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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP, INC., a Delaware corporation, Plaintiff and Counterclaim-Defendant, v. NOVELL, INC., a Delaware corporation, Defendant and Counterclaim-Plaintiff.	**OPENING BRIEF IN SUPPORT OF NOVELL'S MOTION *IN LIMINE* NO. 1 TO PRECLUDE SCO FROM CHALLENGING QUESTIONS ALREADY DECIDED AS A MATTER OF LAW** Case No. 2:04CV00139 Judge Dale A. Kimball

RELIEF REQUESTED

Novell requests that this Court bar SCO from introducing evidence or argument that run contrary to the Court's Order.

ARGUMENT

The Court's August 10, 2007 Memorandum Decision and Order ("Order") considerably limited the scope and nature of the trial. SCO should not be permitted to introduce evidence or argument that questions or challenges matters that the Court has already decided as a matter of law, as such evidence or argument is irrelevant and inconsistent with the law of the case.

For purposes of this motion, Novell regards the following as the Court's principal holdings:

Copyright Ownership

- "[T]he UNIX and UnixWare copyrights did not transfer under the APA or the agreements executed in connection with the APA's Closing." (Order at 57.)
- "Amendment No. 2 did not transfer the UNIX and UnixWare copyrights to SCO." (*Id.* at 61-62.)
- "Novell is the owner of the UNIX and UnixWare copyrights." (*Id.* at 62.)
- "SCO has not provided evidence that it required ownership of the copyrights to exercise its rights under the APA." (*Id.* at 62.)

Fiduciary Duty

- "The APA expressly created an agency relationship between the parties with respect to SVRX Royalties." (*Id.* at 89.)
- "[T]here is no support in the language and structure of the APA for SCO's interpretation of SVRX License to mean product supplements rather than the entire set of agreements relating to the licensing of SVRX code." (*Id.* at 86.)
- "[T]here is no limitation in the APA to 'then-existing' SVRX Licenses." (*Id.* at 93.)
- "SCO never attempted to validly convert Sun or Microsoft. Under Schedule 1.2(b), then, Sun and Microsoft would not be considered validly converted." (*Id.* at 95.)

- "[E]ven incidental licenses of SVRX are considered an SVRX License." (*Id.* at 95.)
- "SCO was required to account for and pass through to Novell the appropriate SVRX Royalties according to the SVRX portions of the 2003 Sun and Microsoft Agreements." (*Id.* at 96.)
- "SCO's conduct also amounts to a breach of fiduciary duty, conversion, unjust enrichment, and breach of express contract . . . ." (*Id.* at 97.)
- "[A]llocation and accounting [of SVRX Royalties] is a part of SCO's duties under the APA . . . ." (*Id.* at 96.)
- "SCO breached its fiduciary duties to Novell by failing to account for and remit the appropriate SVRX Royalty payments to Novell for the SVRX portions of the 2003 Sun and Microsoft Agreements." (*Id.* at 96.)
- SCO has "a continuing duty to fulfill its contractual obligations." (*Id.* at 98.)

The appropriate path for SCO to challenge these holdings is an appeal after trial. Until then, the law of the case doctrine precludes SCO from contesting issues that have been decided as a matter of law. *Mason v. Texaco, Inc.*, 948 F.2d 1546, 1553 (10th Cir. 1991) ("[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983))). In addition, any evidence contrary to the above is by definition irrelevant, as no such issue is presented for decision to the fact finder.

SCO therefore should not be permitted to undermine this Court's Order by introducing contrary evidence or argument.[1]

[1] This relief is especially warranted given the scope of SCO's amended witness disclosures. Despite the considerably narrowed scope of trial, SCO still "may" call witnesses — such as Ed Chatlos, Rob Frankenberg, Kim Madsen, and Duff Thompson — who have had little or no involvement with SCO or Novell for years and whose only imaginable role in trial would be to reopen issues already decided against SCO.

CONCLUSION

For the reasons stated above, Novell requests that this Court bar SCO from introducing evidence or argument that are contrary to the Court's Order.

DATED: August 24, 2007

ANDERSON & KARRENBERG

By: *\/s\/ Heather M Sneddon*

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-and-

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of August, 2007, I caused a true and correct copy of the **OPENING BRIEF IN SUPPORT OF NOVELL'S MOTION *IN LIMINE* NO. 1 TO PRECLUDE SCO FROM CHALLENGING QUESTIONS ALREADY DECIDED AS A MATTER OF LAW** to be served to the following:

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