IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

	:	
	:	Chapter 11
In re	:	
	:	Case No. 07-11337 (KG)
THE SCO GROUP, INC., *et al.*,[1]	:	(Jointly Administered)
	:	
Debtors.	:	**Hearing Date: November 20, 2009 at 2:00 p.m. (EST)**
	:	**Objection Deadline: November 13, 2009 at 4:00 p.m.**
	:	**(EST)**

MOTION OF WAYNE R. GRAY FOR ENTRY OF ORDER LIFTING AUTOMATIC STAY TO PERMIT THE DEBTOR, THE SCO GROUP, INC., TO PARTICIPATE IN FLORIDA FEDERAL COURT ACTION AND PENDING ELEVENTH CIRCUIT COURT OF APPEALS PROCEEDING

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[1] The Debtors and the last four digits of each of the Debtors' federal tax identification numbers are as follows: (a) The SCO Group, Inc., a Delaware corporation, Fed. Tax Id. #2823; and (b) SCO Operations, Inc., a Delaware corporation, Fed. Tax Id. #7393.

MOTION OF WAYNE R. GRAY FOR ENTRY OF ORDER LIFTING AUTOMATIC STAY TO PERMIT THE DEBTOR, THE SCO GROUP, INC., TO PARTICIPATE IN FLORIDA FEDERAL COURT ACTION AND PENDING ELEVENTH CIRCUIT COURT OF APPEALS PROCEEDING

The Movant, WAYNE R. GRAY ("the Movant Mr. Gray" or Mr. Gray"), by and through his undersigned counsel and pursuant to 11 U.S.C. § 362 and Rules 4001 and 9014 of the Federal Bankruptcy Rules, hereby moves this Court for entry of an order lifting the automatic stay to permit the Debtor, THE SCO GROUP, INC. ("the Debtor SCO" or "SCO"), (i) to participate in the Florida Federal Court Action styled and numbered *Wayne R. Gray v. Novell, Inc., The SCO Group, Inc., and X/Open Company Limited,* Case No. 8:06-cv-01950-VMC-TGW, pending in the United States District Court for the Middle District of Florida, Tampa Division ("the Florida Federal Court Action"), and (ii) to participate in the appeal pending before the United States Court of Appeals for the Eleventh Circuit styled and numbered *Wayne R. Gray, Appellant v. Novell, Inc., The SCO Group, Inc., and X/Open Company Limited,* Appeal No. 09-11374-CC, United States Court of Appeals for the Eleventh Circuit ("the Eleventh Circuit Appeal"), and in support of his motion, the Movant Mr. Gray states:

1. On October 23, 2006, the Movant Mr. Gray filed the Florida Federal Court Action, alleging, among other things, that (i) he had sought to register his mark "iNUX" on the Principal Register of the United States Patent and Trademark Office ("the USPTO"), (ii) his application had been opposed by X/Open Company Limited ("the Defendant X/Open" or "X/Open") on the grounds that (a) X/Open was the lawful owner and registrant of the two registered U.S. "UNIX" Trademarks ("the registered U.S.

'UNIX' Trademarks") and (b) Mr. Gray's "iNUX" Mark was confusingly similar to the registered U.S. "UNIX" Trademarks, (iii) X/Open's claimed federal registrations of the "UNIX" Trademarks was false, and (iv) X/Open's opposition to the registration of his "iNUX" Trademark was fraudulent as well, in that X/Open was not the lawful owner of either of those Trademarks.

2. While the opposition proceedings were pending before the Trademark Trial and Appeal Board ("the TTAB"), the Movant Mr. Gray learned that, in a 1995 purchase and sale of the UNIX business, Novell, Inc. ("the Defendant Novell" or "Novell"), had sold the registered U.S. "UNIX" Trademarks, along with business and the goodwill associated with the registered U.S. "UNIX" Trademarks to The Santa Cruz Organization, Inc. ("Santa Cruz"), and that the true owner of the registered U.S. "UNIX" Trademarks was SCO, a successor to Santa Cruz.

3. The Defendant SCO filed a motion to dismiss the Florida Federal Court Action as to it, and then subsequently filed for bankruptcy relief in Delaware federal court.

4. During the course of the litigation of the Florida Federal Court Action, and as a result of certain discovery, the Movant Mr. Gray concluded that the Debtor SCO indeed was the owner of the registered U.S. "UNIX" Trademarks.

5. The Movant Mr. Gray consistently has declared, in filings in the Florida Federal Court Action and in the Eleventh Circuit Appeal, that the Debtor SCO is the owner of the extremely-valuable registered U.S. "UNIX" Trademarks.

6. In the Florida Federal Court Action, the Movant Mr. Gray moved for

partial summary judgment and the Defendants Novell and X/Open moved for final summary judgment.

7. On February 20, 2009, and in an order that ignores key facts, misinterprets or misreads key documents, and violates basic precepts of federal trademark law, the Florida Federal Court denied Mr. Gray's motion for partial summary judgment and granted the motions for summary judgment filed by Novell and X/Open.

8. On March 16, 2009, the Movant Mr. Gray timely filed a notice of appeal, and subsequently filed his "Brief Of Appellant." The Appellees subsequently filed their respective responsive briefs.

9. The Defendant SCO filed no brief in the Eleventh Circuit Appeal; it merely advised that court that it remained in this Delaware bankruptcy court proceeding.

10. On September 17, 2009, and after apparently reviewing the briefs filed by Mr. Gray, X/Open, and Novell (in which Mr. Gray reiterated his view that SCO, and not X/Open, owned the extremely-valuable registered U.S. "UNIX" Trademarks), United States Circuit Judge Birch of the Eleventh Circuit entered an Order (i) noting that the putative Appellee, The SCO Group, Inc., was in bankruptcy and (ii) staying the appeal in its entirety. The pertinent final paragraph of that "Order" reads:

> On August 28, 2009, Appellee The SCO Group, Inc. filed a notice of its Chapter 11 bankruptcy filing with the Bankruptcy Court for the District of Delaware in September 2007. In light of Appellee's bankruptcy, this appeal in its entirety is HEREBY STAYED pending further order of the Bankruptcy Court, wit[h] (sic) the exception noted above. See 8 U.S.C. § 362(a).

11. This Court subsequently appointed Edward Cahn, retired Chief Judge of

the Eastern District of Pennsylvania, to serve as a Chapter 11 Trustee to decide the future of the Debtor SCO. Chief Judge Cahn's responsibilities include reviewing and evaluating certain litigation in which SCO is a party.

12. Undersigned counsel for the Movant Mr. Gray has not been contacted by Chief Judge Cahn or by his counsel (the Blank Rome law firm headquartered in Philadelphia, Pennsylvania), and undersigned counsel is perplexed by what appears to be a complete lack of interest on the part of the Debtor SCO, its current management, and the Chapter 11 Trustee in investigating the evaluating SCO's ownership of the extremely-valuable registered U.S. "UNIX" Trademarks. SCO is well-aware of the Florida Federal Court Action (by reason of correspondence from undersigned counsel), and it is equally well-aware of the Eleventh Circuit Appeal (by reason of the Order of September 17, 2009, entered by Circuit Judge Birch of that Court).

13. A cursory review of the briefs filed by the Movant Mr. Gray in connection with the Eleventh Circuit Appeal will demonstrate that the Debtor SCO unquestionably is the owner of the extremely-valuable registered U.S. "UNIX" Trademarks.

14. Equally important is the fact that the registered U.S. "UNIX" Trademarks were valued at $13 million-$15 million in 1993 (see Attachment Nos. 3, 4, and 5 to this motion) and that their value likely has increased substantially over the past fifteen (15) years by way of additional licenses and other revenue streams.

15. If, as the Movant Mr. Gray contends, the registered U.S. "UNIX" Trademarks belong to the Debtor SCO, and if those Marks have retained (let alone increased) their 1993 value, the Debtor SCO, its current management, and the Chapter 11

Trustee would fail in their duties to SCO, its shareholders, and its creditors if they failed to investigate and evaluate SCO's rights in and to those Marks. In particular, a sale of SCO's assets for $3 million to $5 million (assuming that such a sale included the rights of SCO to the registered U.S. "UNIX" Trademarks) would be grossly undervalued. Indeed, if SCO in fact owns those Marks, as consistently contended by Mr. Gray, the terms and conditions of SCO's exit from bankruptcy would be substantially changed.

16. On Monday, October 26, 2009, counsel for the Defendant-Appellant X/Open notified undersigned counsel for the Movant Mr. Gray of X/Open's intention to file a motion in the Eleventh Circuit Appeal asking that the stay of that appeal be lifted and that that appeal be permitted to proceed without the participation of SCO. (That motion was filed on Thursday, October 29, 2009, and the Movant Mr. Gray fully intends to oppose it.)

