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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

THE SCO GROUP, INC., a Delaware corporation, Plaintiff/Counterclaim-Defendant, vs. NOVELL, INC., a Delaware corporation, Defendant/Counterclaim-Plaintiff.	**SCO'S STATEMENT REGARDING ENTRY OF FINAL JUDGMENT** Civil No. 2:04 CV-00139 Judge Dale A. Kimball Magistrate Brooke C. Wells

STATEMENT

Nearly four months after the Court ordered Novell to submit a Proposed Final Judgment, Novell finally agrees that entry of Final Judgment is proper, but now takes issue with portions of the Proposed Final Judgment that SCO twice submitted. In order again to achieve final resolution of this case, SCO will not object to the changes that Novell has included in its Proposed Final Judgment, except the one that is substantive, though now academic,[1] in nature: the revision related to the Sun Agreement in Paragraph 4. Since only that very limited issue remains and the parties otherwise agree on both the proprietary of the entry of Final Judgment and the Proposed Final Judgment itself, SCO respectfully renews its request that the Court enter Final Judgment on an expedited basis.[2]

Novell's Fourth Counterclaim asks whether SCO was authorized to enter into the Sun Agreement. In its Response to SCO's Notice of Voluntary Dismissal, Novell seeks to lock the Court into a "binary" choice: the Agreement must be either authorized or unauthorized as a whole under the Trial Order. But there is a third option, the one the Court for good reason

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[1] In light of Novell's filings in the Bankruptcy Court last week, seeking immediate payment of proceeds from the Sun Agreement (Ex. 1), Novell has indisputably ratified the Agreement, and any issue regarding the authority to execute it is now moot. In any event, to foreclose any further disputes and delay, SCO here responds to Novell's position as to Paragraph 4 of the Proposed Final Judgment.

[2] Novell suggests that SCO created the delay by not dismissing its unresolved claims with prejudice earlier and argues that SCO has now supposedly conceded that it has no such claims against Novell (Docket No. 563 at 1), implying that SCO has conceded or agreed that those claims have no merit. SCO has not remotely conceded that those claims have no merit. On the contrary, SCO sought to preserve the right to litigate them after an appeal because they have merit – just as Novell has reserved claims it voluntarily dismissed earlier in this case. SCO then decided to dismiss the claims with prejudice in the face of Novell's objections, "in order to expedite resolution of the case and foreclose further disputes about finality." (Docket No. 562 at 2.) In other words, SCO decided to dismiss the claims fully with prejudice only to get Novell to do what the Court had ordered *Novell,* not SCO, to do in the July 16, 2008 Order – submit a Proposed Final Judgment.

actually took in the Trial Order: The Sun Agreement was unauthorized in part. As the Court explained:

> Section 4 of the Sun Agreement is a license to UnixWare and prior SVRX products. Although this section provides a license to prior SVRX products to which Sun did not previously have a right to under its 1994 Agreement with Novell, **the court concludes that this section's inclusion of SVRX as prior products is only incidental to a license to the most recent version of SCO's UnixWare**. Accordingly, Novell is not entitled to revenue attributable to this section of the Sun Agreement.
>
> Section 8.1 of the Sun Agreement, however, lifts the confidentiality provisions with respect to 30 versions of SVRX technology granted to Sun under its 1994 Buy-out Agreement with Novell.
>
> Under Section 4.16 of the amended APA, SCO can only amend an SVRX license if it is done incidentally to its licensing of UnixWare. Also, Section B of Amendment No. 2 to the APA provides that before entering into any potential transaction with an SVRX licensee which "concerns" a buy-out of any such licensee's royalty obligations, SCO must obtain Novell's consent. This provision requires either party who even "become[s] aware of any such potential transaction" to immediately notify the other in writing. The provision further requires that any negotiations with the licensee be attended by both parties, and that both parties consent to any such transaction. There are no exceptions to this provision.
>
> The 2003 Sun Agreement specifically states that it "amends and restates" Sun's 1994 SVRX buy-out agreement with Novell. SCO has no authority to enter such an agreement ***unless it is incidentally involved in the licensing of UnixWare***.
> The court **c*oncludes*** **that** ***the release of confidentiality requirements in Section 8.1 of the 2003 Sun Agreement is not merely incidental*** to a UnixWare license. The provision had significant independent value to Sun as it allowed Sun to opensource its Solaris UNIX-based product. While several of the provisions in the Agreement focus on UnixWare and specific device drivers, the amendment with respect to confidentiality relates to the same technology licensed in the 1994 Buy-out

> Agreement and had significant independent value to Sun apart from a license to the newest versions of UnixWare.

