may disallow the costs on the basis alone that Novell failed to procure the Court’s prior approval. “Although not absolutely necessary, courts generally require litigants to obtain authorization before incurring great expense for exemplification.” Manildra, 878 F. Supp. at 1428 (denying \$12,593 for exemplification costs because prevailing party “did not seek court approval prior to incurring costs”) (citing cases).

B. Copying Costs.

Novell seeks at least \$62,383.28 in copying costs without meeting its burden of proving that these costs were reasonable and reasonably necessary to the case. These costs, copied

directly from the declaration Novell submitted with its Bill of Costs, are reflected in Exhibit A attached hereto.

In Manildra, the prevailing party sought over \$90,000 in copying costs. Like Novell here, that prevailing party purported to support its request with an affidavit asserting that the costs were reasonably necessary and with spreadsheets tabulating the costs. The district court rejected the request in its entirety, explaining:

Manildra does nothing more than reiterate the bald assertion that it incurred in excess of \$90,000.00 in “necessary” copying expenses. The mere recitation with talismanic regularity of the phrase “necessarily obtained for use in the case” is not sufficient to overcome [the opposing party’s] objections. Some further showing is necessary. Manildra’s showing consists only of several tables, separated by law firm, which list the months in which certain costs were incurred for “copies.” These tables shed no light on the critical inquiry: whether the copies were necessarily obtained for use in the case. Manildra fails to come forward with any showing as to the nature of the documents copied or how they were necessary for use in the case.

878 F. Supp. 1417, 1428. See also Zapata Gulf Marine v. P.R. Maritime Shipping Auth., 133 F.R.D. 481, 484 (E.D. La. 1990) (disallowing \$96,345 for copies where prevailing party provided court insufficient information about what was copied or how the copy was used); Walker v. Borden, Inc., 115 F.R.D. 471, 473 (S.D. Miss. 1986) (disallowing bill for copies where prevailing party submitted inadequate documentation).

Here, too, the declaration Novell has submitted is insufficient to overcome SCO’s objections, because the declarant, Mr. Brennan, merely makes the bald assertion that the copies were “necessarily obtained for use in the case,” without making any showing of “the nature of the documents copied or how they were necessary for use in the case.” (See Docket No. 880.) As in Manildra, the tables Novell has submitted also “shed no light on the critical inquiry:

whether the copies were necessarily obtained for use in the case.” (See Docket No. 880-5 at 7-263.)

In addition, Novell’s copying costs are patently unreasonable. See Pehr, 196 F.R.D. at 407 (“Even if the court concludes that a claimed cost was necessarily incurred in the litigation, the amount of the award requested must be reasonable.”). Novell seeks, for example, \$18,809.01 for “photocopying documents as necessary from September 2009 through June 2010” just at the office of its local counsel Workman Nydegger. (Docket No. 880-5 at 3; Docket No. 880 at 9.) Novell then cites to “Exhibit 2,” a table that runs 251 pages long and contains 58 separate copying jobs on each page. (Docket No. 880-5.) That is, Novell seeks costs for 14,558 separate copying jobs (251 x 58) that its local counsel purportedly performed just on this case between September 2009 and 2010. Even assuming that this period includes the entirety of each month, Exhibit 2 means that Novell’s local counsel alone performed an average of 1,456 separate copying jobs per month (14,558/10) just on this case. Such numbers are not only unreasonable; they beg credulity.

C. Other Unauthorized Costs.

Novell’s Bill of Costs also seeks numerous miscellaneous expenses that are not authorized by the statute. Novell seeks, for example:

- \$1,160 for “Customized Folders.” (Docket No. 880-6 at 6.)
- \$897.84 for “Prints w/Assembly.” (Id. at 18.)
- \$318.50 for “Redwell Folders” and \$121.50 for “Manilla Folder.” (Id. at 18.)
- \$298.35 for “Redwelds with Custom Labels” and \$ 37.35 for “Manilla Folders with Custom Labels.” (Id. at 39.)
- \$59.96 for custom “binders” and \$21.24 for “custom printed tabs.” (Id. at 38.)

Where Novell – the party with the burden of proof – has failed to disaggregate such costs, the Court should deny Novell’s Bill of Costs in its entirety. “Prevailing parties necessarily assume the risks inherent in a failure to meet that burden.” English, 248 F.3d at 1013; see also Griffith, 157 F.R.D. at 502. At minimum, the Court should order Novell to disaggregate such costs now, and the Court should deny all such costs whether or not it orders such disaggregation.

III. CONCLUSION

Wherefore, for the reasons set forth above, SCO objects to Novell’s Bill of Costs insofar as it seeks \$127,494.25 for unauthorized costs of professional services, \$62,383.28 for unreasonable and unsupported copying costs, and thousands of additional dollars in unauthorized miscellaneous expenses.

SCO respectfully asks the Court to strike all these costs from Novell’s Bill of Costs, or deny the Bill in its entirety.

DATED this 26th day of August, 2010.

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CERTIFICATE OF SERVICE

I, Edward Normand, hereby certify that on this 26th day of August, 2010, a true and correct copy of the foregoing **SCO'S OBJECTIONS TO NOVELL'S BILL OF COSTS** was filed with the court and served via electronic mail to the following recipients:

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