17. On Tuesday, October 27, 2009, undersigned counsel for the Movant Mr. Gray wrote to counsel for X/Open and (i) advised him of the filing of this motion, (ii) advised him that, in light of the fact (conceded by the Appellee Novell in numerous public statements, publications on its official authorized website, and most importantly, in official filings in *The SCO Group, Inc. v. Novell, Inc.*, Case No. 2:04CV139DAK, United States District Court for the District of Utah, *aff'd in part and reversed in part, The SCO Group, Inc. v. Novell, Inc.,* 2009 U.S. App. LEXIS 18987 (10th Cir., Aug. 24, 2009), *petition for rehearing en banc denied,* October 20, 2009) ("the Utah District Court Action"), (iii) advised him that the Debtor SCO clearly owned the extremely-valuable registered U.S. "UNIX" Trademarks, and (iv) advised him that he (Mr. Gray) in good

conscience could not acquiesce in any effort to vacate the stay of the Eleventh Circuit Appeal unless and until SCO had had an opportunity to (a) take such discovery in the Florida Federal Court Action as it deemed necessary to evaluate its ownership of the registered U.S. "UNIX" Trademarks and (b) file a brief in the Eleventh Circuit Appeal declaring its position as to its ownership of the registered U.S. "UNIX" Trademarks.

18. Without question, the Defendants-Appellees Novell and X/Open want to litigate the issue of the ownership of the registered U.S. "UNIX" Trademarks behind the backs of SCO, its current management, and this Court. And that effort simply is not appropriate. It may be good strategy; it may be consummate lawyering; it may be a highly-skilled manipulation of the United States federal court system: But it is wrong. SCO should be permitted to participate in litigation involving its ownership rights in the extremely-valuable intellectual property represented by the registered U.S. "UNIX" Trademarks.

Accordingly, this Court should enter an order (i) lifting the automatic stay with respect to the participation of the Debtor SCO in the Florida Federal Court Action, (ii) directing the Chapter 11 Trustee to investigate (and, if necessary, conduct discovery on) the merits of the view of the Movant Mr. Gray that, in fact and in law, SCO, and not X/Open, is the proper and exclusive owner of the registered U.S. "UNIX" Trademarks, and report the results of that investigation and evaluation to this Court and to counsel for Mr. Gray, along with a written recommendation as to the action (if any) to be taken by SCO in connection with the Eleventh Circuit Appeal. This Court then would authorize the Chapter 11 Trustee (Chief Judge Cahn) either to take no further action or to file a

brief on behalf of SCO in the Eleventh Circuit appeal. Undersigned counsel for Mr. Gray, and Mr. Gray himself are prepared to offer Chief Judge Cahn and this Court all available assistance.

MEMORANDUM IN SUPPORT OF MOTION OF WAYNE R. GRAY FOR ENTRY OF ORDER LIFTING AUTOMATIC STAY TO PERMIT THE DEBTOR, THE SCO GROUP, INC., TO PARTICIPATE IN TAMPA FEDERAL COURT ACTION AND PENDING ELEVENTH CIRCUIT COURT OF APPEALS PROCEEDING

I. BACKGROUND.

SCO, Novell, and X/Open all were defendants in the Florida Federal Court Action. That action is one of several legal proceedings involving SCO's UNIX intellectual property that was purchased by its predecessor Santa Cruz from Novell in a September 19, 1995, "Asset Purchase Agreement" ("the APA"). Because of SCO's bankruptcy, the Florida Federal Court Action was stayed as to SCO, and the Eleventh Circuit Appeal currently is stayed in its entirety. The lawsuit that is not stayed, *SCO v. Novell* in the United States District Court for the District of Utah ("the Utah District Court Action"), is inseparably linked with the Florida Federal Court Action and the Eleventh Circuit Appeal.

The Debtor SCO is the lawful owner of the registered U.S. "UNIX" Trademarks and the goodwill associated with those Marks, pursuant to the 1995 APA and the subsequent 1995 "Bill of Sale." Yet X/Open falsely asserts that it has owned the "UNIX" Trademarks since 1994. The Movant Mr. Gray seeks SCO's immediate leave to participate in the Florida Federal Court Action and the Eleventh Circuit Appeal because, without that leave, SCO's stockholders and creditors risk (i) being deprived of their

lawful ownership of the extremely-valuable registered U.S. “UNIX” Trademarks, assets believed to be valued at least $13 million - $15 million, and (b) being denied trademark licensing fees dating back to at least May, 1997, fees that may themselves aggregate several million dollars.

II. INTRODUCTION

The Debtor SCO does not, and indeed cannot, dispute that it is the lawful owner of the extremely-valuable registered U.S. “UNIX” Trademarks, assets valued at $15 million in 1993 and oddly not addressed in any of SCO's bankruptcy filings.

Novell, in the long-running Utah District Court Action, repeatedly admitted to that court in 2007 that the APA transferred to Santa Cruz its entire UNIX business "without limitation," all of its UNIX contracts and licenses "without limitation," and the registered U.S. “UNIX” Trademarks that it owned, together with the goodwill associated with them. Title to the UNIX assets, including title to the registered U.S. “UNIX” Trademarks, transferred with execution and delivery of a December 6, 1995, “Bill of Sale.”

The Debtor SCO admitted to the USPTO in August, 2005, and to the Utah District Court in 2007, that the 1995 APA and subsequent “Bill of Sale” transferred the registered U.S. “UNIX” Trademarks and the goodwill associated with those Trademarks, to Santa Cruz, and it never disputed Novell's identical admissions. SCO admitted to Mr. Gray in July, 2007, that Novell never represented to Santa Cruz on or prior to the December 6, 1995, closing that the registered U.S. “UNIX” Trademarks would not transfer to it.

There is no dispute that there were only two amendments to the APA and that neither amendment modified the APA as to transfer of the registered U.S. "UNIX" Trademarks and associated goodwill. It also is undisputed that Novell exited the UNIX business after December 6, 1995, and was prohibited from re-entry pursuant to certain non-competition provisions in both the APA and its related "Technology Licensing Agreement" ("the TLA").

The Utah District Court in its August, 2007, opinion, and the Tenth Circuit Court of Appeals in its September, 2009, opinion, both repeatedly confirmed SCO's and Novell's undisputed admissions that the APA and the "Bill of Sale" transferred Novell's registered U.S. "UNIX" Trademarks, and the goodwill associated with those Trademarks, to Santa Cruz.

Although SCO and Novell argued issues of UNIX copyright ownership in the Utah District Court Action and in the Tenth Circuit Appeal, Novell (completely contrary to its positions in those cases, and an unrelated third party, X/Open, argued first in the Florida Federal Court Action and now before the Eleventh Circuit Court of Appeals that X/Open owns the registered U.S. "UNIX" Trademarks, contending that the APA did not transfer either registered U.S. "UNIX" Trademark to Santa Cruz. They also rely on a purported Novell-Santa Cruz-X/Open "Confirmation Agreement" dated September, 1996. But that agreement does not purport to modify the APA as to trademark transfer or ownership. Although that agreement confirms Novell's intent in the APA to transfer its registered U.S. "UNIX" Trademarks to Santa Cruz in the APA, the signatories to that agreement oddly agreed that Novell, even though it owned no UNIX business and could

not lawfully own the registered U.S. "UNIX" Trademarks (or the goodwill associated with those Trademarks) would assign the registered U.S. "UNIX" Trademarks to X/Open. How Novell would accomplish that feat, having already sold the UNIX business and the registered U.S. "UNIX" Trademarks (and the goodwill associated with those same Trademarks) to Santa Cruz over a year earlier, remains unexplained.

In a subsequent Novell-X/Open November, 1998, assignment agreement, an agreement whereby Novell purported to assign the same registered U.S. "UNIX" Trademarks to X/Open, Novell had to have known that it was falsely representing to the USPTO and to the public that it owned (and was assigning to X/Open) the UNIX business (a clear breach of the APA and TLA non-competition restrictions), the registered U.S. "UNIX" Trademarks, and the goodwill associated with those Trademarks, that it previously had sold and transferred to Santa Cruz in the 1995 APA and the subsequent "Bill of Sale." Although Novell and X/Open knew or should have known that the assignment agreement was false, they fraudulently recorded it at the USPTO in June, 1999.

X/Open, based on its false claims of ownership of the registered U.S. "UNIX" Trademarks, in April, 2001, opposed Mr. Gray's USPTO application to register his "iNUX" trademark. Mr. Gray then filed the Florida Federal Court Action in 2006 after discovering the APA and concluding that SCO lawfully owned the registered U.S. "UNIX" Trademarks and the goodwill associated with those Trademarks. The Florida District Court stayed its action as to SCO in September, 2007.