Instead of the all-or-nothing reading Novell advocates, the Court thus actually made a series of nuanced findings and conclusions about specific provisions of the Sun Agreement. And the Court's reasoning is clear:

1. "Under Section 4.16 of the amended APA, SCO can only amend an SVRX license if it is done incidentally to its licensing of UnixWare."

2. The SVRX License in Section 4 of the Sun Agreement was "incidentally involved in the licensing of to UnixWare." Accordingly, that SVRX License was fully authorized.

3. Conversely, with respect to the requirements of Section B of Amendment No. 2, SCO was precluded from entering into the Sun Agreement "*unless it is incidentally involved in the licensing of UnixWare."* The plain language the Court used thus makes clear that the Sun Agreement does not run afoul of Section B insofar as it licenses SVRX incidentally to the licensing of UnixWare.

4. "The court concludes that the release of confidentiality requirements in Section 8.1 of the 2003 Sun Agreement is not merely incidental to a UnixWare license." Thus Section 8.1 is the only SVRX provision in the Sun Agreement that the Court found did not fit into the "incidental" exception.

5. Accordingly, only Section 8.1 – the only provision of the Sun Agreement that ***actually concerns*** the 1994 buy-out agreement by relaxing its confidentiality restrictions – was found to be unauthorized under Section B of Amendment No. 2.

Contrary to Novell's assertions, there is nothing wrong with SCO's understanding of the Court's Order. As to "agreement splitting," while the Court previously found that the Sun and Microsoft Agreements were SVRX Licenses under Item VI of the APA, the Court has also repeatedly acknowledged that the Agreements consist of SVRX and non-SVRX "components." (See, e.g., Docket No. 453 at 15-17.) Indeed, the very purpose of trial was to determine the relative value of such components. (Id.) The relevant question at trial was not whether the Sun Agreement as a whole fits the APA's definition of SVRX Licenses – that was resolved by the

Court on summary judgment – but whether the SVRX "components" were unauthorized under other provisions. The Court only found that the release of confidentiality restrictions in Section 8.1 was unauthorized because it "is not merely incidental to a UnixWare license."

Similarly, the Court's conclusions do not amount to "an advisory opinion." They do not address the hypothetical Novell poses – "if the 2003 Sun Agreement had not excised the 1994 Sun buy-out's confidentiality requirements, would SCO have been authorized to enter into it?" – but the question posed by the Fourth Counterclaim: whether SCO had the authority to enter in the 2003 Sun Agreement. Novell actually does not object to the question the Court addresses, but to the Court's answer, as SCO understands it: SCO *was* authorized to enter into the 2003 Sun Agreement, except the release of confidentiality restrictions in Section 8.1.

It is Novell's reading of the Court's Trial Order that suffers from incurable defects. Novell has never disputed and this Court has affirmed that SCO owns and has unfettered rights to license its valuable UnixWare and OpenServer software. Indeed, in the Trial Order, the Court concluded that the UnixWare and OpenServer licenses in the Sun Agreement accounted for the bulk of the value of the Agreement, and that those payments were SCO's to keep. (Order at 41-42.) Novell's proposed reading of the Order would have the Court declare that even the UnixWare and OpenServer licenses in the Sun Agreement were unauthorized merely because they happen to be granted in the same document that also contained a provision "concerning" the 1994 buy-out agreement.

For the foregoing reasons, SCO respectfully asks the Court to enter SCO's Proposed Final Judgment, as attached hereto.

DATED this 6th day of November, 2008.

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CERTIFICATE OF SERVICE

Plaintiff/Counterclaim-Defendant, The SCO Group, Inc., hereby certifies that on this 6th day of November, 2008, a true and correct copy of the foregoing SCO's Statement Regarding the Entry of Final Judgment was electronically filed with the Clerk of Court and delivered by CM/ECF to:

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