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*Attorneys for Plaintiff, The SCO Group, Inc.*

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

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THE SCO GROUP, INC.,  
a Delaware corporation,

*Plaintiff,*

vs.

NOVELL, INC.,  
a Delaware corporation,

*Defendant.*

**PLAINTIFF'S MOTION FOR  
LEAVE TO FILE SECOND  
AMENDED COMPLAINT**

Civil No.: 2:04CV00139

Judge: Dale A. Kimball

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Plaintiff, The SCO Group, Inc., respectfully moves for leave to file a Second Amended Complaint (attached hereto as Exhibit A) pursuant to Federal Rule of Civil Procedure 15(a).

Under Rule 15, which governs the amendment of pleadings, “leave shall be freely given when justice so requires.” “The liberal granting of motions for leave to amend reflects the basic policy that pleadings should enable a claim to be heard on its merits.” Calderon v. Kansas Dep’t of Soc. and Rehab. Servs., 181 F.3d 1180, 1185-86 (10th Cir. 1999) (citing Foman v. Davis, 371 U.S. 178, 182-83 (1962)). The liberal standard governing amendments is intended to “safeguard a plaintiff’s opportunity to test” its “claims on the merits.” Bauchman v. W. High Sch., 132 F.3d 542, 559 (10th Cir. 1997) (citing Foman, 371 U.S. at 182). The Court should grant leave to amend unless the non-moving party shows that the proposed amendment is unduly and inexplicably delayed, prompted by bad faith, would unduly prejudice the opposing party, or would be futile.” Foman, 371 U.S. at 182; accord Las Vegas Ice and Cold Storage Co. v. Far W. Bank, 893 F.2d 1182, 1185 (10th Cir. 1990).

Where, as here, the motion to amend is filed even before any discovery has been produced, there is no undue delay, bad faith, or undue prejudice to the other side. See, e.g., FDIC v. Grant, 8 F. Supp. 2d 1275, 1288 (N.D. Okla. 1998) (granting motion to file second amended complaint “at a time when no discovery had taken place”); Mask v. Johnson, No. 96 Civ. 6167 (DC), 1997 WL 662337, at \*2 (S.D.N.Y. Oct. 22, 1997) (attached hereto as Exhibit B) (granting motion where “no discovery has yet been commenced in the case”); Taylor v. Florida State Fair Auth., 875 F. Supp. 812, 815 (M.D. Fla. 1995) (granting motion to amend where “[a]lthough the parties have completed the case management report, discovery has not commenced” and trial was not scheduled for over a year). See generally Atiya v. Salt Lake County, 988 F.2d 1013, 1018 (10th

Cir. 1993) (affirming district court's decision granting leave to amend where the amendment "did not occur on the eve of trial and did not delay a determination of the dispute").

In addition, during the course of their negotiation of the Attorneys' Planning Report that the parties submitted to the Court and which provided the basis for the Magistrate Judge's Case Management Order (Dec. 6, 2005) (attached hereto as Exhibit C), counsel for SCO informed counsel for Novell that SCO intended to file a second amended complaint (and counsel for Novell did not object). Indeed, the parties agreed in their Attorneys' Planning Meeting Report (Dec. 1, 2005) (attached hereto as Exhibit D) that "the cutoff date for amending pleadings is March 7, 2006." The Case Management Order provides that each party shall have until March 7, 2006, to file a motion to amend pleadings. Trial is scheduled for June 2007 -- almost eighteen (18) months from now.

SCO seeks leave to file a Second Amended Complaint in significant part in consideration of the counterclaims that Novell asserted in its Answer and Counterclaims (July 29, 2005) (attached hereto as Exhibit E). In that pleading, Novell brings seven causes of action: a claim for slander of title, two claims for breach of the Asset Purchase Agreement ("APA") between the parties, two claims for declaratory relief pursuant to the APA, a claim for restitution/unjust enrichment relating to the APA, and a claim for accounting under the APA. Novell's counterclaims thus significantly expand the scope of the litigation, such that it is sensible for SCO to add the new claims in the Second Amended Complaint, relating primarily to the APA and to Novell's conduct in connection with the parties' differing interpretations of that Agreement.

SCO's proposed Second Amended Complaint reasserts SCO's slander-of-title claim. In addition, in keeping with the expanded scope of the litigation, the Second Amended Complaint asserts the following claims:

- Breach of contract based on Novell's violation of the non-compete provisions and covenant of good faith and fair dealing in the APA and related agreement with SCO, by, among other things, making unauthorized distributions of SCO's UNIX technology in competition with SCO's own UNIX offerings.
- An alternative breach-of-contract claim seeking specific performance of Novell's obligations under the APA (which transferred the UNIX business and technology to SCO, including the associated copyrights) to take any action necessary to effectuate the purposes of that Agreement and consummate the transactions contemplated therein.
- Copyright infringement based on, among other things, Novell's unauthorized distribution, in its Linux offerings, of UNIX technology outside of the limited license by which SCO's predecessor licensed back to Novell the UNIX technology it transferred to SCO pursuant to the APA.
- Unfair competition based on, among other things, Novell's false claims of copyrights and ownership in UNIX; misappropriation of UNIX technology in Linux; and wrongful attempts to thwart SCO's claims and rights to enforce its UNIX intellectual property.

These claims thus essentially relate to the same subject matter as Novell's counterclaims. See, e.g., LeaseAmerica Corp. v. Eckel, 710 F.2d 1470, 1474 (10th Cir. 1983) (no prejudice where te amended complaint referred "to the same chattels, the same consideration, and the same transaction" already at issue in the case); Kreinik v. Showbran Photo, Inc., No. 02 Civ. 1172 (RMB)(DF), 2003 WL 22339268, at \*10 (S.D.N.Y. Oct. 14, 2003) (attached hereto as Exhibit F) (plaintiff's amendment would not cause the defendant any prejudice where those claims relate to the defendant's counterclaims). SCO respectfully submits, moreover, that all of the previous and new claims in its Second Amended Complaint are well pleaded, not futile.

SCO respectfully submits that, under the circumstances, the Court should grant SCO's motion for leave to file the Second Amended Complaint.

Dated this 30th day of December, 2005.

By:

  
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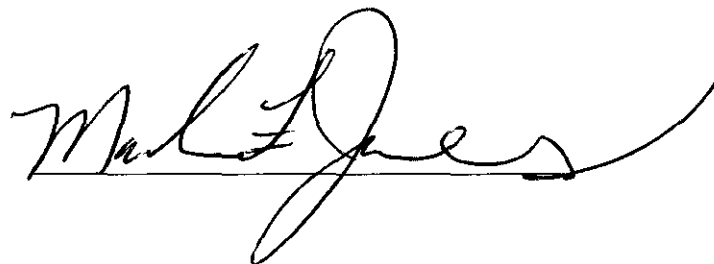
*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 30th day of December, 2005, I caused to be mailed a true and correct copy of the foregoing via first class U.S. Mail, postage prepaid, to the following:

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A handwritten signature in black ink, appearing to read "Michael Jacobs", written over a horizontal line. The signature is cursive and stylized.