The Florida District Court, in what at best can be described as a bizarre February,

2009, opinion that (i) ignores SCO's and Novell's admissions as to the 1995 APA and subsequent "Bill of Sale" and the resulting transfer of the registered U.S. "UNIX" Trademarks; (ii) ignores Novell's admissions, as set forth in the Utah District Court's August, 2007, Opinion; and (iii) ignores established contract and federal trademark law, ruled that X/Open lawfully owned the registered U.S. "UNIX" Trademarks and the goodwill associated with those trademarks. With no supporting evidence before it, the Florida District Court ruled that the 1996 Agreement proved that Novell remained in the UNIX business and owned the registered U.S. "UNIX" Trademarks and the goodwill associated with those Trademarks, from then until 1998. Even Novell and X/Open could not bring themselves to such an unsupported argument.

Mr. Gray filed a related appeal in Eleventh Circuit Court of Appeals, and that appeal recently was stayed in its entirety pending SCO exiting bankruptcy and participating in the pending Florida Federal Court Action and the Eleventh Circuit Appeal to protect its ownership rights in the registered U.S. "UNIX" Trademarks.

Justice, together with the Federal Bankruptcy Code, require that this Court lift the stay as to SCO in connection with the Florida District Court Action and the Eleventh Circuit Appeal because SCO's stockholders and creditors risk being denied recovery of assets valued at least $13 million - $15 million, together with trademark licensing fees dating back to at least May, 1997, that may total several million dollars.

III. THE UNDISPUTED FACTS.

A. The September 19, 1995, Novell-Santa Cruz UNIX "Asset Purchase Agreement."

The 1995 APA (and the subsequent December 6, 1995, "Bill of Sale") plainly

state that Novell sold, and that the Buyer Santa Cruz purchased, virtually all of the Seller Novell's UNIX business in 1995. The public comments of senior officials of Novell make equally clear that "all of Novell's UNIX business" included all UNIX trademark licenses and the registered U.S. "UNIX" Trademarks owned by the Seller Novell.

1. The Public Announcement by the Seller Novell's General Counsel

On September 18, 1995, the Seller Novell's General Counsel (David Bradford) confirmed to the Seller Novell's Board of Directors that Novell intended to sell all of its UNIX business to the Buyer Santa Cruz and that the sale would include its registered U.S. "UNIX" Trademarks. The Minutes of that Board meeting stated: "RESOLVED ... Pursuant to the Asset Purchase Agreement ... Novell will retain all of its patents, copyrights and trademarks (except for the trademarks UNIX and UnixWare)."[2]

2. The APA and the "Bill of Sale"

a. The Seller Novell and the Buyer Santa Cruz agreed in the APA that it was an integrated agreement governed by California law and that the transferred UNIX assets were not subject to any prior agreement.[3] In Article II, Section 2.11(b) of the APA, entitled "Title to Properties; Absence of Liens and Encumbrances," the Seller Novell warranted to the Purchaser Santa Cruz that the registered U.S. "UNIX" Trademarks being transferred to Santa Cruz were free of all encumbrances:[4]

> (b) Seller has good and valid title to… all of the tangible properties and assets, real, personal and mixed, which are

[2] Gray Appendix Bates Stamped documents in *Gray v. Novell, et.al.*, United States Eleventh Circuit Court of Appeals; as follows: (01010(¶5); 01654(No.76); 01667(¶2); 01700(¶1)).
[3] (01531(¶2)-01532(¶¶1-4); 01536(FN8); 01739(¶3)-01740(¶1); 01773(¶3)).
[4] (00966; 02060).

> material to the conduct of the Business, free and clear of any liens, charges, pledges, security interests, or other encumbrances … . (Emphasis added.)

Item I of Schedule 1.1(a) to the APA, titled "Assets," and identifying the "Assets" being transferred to the Buyer Santa Cruz, memorialized the Seller Novell's agreement to transfer its entire UNIX business "without limitation" to the Buyer Santa Cruz, including its UNIX trademark licensing business predating 1994:[5]

> All rights and ownership of UNIX and UnixWare, including but not limited to all versions of UNIX and UnixWare and all copies of UNIX and UnixWare (including revisions and updates in process), and all technical, design, development, installation, operation and maintenance information concerning UNIX and UnixWare, including source code, source documentation, source listings and annotations, appropriate engineering notebooks, test data and test results, as well as all reference manuals and support materials normally distributed by Seller to end-users and potential end-users in connection with the distribution of UNIX and UnixWare, such assets to include without limitation the following: (Emphasis added).

b. Item III of Schedule 1.1(a) of the APA memorialized the Seller Novell's agreement to transfer all of its UNIX license agreements and contracts "without limitation" to the Buyer Santa Cruz, including all of its UNIX trademark license agreements:[6]

> All of Seller's rights pertaining to UNIX and UnixWare under any software development contracts, licenses and any other contracts to which Seller is a party or by which it is bound and which pertain to the Business (to the extent that such contracts are assignable), including without limitation: (Emphasis added).

Interestingly, Item III of Schedule 1.1(a) of the APA clearly transferred all UNIX

[5] (02100(Item No. I)).
[6] (02101(Item No. III)).

trademark license agreements, including any such agreement between the Seller Novell and X/Open, to the Buyer Santa Cruz.

c. Item V of Schedule 1.1(a) of the APA memorialized the Seller Novell's agreement to transfer all of its registered U.S. "UNIX" Trademarks to the Buyer Santa Cruz:[7]

> Intellectual property - Trademarks UNIX and UnixWare as and to the extent held by Seller (excluding any compensation Seller receives with respect of the license granted to X/Open regarding the UNIX trademark).

Significantly, the license compensation exclusion is consistent with the Seller Novell retaining other UNIX license royalties even as it transferred ownership and enforcement of all of its UNIX licenses to the Buyer Santa Cruz.[8]

d. Item V of Schedule 1.1(b) to the APA, titled "Excluded Assets," is consistent with Schedule 1.1(a), confirming that the Seller Novell excluded the registered U.S. "UNIX" Trademarks from the class of non-transferring assets. Schedule 1.1(b) specifically identified the registered U.S. "UNIX" Trademarks as assets <u>not excluded</u> from transfer: "A. All copyrights and trademarks, except the trademarks UNIX and UnixWare."[9] Attachment C to the Seller Novell's "Seller Disclosure Schedule" to the APA lists the registered U.S. "UNIX" Trademarks owned by the Seller Novell as being transferred to the Buyer Santa Cruz, and the registered U.S. "UNIX" Trademarks are

[7] (02102(Item No. V); 02452(¶¶1-2)).
[8] (00598(¶3)).
[9] (02105(Item No. V); 01661(No.IV,A(1)); 01662(¶1); 01516-01517(No.3-No.4); 01731(¶1)).

identified at page 9 of Attachment C.[10]

3. More Public Announcements by Novell's Senior Management

a. The Seller Novell's Worldwide Sales Director for UNIX (Larry Boufford), confirmed in his email dated October 18, 1995, that the Seller Novell was selling its entire UNIX business to the Buyer Santa Cruz and that the Seller Novell thereafter would not be in any UNIX business:[11]

> …give Sco all information, contracts, assets etc. pertaining to the UnixWare business and the old UNIX source code business. They have bought it lock, stock, and barrel. Once the transaction is closed (Nov.-Dec.) we will have no more involvement with this business. (Emphasis supplied.)

b. The Seller Novell's Senior Product Manager (Skip Jonas) confirmed the Seller Novell's complete exit from the UNIX business, explaining on December 4, 1995, to other Novell transition team members:[12]

> As of the Closing Date (now set for 12/6), all UNIX & UW agreements transfer to SCO . . . . Novell is out of the UNIX/UW business after the Closing and does not have the right to sell UW. ("UW" represents UnixWare).

Amendment No. 1 to the APA does not modify Schedule 1.1(a), nor does it modify Schedule 1.1(b) as to their inclusion of registered U.S. "UNIX" Trademarks as transferring assets.[13]

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[10] (02121).
[11] Novell senior manager Larry Bouffard (last viewed October 24, 2009) Official authorized SCO website www.sco.com/company/legal/update/Bouffard.pdf .
[12] Novell senior manager Skip Jonas (last viewed October 24, 2009) Official authorized SCO website www.sco.com/company/legal/update/website2.5.pdf .
[13] (01740(¶3); 02480(¶ 3)-04481(¶1); 02512(¶2); 02515(¶3))

B. The September 1996 "Confirmation Agreement."

On September 4, 1996, over a year after the APA and ten (10) months after the "Bill of Sale," Novell, Santa Cruz, and X/Open executed a so-called "Confirmation Agreement," just one month before Amendment No. 2 to the APA. There, Novell confirmed that Santa Cruz was the lawful owner of the registered U.S. "UNIX" Trademarks pursuant to the 1995 APA (and, by implication, pursuant to the "Bill of Sale." But the signatories to the "Confirmation Agreement" agreed that, notwithstanding Santa Cruz's continuing ownership of the registered U.S. "UNIX" Trademarks and the goodwill associated with those Trademarks, Novell, not Santa Cruz, would assign the registered U.S. "UNIX" Trademarks to X/Open on some future date:[14]

> WHEREAS, NOVELL and SCO entered into a September 19, 1995 Purchase Agreement, as amended (APA"). pursuant to which NOVELL agreed to convey its entire right, title and interest in and to the UNIX trademark to SCO.…
>
> * * *
>
> WHEREAS, X/OPEN and SCO desire to provide for the acceleration of vesting of title … to the UNIX trademark,
>
> * * *
>
> … notwithstanding any understanding to the contrary, NOVELL shall for this purpose be considered the owner of legal title to the UNIX trademark…
>
> * * *
>
> SCO agrees that notwithstanding the fact that NOVELL will be executing [UNIX trademark] assignment document(s) [to X/Open] after the Closing Date established by the APA, such assignment by NOVELL shall not be considered a breach of NOVELL's obligations [to Santa Cruz] under the APA. (emphasis added)

No accelerated transfer of a UNIX trademark to X/Open ever was executed by Novell before the May 14, 1997, date set forth in a May, 1994 agreement between Novell and

[14] (02163(¶¶2,4 and No.1)).

X/Open.

Significantly, no provision in the so-called "Confirmation Agreement" provided that it retroactively modified or clarified the APA, any Schedule attached to the APA, the related "Bill of Sale" or the TLA with respect to Novell's lawful and complete transfer to Santa Cruz of its right, title, and interest in and to the entire UNIX business, (including the registered U.S. "UNIX" Trademarks and the goodwill associated with those Trademarks) to Santa Cruz on December 6, 1995.

The "Confirmation Agreement" nowhere refers to a subsequent partial unwinding of the APA, to a subsequent modification of Schedules 1.1(a) or 1.1(b) to the APA, to any subsequent transfers from Santa Cruz back to Novell of (i) any part of the UNIX business that it (Novell) sold to Santa Cruz through the APA, (ii) any goodwill of the UNIX business that it (Novell) sold to Santa Cruz through the APA, (iii) any UNIX trademark that it (Novell) transferred to Santa Cruz through the APA, (iv) any "UNIX" trademark licenses that it (Novell) sold to Santa Cruz through the APA, or (v) any other asset of the UNIX business that it (Novell) sold to Santa Cruz through the APA.

No party has ever produced any document that operated to transfer any UNIX assets from Santa Cruz (or any of its successors) back to Novell in connection with, or at the time of, the execution and delivery of the so-called "Confirmation Agreement": no conveyance document, no bill of sale, no nothing. There is no lawful basis for concluding that, although Novell had transferred the registered U.S. "UNIX" Trademarks (and the goodwill associated with those Trademarks) to Santa Cruz, Santa Cruz somehow managed to transfer those same assets back to Novell.

A careful review of the so-called "Confirmation Agreement" discloses only that it purports to supplement the APA as to obligating Santa Cruz to unknown terms in the never-produced May 14, 1994, Novell-X/Open "Trademark Relicensing Agreement":[15]

> …. [APA is] subject to rights and obligations established in a May 14, 1994 NOVELL-X/OPEN Trademark Relicensing Agreement, as amended ("1994 Agreement")… (Emphasis added.)

That bald statement -- an unsupported declaration that "NOVELL shall …be considered the owner of legal title to the UNIX trademark" -- is insufficient to modify the APA; it is contrary to the express wording and operation of the APA; it is contrary to established United States trademark law; it is not designated or treated or numbered as an amendment to the APA; it is contrary to the California Parol Evidence Code; and, interestingly enough, it was executed a month before Amendment No. 2 to the APA. And Amendment 2 makes no mention of it.

Perhaps most significantly, the so-called "Confirmation Agreement" (and the subsequent purported 1998 false assignment of the registered U.S. "UNIX" Trademarks to X/Open) have not caused Santa Cruz or its successors to cease operating the UNIX business that Santa Cruz purchased from Novell or caused any of those companies to cease using the registered U.S. "UNIX" Trademarks transferred to Santa Cruz through the APA to identify its business and all of its UNIX software products. SCO (as a successor to Santa Cruz) states on its official website that it owns, and is still in, the UNIX business:

[15] (02163(¶2)) X/Open argues that the so-called "Confirmation Agreement" actually refers to a May 10, 1994 Agreement, but no party to *Gray v. Novell, et al.* has sworn under oath to the Florida or Utah courts that the May 14, 1994 Agreement does not exist.

> "SCO is the exclusive licensor to UNIX-based system software providers." Official authorized SCO website titled "About SCO" at ¶3 (last viewed October 24, 2009) - http://www.sco.com/company/profile.html ;
>
> "SCO's primary business is still UNIX and its primary commitment is to continue to enrich the UNIX platforms …" Official authorized SCO website titled "UNIX Products" at ¶1 - http://www.sco.com/products/unix/ (last viewed October 24, 2009); and
>
> "… there are now more than two million SCO UNIX servers installed in more than 82 countries." Official authorized SCO website titled "Milestones in the History of The SCO Group: Celebrating Thirty Years of SCO" at ¶2 (last viewed October 245, 2009) - http://www.sco.com/company/history.html.

And, to put the final nail in this coffin, Amendment No. 2 to the APA was executed on October 16, 1996, nearly a year after the "Bill of Sale," but it failed to modify Item III of Schedule 1.1(a) which includes the UNIX trademark license agreements. Nor did Amendment No. 2 modify (or recognize any modification of) Item V of Schedule 1.1(a), which included the registered U.S. "UNIX" Trademarks as assets that transferred to Santa Cruz.[16]

C. The November 13, 1998, Novell -X/Open Assignment Agreement.

Although Novell was completely out of the UNIX business and did not own either of the registered U.S. "UNIX" Trademarks or any goodwill associated with those Trademarks,[17] it entered into a trademark assignment with X/Open on or about November 13, 1998. In that document, Novell purportedly assigned the registered U.S. "UNIX" Trademarks to X/Open on November 13, 1998 ("the 1998 Assignment"): "... Assignor

[16] (02480(¶3); 02481(¶1); 02512(¶3); 02515(¶¶2-3)).
[17] (02265(No.32)-02266(No.33)).

hereby assigns unto Assignee all property, right, title and interest in the said [UNIX] trade marks with the business and goodwill attached to the said [UNIX] trade marks…" The assignment documents offered no explanation for how Novell had come to re-acquire the UNIX business, the goodwill associated with that business, or the registered U.S. "UNIX" Trademarks that it previously had sold to Santa Cruz through the 1995 APA nd the 1995 "Bill of Sale." Moreover, the 1998 Assignment is dated more than two years after the signatories to the so-called "Confirmation Agreement" purportedly agreed to an accelerated UNIX trademark transfer. X/Open recorded the false 1998 Assignment at the USPTO on June 22, 1999.[18]

D. The Florida District Court Action - *Gray v. Novell, X/Open, and SCO*.

X/Open filed an opposition in the USPTO to Mr. Gray's "iNUX" trademark application on April 11, 2001, styled *X/Open v. Gray*, Opposition No. 91122524, falsely representing in that opposition that it lawfully owned the registered U.S. "UNIX" Trademarks.[19]

After viewing (i) X/Open's continuing misrepresentations that it owned the registered U.S. "UNIX" Trademarks since 1994 and (ii) portions of the 1995 APA, in January, 2004, Mr. Gray filed an amended answer, affirmative defenses and counterclaims to add a counterclaim of fraud. *X/Open v. Gray* was stayed by the USPTO in February, 2005, to consider Mr. Gray's pending motions to compel discovery related to UNIX trademark ownership and the May, 1994, Agreements.

[18] (02167-02171).
[19] (02173; 02177).

Mr. Gray filed the Florida Federal Court Action on October 21, 2006, after his independent research revealed Novell's and X/Open's scheme to conceal SCO's lawful UNIX trademark ownership. On April 9, 2007, Mr. Gray filed an opposition to X/Open's "UNIXWARE" trademark application, before the TTAB, Opposition No. 91176820.[20]

Mr. Gray's Florida Federal Court Action alleges (among other things) fraud upon the USPTO based on X/Open's June, 1999, recordation of the November 13, 1998, Assignment that falsely represents that Novell was in the UNIX business and lawfully owned the registered U.S. "UNIX" Trademarks and the goodwill associated with those Trademarks, in 1998. In his complaint, Mr. Gray specifically alleged:

> 55. Pursuant to the APA as modified by Amendments No. 1 and No. 2, Santa Cruz was the lawful owner of the UNIX marks in and after December 1995.

In its first revised answer and affirmative defenses, Novell denied that Santa Cruz owned the registered U.S. "UNIX" Trademarks pursuant to the 1995 APA and the related "Bill of Sale."

X/Open moved for summary judgment on June 26, 2008, and, plainly acting as Novell's proxy, asserted that Novell did not transfer its registered U.S. "UNIX" Trademarks to Santa Cruz because of the wording of Item V in Schedule 1.1(a), boldly stating: "The 1995 Novell-SCO APA did not transfer the UNIX Trademark from Novell to SCO." X/Open also asserted that the September, 1996, so-called "Confirmation

[20] X/Open also repeatedly represented that it lawfully owns the "UnixWare" marks. Such representations are clearly false in light of the Debtor SCO's asset disclosures before this Court. Indeed, X/Open even filed a false SCO-X/Open assignment agreement before the USPTO in 2006, fraudulently asserting such ownership since 2004. See USPTO webpage - http://assignments.uspto.gov/assignments/q?db=tm&sno=74433508.

Agreement" modified the 1995 APA as to the terms of some as-yet-unproduced May 14, 1994, "Agreement." Novell joined X/Open's motion, supporting X/Open's arguments that the 1995 APA did not transfer its registered U.S. "UNIX" Trademarks to Santa Cruz.

On October 27, 2008, Mr. Gray filed his opposition to X/Open's summary judgment motion (and his Declaration), along with his supporting affidavit, based in significant part on Novell's admissions in the Utah District Court Action and the Utah District Court's 2007 Opinion.

Mr. Gray moved for summary judgment, pointing out and relying upon (i) Novell's admissions in the Utah District Court Action and (ii) the Utah District Court's conclusions that the 1995 APA transferred Novell's entire UNIX business, registered U.S. "UNIX" Trademarks, and the goodwill associated with those Trademarks, to Santa Cruz on December 6, 1995, and that by reason of the restrictive covenants Novell in fact had been prohibited from re-entering the UNIX business.

X/Open opposed Mr. Gray's summary judgment motion and, again acting as Novell's proxy, once again (i) incorrectly asserted that the 1995 APA had not transferred the registered U.S. "UNIX" Trademarks to Santa Cruz and (ii) incorrectly contended that its licensed use of the UNIX mark as an unregistered certification mark in its new UNIX certification business somehow established new rights to the registered U.S. "UNIX" Trademarks.[21] X/Open again asserted that the so-called "Confirmation Agreement"

[21] See X/Open's Official authorized website at - http://www.opengroup.org/certification/unix-home.html titled "UNIX System Certification" (last viewed October 24, 2009). X/Open has admitted since 1993 that its use of UNIX has been as a certification mark and that it does not now, and never has, used UNIX as a trademark as registered. "Use of the mark by the assignee in connection with a different goodwill and different product would result in a fraud on the purchasing public…" *Marshak v. Green*, 746 F.2d 927, 929 (2d Cir. 1984). (00714(Nos.30-31); 00753(No.143); 00816-00817; 00821(¶1); 00838(¶4); 00916(¶¶3-6);

modified the 1995 APA as to a never-produced May, 1994, agreement and filed declarations by X/Open's Steve Nunn and Novell's Associate Counsel Jim Lundberg ("Mr. Lundberg").

In his declaration, Mr. Lundberg did not deny the existence of the May 14, 1994, "Agreement" specified in the so-called "Confirmation Agreement" and, apparently unaware of (and in complete contradiction of) his employer Novell's admissions and the findings and conclusions set forth in the Utah District Court's 2007 Opinion, declared that the 1995 APA did not transfer Novell's entire UNIX business, licenses, and trademarks to Santa Cruz. Mr. Lundberg then declared that the so-called "Confirmation Agreement" was an amendment to the 1995 APA and it somehow confirmed that Novell remained in the UNIX licensing business after 1995.

The Florida District Court, ignoring Mr. Gray's evidence before that court, ignoring Novell's admissions, and ignoring the findings and conclusions set forth in the Utah District Court's 2007 Opinion, (i) incorrectly concluded that it need not consider Novell's lawful transfer of title to its registered U.S. "UNIX" Trademarks, and the goodwill associated with those Trademarks, pursuant to the 1995 APA and (ii) incorrectly concluded that the 1998 Assignment lawfully transferred the UNIX business, and the goodwill associated with that assigned Trademark, to X/Open.

E. The Utah District Court Action - *SCO v. Novell*.

In its summary judgment motion memorandum of April 20, 2007, in the Utah

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01791-01792; 01795-01796;01798).Yet, X/Open even now continues to falsely represent that it has owned the registered U.S. "UNIX" Trademarks since 1994. See X/Open Official authorized website main web page titled "Who Owns UNIX®?" updated May 23, 2003, archived by Wayback on May 24, 2003 (last viewed October 24, 2009) at - http://web.archive.org/web/20030524200917/http://www.opengroup.org.

District Court Action, Novell confirmed that it had transferred its entire UNIX business, including all UNIX trademark license agreements, to Santa Cruz in 1995. In support of that proposition, Novell submitted the declaration of SCO's Software Licensing Director William Broderick (a former Novell employee):[22]

> Broderick noted that his career "has followed the UNIX business as it has been transferred successively from AT&T/USL to Novell to Santa Cruz to Caldera (now SCO)." (Id., ¶ 9.) He further asserted that the transfer from Santa Cruz to Caldera (as well as the preceding transfers) included all of the UNIX assets and business, stating as follows:
>
> - "In each instance (USL to Novell, Novell to Santa Cruz, and Santa Cruz to Caldera), the company selling the UNIX technology also transferred control of the commercial enterprise that developed, marketed and licensed that technology (the UNIX business). In each instance, the makeup and operation of the UNIX business continued as constituted through and after each transition." (Id., ¶ 10.)
> - "In each instance, the transferred UNIX business included "without limitation" the UNIX source code, binary code, and intellectual property, licenses and other agreements; and the rights, liabilities, and claims related to that business."4 (Id., ¶ 11.)
> - "In each instance, the transferred UNIX business also included all or many of the people who managed and operated the business, including senior-level managers, engineers, sales people, support staff, and other employees. It also included customer, supplier, and vendor relationships." (Id., ¶ 12.)
> - "In each instance, the transferred UNIX business also included office space, leaseholds, furniture, and equipment." (Id., ¶ 13.) "In short, through and after each transaction, my colleagues and I almost universally kept doing the same work, with the same people, from the same offices and buildings, developing and delivering the same UNIX products and services to the same customers. We also continued to develop the same technology, service the same contracts, and collect revenues under those contracts." (Id., ¶ 14.)
> - "In each instance, after each transaction, neither the seller nor its employees remained involved in managing or operating the business. The buyer (mainly through its newly acquired employees) took over those responsibilities." (Id., ¶ 15.) (emphasis added).

[22] (01484-01485(No.32)).

Novell repeatedly admitted in that summary judgment memorandum that the intent of the 1995 APA was to, and did lawfully, transfer its registered U.S. "UNIX" Trademarks to Santa Cruz. Indeed, Novell flatly stated: "Thus, the only 'Intellectual Property' identified in the list of assets to be transferred were the UNIX and UnixWare trademarks."; "[i]t [Novell's outside counsel] revised Schedule 1.1(a) so that the UNIX and UnixWare trademarks were the only 'Intellectual Property' included in the transaction"; and "[t]he only 'Intellectual Property' identified in the Schedule 1.1(a) list of assets to be transferred are the UNIX and UnixWare trademarks."[23]

Novell also confirmed in that same summary judgment memorandum that Schedule 1.1(a) and Schedule 1.1(b) of the 1995 APA were consistent in transferring its registered U.S. "UNIX" Trademarks to Santa Cruz:[24]

> Thus, the intellectual property listed as included assets under Schedule 1.1(a) was consistent with the intellectual property excluded by Schedule 1.1(b): only the UNIX and UnixWare trademarks were included, and all patents, copyrights, and trademarks were excluded except for the UNIX and UnixWare trademarks.

(Emphasis added.)

And, just to make the point crystal-clear, Novell declared in its memorandum of May 14, 2007, filed in the Utah District Court Action, that, pursuant to the 1995 APA, it had transferred its registered U.S. "UNIX" Trademarks: "**The APA did transfer UNIX and UnixWare trademarks to Santa Cruz** (to the extent owned by Novell)".[25] (Emphasis added.)

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[23] (01516-01517(No.3); 01522(No.17); 01529(¶6)).
[24] (01517(No.4)).
[25] 01683(¶2)).

Indeed, SCO squarely confirmed in its memorandum of May 18, 2007, in the Utah District Court Action, that, pursuant to the report of Santa Cruz's auditor (Peat Marwick, LLP) dated November 16, 1995, the 1995 APA transferred Novell's registered U.S. "UNIX" Trademarks, and the goodwill associated with those Trademarks, to Santa Cruz.[26] SCO also confirmed that, to protect the value to Santa Cruz of the transferred UNIX and UnixWare assets, the APA and related TLA each contained a non-competition provision, whereby Novell agreed not to compete with SCO's core UNIX operating-system products.[27]

The Utah District Court, in its August 10, 2007, Opinion, confirmed at least six times Novell's admission that, pursuant to the APA, it had transferred its registered U.S. "UNIX" Trademarks to Santa Cruz:[28]

> With respect to their "Intellectual Property" provisions, Schedule 1.1(a) and Schedule 1.1(b) are consistent. Schedule 1.1(b) excludes from transfer "[a]ll copyrights and trademarks, except for the trademarks UNIX and UnixWare" and "[a]ll Patents." Id. APA Sched. 1.1(b) § V.A, V.B. Schedule 1.1(a) transfers only "[t]rademarks UNIX and UnixWare …

(Emphasis added.)

* * *

> Schedule 1.1(a) provides that the only intellectual property Santa Cruz was acquiring were the UNIX and UnixWare trademarks.

* * *

> Schedule 1.1(b) clearly distinguished UNIX and UnixWare trademarks as assets being transferred. Schedule 1.1(a) also clearly transferred only UNIX and UnixWare trademarks.

(Emphasis supplied).

[26] (01574(No.26);01602(¶4)).
[27] (01566-01567(Nos. 7-10)).
[28] (01691(¶1);01700(¶1);01731(¶1);01735(¶2);01737(¶2);01738(¶2)-01739(¶1);01740(¶3)).

The Utah District Court, in its August 10, 2007, Opinion, also confirmed Novell's admissions that (i) there were only two amendments to the APA, Amendment No. 1 and Amendment No. 2, and (ii) neither amendment modified Novell's transfer of its registered U.S. "UNIX" Trademarks, and the goodwill associated with those Trademarks, to Santa Cruz:[29]

> Although changes to Schedule 1.1(a) and 1.1(b) were made in Amendment No. 1, there were no changes made to the intellectual property provisions.
>
> * * *
>
> Furthermore, Amendment No. 2 also did not amend Schedule 1.1(a). It is undisputed that the Bill of Sale transferred the Assets contained on Schedule 1.1(a).

F. The Tenth Circuit Appeal.

In its opening statement, the Tenth Circuit laid to rest any doubt that the Utah District Court Action and the Florida District Court Action were (and are) inseparably linked. The Tenth Circuit confirmed that the issue in that appeal was the broader issue of what Intellectual Property transferred pursuant to the 1995 APA, stating:[30]

> This case primarily involves a dispute between SCO and Novell regarding the scope of intellectual property in certain UNIX and UnixWare technology and other rights retained by Novell following the sale of part of its UNIX business to Santa Cruz, a predecessor corporate entity to SCO, in the mid-1990s.

The Tenth Circuit again confirmed the repeated admissions of Novell and SCO that the APA had transferred Novell's registered U.S. "UNIX" Trademarks, and the goodwill

[29] (01743(¶3);01746(¶¶2-3)).
[30] *SCO v. Novell* Appeal Case No. 08-4217, Opinion ¶1 at page 1.

associated with those Trademarks, stating:[31]

> Schedule 1.1(a) included within the list of "Assets" transferred, "[a]ll rights and ownership of UNIX and UnixWare." App'x 313. Section V of the Asset Schedule, entitled "Intellectual property" provided that Santa Cruz would obtain "[t]rademarks UNIX and UnixWare as and to the extent held by Seller" but did not explicitly mention copyrights. App'x 315. In contrast, Schedule 1.1(b), the list of assets excluded from the deal, did expressly speak to copyrights. Section V—"Intellectual Property"—explained that "*All copyrights* and trademarks, except for the trademarks UNIX and UnixWare," as well as "[a]ll [p]atents," were excluded from the deal. App'x 318 (emphasis added).

IV. ARGUMENT.

A. The APA and Related "Bill of Sale" transferred the Registered U.S. "UNIX" Trademarks and the Goodwill Associated with Those Trademarks, to Santa Cruz.

It is beyond argument that, as of December 6, 1995, Santa Cruz owned the entire UNIX business, including the UNIX trademark licensing, the registered U.S. "UNIX" Trademarks, and the goodwill associated with those Trademarks, that formerly belonged to Novell.

The wording of the 1995 APA is clear that Novell (as Seller) and Santa Cruz (as Purchaser) agreed that there were no prior encumbrances on the registered U.S. "UNIX" Trademarks to be transferred by the "Bill of Sale." (Article II, Section 2.11(b)). The wording of Schedules 1.1(a) and 1.1(b) were clear and consistent in transferring Novell's entire UNIX business (including the UNIX trademark licensing business) "without limitation" to Santa Cruz; were clear and consistent in transferring all UNIX trademark licenses (including all May 1994 X/Open licenses) "without limitation" to Santa Cruz;

[31] *SCO v. Novell* Appeal Case No. 08-4217, Opinion ¶4 at page 3 through ¶1 at page 4.

and were clear and consistent in transferring all of Novell's "UNIX" trademarks to Santa Cruz. Attachment C to the "Seller [Novell] Disclosure Schedule" clearly identifies the transferring registered U.S. "UNIX" Trademarks.

Both before and after the execution and delivery of the "Bill of Sale" of December 6, 1995, Novell confirmed in its communications and documents that the intent of the 1995 APA was to transfer, and did transfer, to Santa Cruz all of its UNIX business ownership rights.[32]

California Contract Law

By its title "Assets," the intent of Schedule 1.1(a) is to identify unambiguously some, but not all, included assets, not to restrict transferring assets. Only those assets identified in Schedule 1.1(b), titled "Excluded Assets," are excluded from transfer, and no registered U.S. "UNIX" Trademarks, license agreements, or goodwill are identified as "Excluded Assets."

In their summary judgment motions and in their opposition to Mr. Gray's partial summary judgment motion, X/Open and Novell argued that the 1995 APA did not transfer Novell's registered U.S. "UNIX" Trademarks to Santa Cruz because the wording of Item V in Schedule 1.1(a) to the APA somehow obligated Novell to transfer its registered U.S. "UNIX" Trademarks to X/Open and not to Santa Cruz. That argument ignores established contract and trademark law. X/Open and Novell produced no

[32] (00719(No.47);00741(¶¶125-126);00742(¶128);00743(¶130);00743-00746(¶131);0747-00748(¶133);01010(¶5);01125(¶2);01654(No.76);01667(¶2);01700(¶1);01964(¶1);01973(No.4); 02138;02141(¶1); 02144(¶1);02151(¶2); 02153(¶1); 02154(¶3); (01516-01517(No.3);01517(No.4); 01522(No.17);01529(¶6);01683(¶2)).

evidence to support such an inconsistent, absurd, and meaningless interpretation.[33]

Without question, any interpretation -- that the wording of Item V in Schedule 1.1(a) of the 1995 APA *restricts* UNIX trademark transfer -- is absurd and contrary to the wording of the APA. For example, such an interpretation would make meaningless Article II, Section 2.11(b), of the APA, declaring that no transferring UNIX assets are encumbered. It also conveniently ignores Novell's admissions, and the Utah District Court's repeated acknowledgments in the Utah District Court Action, that Schedules 1.1(a) and 1.1(b) of the APA are consistent in transferring the registered U.S. "UNIX" Trademarks.[34] And it would make meaningless Novell's admissions, and the Utah District Court's declaration in the Utah District Court Action, that Novell in fact did transfer to Santa Cruz the registered U.S. "UNIX" Trademarks that it owned. "A contract may not be interpreted in a manner which would render one of its terms meaningless." *Kavruck v. Blue Cross of Cal.*, 108 Cal. App. 4th 773, 783 (2003). Indeed, it is fundamental that a court may not interpret one provision to render another provision "meaningless." *Ameripride Servs. v. Valley Indus. Serv* ., No. CIV. S-00-113 LKK/JFM, 2007 WL 656850, at *11 (E.D. Cal. Feb. 28, 2007).[35]

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[33] *Bionghi v. Metro. Water Dist.*, 70 Cal. App. 4 1358, 1363-66 (1999) (affirming summary adjudication where contractual clause was not reasonably susceptible to more than one meaning, declaring that a party cannot "smuggle extrinsic evidence to add a term to an integrated contract").

[34] Schedule 1.1(b) to the 1995 APA plainly states that Novell will not exempt any UNIX trademark from transfer to Santa Cruz. A fundamental principle of contract interpretation is that there are no surplus words. If the words are there, they have meaning and effect.

[35] The plain language alone governs the meaning of a contract unless that language "involve[s] an absurdity." See Cal. Civ. Code §§ 1638, 1639. The California Supreme Court has held that, "in the construction of a contract, the office of the court is simply to ascertain and declare what, in terms or in substance, is contained therein, and not to insert what has been omitted or omit what has been inserted." *Jensen v. Traders & Gen. Ins. Co.*, 52 Cal. 2d 786, 790 (1959) (citing Cal. Code Civ. Proc. § 1858). "[A]s a

Federal Trademark Law

Without question, Novell was gone from the UNIX business after the execution and delivery of the "Bill of Sale" of December 6, 1995. Novell agreed to the non-competition restrictions in both the APA and its related "Technology Licensing Agreement" ("the TLA"), and it never has identified any UNIX business that did not transfer to Santa Cruz in December, 1995.[36]

Established trademark law confirms that, because Novell transferred its entire UNIX business, and the goodwill associated with that business, to Santa Cruz and exited the UNIX business after December 6, 1995, stating its intent not to re-enter that business, the registered U.S. "UNIX" Trademarks automatically transferred to Santa Cruz. *See Oklahoma Beverage Co. v. Dr. Pepper Love Bottling Co.*, 565 F.2d 629, 632 (10th Cir. 1977) (concluding that trademark transferred with sale of entire business even though it was not mentioned in the sale contract and stating that "[n]o particular words are necessary for the assignment when the business and the goodwill are transferred to another who continued the operation under the same trademark."); J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 18:37 (4th ed. 2005) ("When a business is sold as a going concern, the intent to transfer good will and trademarks to the buyer is presumed. Good will and trademarks are transferred even though not specifically mentioned in the contract of sale. That is, trademarks and the good will they symbolize

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general matter, implied terms should never be read to vary express terms." *Carma Developers, Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 374 (1992).

[36] Novell was not involved in any UNIX business after December 6, 1995, and at least through 2001 (non-compete provisions in APA at Section 1.6 and in TLA at Section II.A.(2)). Dkt 301 at 3 and 4, in the Utah District Court Action.

are presumed to pass with the sale of a business.").[37]

Novell admitted, the Utah District Court accepted, and all evidence supports, that Schedules 1.1(a) and 1.1(b) to the 1995 APA are consistent in including the registered U.S. "UNIX" Trademarks owned by Novell, identified in Attachment C to Novell's "Seller Disclosure Schedule" to the 1995 APA, as UNIX assets that transferred to Santa Cruz pursuant to that transaction.

All evidence presented by Novell and SCO in the Utah District Court Action, and presented by Mr. Gray to the Florida District Court, supports the undisputed fact of Novell's transfer to Santa Cruz of its entire UNIX business (including its UNIX trademark licensing), its registered U.S. "UNIX" Trademarks, and the goodwill associated with those Trademarks, on December 6, 1995. Novell then exited the UNIX business, declaring that it had no intent to re-enter that business. Clearly, Novell was not in any UNIX business as of the so-called September, 1996, "Confirmation Agreement" or after that so-called "agreement."

B. The 1996 Confirmation Agreement is a Legal Nullity.

The wording in the 1996 "Confirmation Agreement" -- that Novell "will be considered" the owner of the registered U.S. "UNIX" Trademarks "for the purpose of" a future assignment -- has no legal meaning or significance. The parties could just have easily inserted "Brooklyn Bridge" for "trademarks" and it would have had just as much

[37] Where the entire business is purchased and the business is continued under its original name, it must be presumed that the purchaser acquired the goodwill of the business together with the commercial symbols of that goodwill, the business' trademarks and trade names. *Dovenmuehle v. Gilldorn Mortgage Midwest Corp.*, 871 F.2d 697, 700 (7th Cir. 1989) ("Absent contrary evidence, a business trade name is presumed to pass to its buyer.")

legal significance.

The bald assertion in the so-called "Confirmation Agreement" of Novell's trademark ownership for the purpose of a future event defies all established trademark law and common sense, and it reads more like an agreement to conceal from the relevant purchasing public the fact that the 1995 APA transferred the registered U.S. "UNIX" Trademarks.

The "Confirmation Agreement" Recognized The APA

A review of the pertinent documents discloses that Santa Cruz lawfully owned all right, title, and interest in and to the entire UNIX business, including the registered U.S. "UNIX" Trademarks and the goodwill associated with those Trademarks, after December 6, 1995, and no evidence has been presented that Santa Cruz subsequently lawfully transferred its registered U.S. "UNIX" Trademarks, and the goodwill associated with those Trademarks, to Novell or X/Open.[38]

No party to the Florida District Court Action has argued that the September, 1996, "Confirmation Agreement" modified (retroactively or otherwise), supplemented, or clarified any wording in the 1995 APA or the related "Bill of Sale" as to the ownership of the registered U.S. "UNIX" Trademarks. Indeed, the so-called "Confirmation Agreement" clearly confirmed Novell's intent to transfer its ownership and rights to the registered U.S. "UNIX" Trademarks to Santa Cruz pursuant to the 1995 APA. But, where

[38] It is absurd to think that Santa Cruz would need a certification mark license from X/Open to use its own registered U.S. "UNIX" Trademarks; Santa Cruz also held a UNIX trademark software product license since 1989 that it also owned after 1995. See SCO's Official website titled "Milestones in The History of The SCO Group 1979 through 1999 " at **1989** stating: "SCO … product licensed by AT&T to use the UNIX System trademark." at URL - http://www.sco.com/company/history_1979-1999.html .

that purported agreement went on to discuss transfers of those trademarks to X/Open, it was not a lawful trademark transfer agreement. Although Santa Cruz remained the lawful owner of the registered U.S. "UNIX" Trademarks, and the goodwill associated with those Trademarks, the agreement refers to a proposed future Novell-X/Open UNIX trademark transfer accelerated to occur prior to May 14, 1997, pursuant to the terms of some as-yet-unproduced May 14, 1994, Agreement, not the May 10, 1994, Agreement. No accelerated trademark transfer ever happened. No party ever has declared under oath to any court that the May 14, 1994, Agreement does not exist.

No bill of sale or other written instrument of transfer was executed in connection with the so-called "Confirmation Agreement." That agreement did not purport to retroactively modify the "Bill of Sale" as to the transferring assets; rather, the effective date of its terms was nine months after the 1995 APA closed with the execution and delivery of the related December 6, 1995, "Bill of Sale."

California Contract Law

If the September, 1996, "Confirmation Agreement" was an amendment to, and modified, the 1995 APA (which it did not as to any UNIX trademark), then its terms and provisions must be taken together with, and must be consistent with, those of the APA.[39]

The odd wording of the so-called "Confirmation Agreement" -- that Novell "shall … be considered the owner of …. the UNIX trademark" for the purpose of a future transfer to X/Open -- violated California contract law. That wording directly conflicts

[39] Cal. Civ. Code § 1641 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."). "A written instrument must be construed as a whole, and multiple writings must be considered together when part of the same contract." *Nish Noroian Farms v. Agric. Labor Relations Bd.*, 35 Cal. 3d 726, 735 (1984).

with the terms of Article II, Section 2.11(b), of the 1995 APA concerning no prior asset encumbrances, contradicts Schedules 1.1(a) and 1.1(b) to the APA, directly modified (without actually saying so) the related "Bill of Sale," and directly modified (without actually saying so) the APA and the TLA as to their UNIX business non-competition restrictions. That "Confirmation Agreement" ignored, violated, or otherwise declined to comply with established federal trademark law, because all UNIX business, including UNIX trademark licensing, UNIX license agreements, and registered U.S. "UNIX" Trademarks, and the goodwill associated with those Trademarks, transferred "without limitation" to Santa Cruz pursuant to the 1995 APA and its related "Bill of Sale." Even a casual reading of the so-called "Confirmation Agreement" discloses no provisions or words that may be interpreted as stating (or even suggesting) that its intent was to modify or supplement retroactively the specific and detailed language of the 1995 APA, its related "Bill of Sale," or the TLA.[40]

The so-called "Confirmation Agreement" does not identify the specific registered "UNIX" mark that Novell lawfully owned and was to transfer to X/Open. Where there are specific provisions of a document, detailing the assets being transferred and the assets being excluded, the more specific provisions control. *National Ins. Underwriters v. Maurice Carter*, 17 Cal. 3d 380, 386 (1976) ("[W]hen a general and a particular provision are inconsistent, the latter is paramount to the former."). Schedule 1.1(a) of the 1995 APA is consistent with Schedule 1.1(b) in identifying the UNIX Intellectual

[40] A question of fact remains for the jury as to the parties' knowing and willful intent to violate established trademark law concerning Novell's future transfer of registered U.S. "UNIX" Trademarks lawfully owned by Santa Cruz to X/Open. (00720(No.50);00747-00748(No.133);01966-01967(No.5); 01975(No.4)).

Property that Novell was transferring to Santa Cruz, and that schedule specifically included Novell's registered U.S. "UNIX" Trademarks, as identified on Attachment C to its Disclosure Schedule.[41]

The provision in the so-called "Confirmation Agreement" -- that Novell "shall …be considered the owner of ... the UNIX trademark" -- plainly was for the purpose of a future transfer to X/Open; it does not establish that Novell was the lawful owner of any UNIX trademark because of any retroactive modification to the 1995 APA. The so-called "Confirmation Agreement," after specifically confirming that the intent of the APA was to transfer (and did transfer) title to Novell's registered U.S. "UNIX" Trademarks to Santa Cruz, provides no explanation as to how or why Novell's purported ownership was lawful.

United States Federal Trademark Law

If the so-called "Confirmation Agreement" was a stand-alone agreement that superseded the 1995 APA (as the Florida District Court appears to have concluded), its terms and provisions relating to Novell's purported "UNIX" Trademark ownership must be consistent with prevailing federal trademark law. As such, the "Confirmation Agreement" (or some other as-yet not produced document) somehow must have lawfully transferred the registered U.S. "UNIX" Trademarks back to Novell. And that purported transfer would have been effective only as of September 4, 1996, the date of the "Confirmation Agreement."

There is no evidence of a transfer of either the registered U.S. "UNIX"

[41] (01735(¶2)).

Trademarks back to Novell. But even if there were, such a transfer would have been an invalid transfer "in gross." After selling its entire UNIX business, Novell exited that business with a stated intent not to re-enter it, and the UNIX goodwill (which is not even mentioned in the "Confirmation Agreement" or by the Florida District Court), remained with Santa Cruz and now is with its successor in interest, SCO.[42]

Ownership of a business necessarily includes the goodwill of the business, and it is well-settled that a trademark merely symbolizes that business goodwill. "If there is no business and no goodwill, a trademark symbolizes nothing."; "Goodwill and its trademark symbol are as inseparable as Siamese Twins who cannot be separated without death to both." (*McCarthy on Trademarks and Unfair Competition* (4th ed., 1992), §18:2, at 18-5 to 18-7 (release No. 38, Sept., 2006) (McCarthy).)

Goodwill is bound to the business with which it is associated, and it "can no more be separated from a business than reputation from a person." *Id.* at 18-7 (citing *Webster Investors, Inc. v. Comm'r*, 291 F.2d 192 (2d Cir. 1961)). To suggest that Novell's transfer of its entire UNIX business to Santa Cruz in 1995 did not include the goodwill of that business -- and necessarily the registered U.S. "UNIX" Trademarks symbolizing that goodwill -- is contrary to both common sense and established federal trademark law.

Because a trademark symbolizes the goodwill of a business, and it therefore has

[42] "[I]t is well-settled law that "the transfer of a trademark or trade name without the attendant good-will of the business which it represents is, in general, an invalid, "in gross" transfer of rights."" *Int'l Cosmetics Exchange, Inc. v. Gapardis Health & Beauty, Inc.*, 303 F.3d 1242, 1246 (11th Cir. 2002) (quoting *Berni v. Int'l Gourmet Rest. of Am.*, 838 F.2d 642, 646 (2d Cir. 1988)). Without the appurtenant goodwill, Novell could not legally hold the mark for later transfer to X/Open. *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97, 39 S.Ct. 48, 50, 63 L.Ed. 141 (1918) ("There is no such thing as property in a trademark except as a right appurtenant to an established business or trade in connection with which the mark is employed.").

no independent significance apart from that goodwill, the law requires "that good-will always go with the trademark . . . ." (2 McCarthy, supra, § 18:3.) Thus, "there are no rights in a trademark alone and . . . no rights can be transferred apart from the business with which the mark has been associated." *Mister Donut of America, Inc. v. Mr. Donut, Inc.* 418 F.2d 838, 842 (9th Cir. 1969); 2 McCarthy, *supra*, § 18:2. An attempt to assign or sell a trademark "divorced from its good-will" is characterized as an unenforceable "assignment in gross." 2 McCarthy, *supra*, § 18:3.

> A trademark cannot be sold 'in gross,' that is, separately from the essential assets used to make the product or service that the trademark identifies. (citations omitted.) The discontinuity would be too great. The consumer would have no assurance that he was getting the same thing (more or less) in buying the product or service from its new maker.

Green River Bottling Co. v. Green River Corp., 997 F.2d 359, 362 (7th Cir. 1993).

A contract's purpose must be to accomplish some goal that is legal and not in violation of established laws. Under California law governing contracts, an essential element of a contract is that it have a "lawful object." (Cal.Civ.Code § 1550.) The object of a contract must have been lawful when its parties attempted to form it. Cal.Civ.Code § 1596. A contract is not lawful if it is contrary to an express provision of law or is contrary to the policy of express law. (Cal.Civ.Code § 1667.) An unlawful or illegal contract is void. *Kolani v. Gluska*, 64 Cal.App.4th 402, 406-407, 75 Cal.Rptr.2d 257, 260 (1998). All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law. (Cal.Civ.Code § 1668.)

The trademark transfer provision of the so-called “Confirmation Agreement” does not have a lawful object under 15 U.S.C. § 1060(a) ("A registered mark or a mark for which application to register has been filed shall be assignable with the goodwill of the business in which the mark is used, or with that part of the goodwill of the business connected with the use of and symbolized by the mark."). Thus, the so-called “Confirmation Agreement” provision -- that Novell would at some future date transfer a UNIX trademark to X/Open that it has transferred and does not own -- violates established trademark law, is unlawful, and has no legal force or effect.

V. CONCLUSION.

Except as to ownership of the UNIX copyrights, SCO and Novell do not dispute that:

1. The registered U.S. “UNIX” Trademarks were free and clear of any liens, charges, pledges, security interests, or other encumbrances in 1995 (APA Article II, Section 2.11(b));

2. The intent of the APA was to transfer (and did transfer) Novell’s entire UNIX business and all UNIX trademark licenses “without limitation,” together with Novell’s registered U.S. “UNIX” Trademarks, to Santa Cruz (APA Schedule 1.1(a) and Schedule 1.1(b));

3. Title to all UNIX business assets, including Novell’s registered U.S. “UNIX” Trademarks, transferred to Santa Cruz upon the parties’ December 6, 1995, execution of the related “Bill of Sale”;

4. Novell was not involved in any UNIX business after December 6, 1995, and at least through 2001 (non-competition restrictions in APA at Section 1.6 and in TLA at Section II.A.(2)); and

5. Santa Cruz and its successors never lawfully transferred back to Novell any UNIX business, the UNIX trademark licenses and the registered U.S. “UNIX” Trademarks, or the goodwill associated with those Trademarks, on or after

December 6, 1995.

The Debtor SCO unquestionably is the lawful owner of the registered U.S. "UNIX" Trademarks, and the goodwill associated with those Trademarks, pursuant to the 1995 APA and by operation of established federal trademark law. Even if the intent of the 1996 "Confirmation Agreement" was to modify or supplement the APA as to UNIX trademark ownership (which it was not), neither Novell nor X/Open could be considered the lawful owner of the registered U.S. "UNIX" Trademarks because the goodwill followed the UNIX business, and the registered U.S. "UNIX" Trademarks are inseparable from their the goodwill associated with those Trademarks,. Novell's voluntary exit from the UNIX business, with no intent to re-enter, and the contractual prohibition upon re-entry, and X/Open's use of the word UNIX only as an unregistered certification mark, are both dispositive evidence that neither could lawfully own the registered U.S. "UNIX" Trademarks and the goodwill associated with those Trademarks, at any time for any reason after December 6, 1995.

Mr. Gray seeks SCO's immediate and full participation in the Florida Federal Court Action and the Eleventh Circuit Appeal because if it is not, SCO's stockholders and creditors risk being denied lawful ownership of the registered U.S. "UNIX" Trademarks, assets valued considerably over $15 million, and denied trademark licensing fees dating back to at least May, 1997, that may total several million dollars; and because X/Open is falsely claiming ownership of the registered U.S. "UNIX" Trademarks, Mr. Gray will be denied justice.

Accordingly, this Court should enter an order (i) lifting the automatic stay with

respect to the participation of the Debtor SCO in the Florida Federal Court Action, (ii) directing the Chapter 11 Trustee to investigate (and, if necessary, conduct discovery on) the merits of the view of the Movant Mr. Gray that, in fact and in law, SCO, and not X/Open, is the proper and exclusive owner of the registered U.S. "UNIX" Trademarks, and report the results of that investigation and evaluation to this Court and to counsel for Mr. Gray, along with a written recommendation as to the action (if any) to be taken by SCO in connection with the Eleventh Circuit Appeal. This Court then would authorize the Chapter 11 Trustee (Chief Judge Cahn) either to take no further action or to file a brief on behalf of SCO in the Eleventh Circuit appeal. Undersigned counsel for Mr. Gray, and Mr. Gray himself are prepared to offer Chief Judge Cahn and this Court all available assistance.

November 2, 2009.

Respectfully submitted,

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