MORRISON & FOERSTER LLP
Michael A. Jacobs, *admitted pro hac vice*
Eric M. Acker, *admitted pro hac vice*
Grant L. Kim, *admitted pro hac vice*
425 Market Street
San Francisco, CA 94105-2482
Telephone: (415) 268-7000
Facsimile: (415) 268-7522

ANDERSON & KARRENBERG
Thomas R. Karrenberg, #3726
Heather M. Sneddon, #9520
50 West Broadway, Suite 700
Salt Lake City, UT 84101
Telephone: (801) 534-1700
Facsimile: (801) 364-7697

Attorneys for Defendant and Counterclaim-Plaintiff Novell, Inc.

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP, INC., a Delaware corporation, Plaintiff, vs. NOVELL, INC., a Delaware corporation, Defendant.	**MEMORANDUM IN SUPPORT OF NOVELL'S RULE 60(b) MOTION FOR RELIEF FROM FINAL JUDGMENT** Case No. 2:04CV00139 Judge Ted Stewart

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 60(b), Novell requests that the Court set aside the portion of the District Court's November 20, 2008 Final Judgment that Novell was not entitled to royalties from certain licenses entered by SCO because those licenses did not constitute a license of the copyrights to the UNIX System V operating system ("SVRX License"). This portion of the Final Judgment was based on the Court's earlier summary judgment ruling that the UNIX copyrights were owned by Novell, and not by SCO. The District Court held that Novell had a contractual right to 95% of the royalties that SCO collected under SVRX Licenses, but that licenses that purported to release SCO's claims for infringement of UNIX System V copyrights could not constitute an SVRX License because SCO did not own those copyrights and hence had no rights to release. Thus, the essential predicate for the District Court judgment rejecting Novell's claim for SVRX royalties was its prior summary judgment ruling that SCO did not own the UNIX copyrights.

On August 24, 2009, the Tenth Circuit reversed the summary judgment ruling on copyright ownership and remanded that issue for trial. Thus, the District Court's judgment rejecting Novell's claim for SVRX royalties is based on a ruling that has now been vacated. Therefore, Novell is entitled to relief from that judgment under Federal Rule of Civil Procedure 60(b)(5), which authorizes relief from a judgment that "is based on an earlier judgment that has been reversed or vacated." Fed. R. Civ. P. 60(b)(5).

II. FACTUAL BACKGROUND

The SCO Group, Inc. ("SCO") commenced this lawsuit in 2004 asserting slander of title against Novell, Inc. ("Novell") for Novell's public statements that it had retained ownership of the UNIX and UnixWare copyrights when it sold part of its UNIX business to SCO's

predecessor-in-interest in 1995. (Dkt. No. 31.) Novell denied SCO's claims and asserted counterclaims for slander of title, breach of contract, and unjust enrichment. (Dkt No. 78.)

In February 2006, SCO filed a Second Amended Complaint that added numerous new claims. (Dkt. No. 96.) SCO alleged that Novell was distributing a version of the Linux operating system that infringed SCO's UNIX copyrights. (*Id.* at ¶¶ 13-14.) With respect to SVRX Licenses, SCO acknowledged that Novell had retained the right to receive certain royalties from those licenses, but alleged that Novell was attempting to extend that right beyond its contractual entitlement. (*Id.* at ¶¶ 15-16.) Novell responded by denying SCO's claims and asserting additional counterclaims, including a claim for 95% of royalties from all SVRX Licenses executed by SCO. (Dkt. No. 142 at ¶¶ 74-82.)

In August 2007, the District Court ruled on the parties' summary judgment motions. (Dkt. No. 377.) In July 2008, the Court issued a ruling following a bench trial resolving certain factual issues regarding royalties. (Dkt. No. 542.) A Final Judgment in the case was issued on November 20, 2008. (Dkt. No. 565.) In August 2009, the Tenth Circuit issued an opinion affirming part of the Final Judgment, but reversing parts of the District Court's summary judgment ruling. *SCO Group, Inc. v. Novell, Inc.*, 578 F.3d 1201 (10th Cir. 2009). The pertinent details of these decisions are described below.[1]

A. August 10, 2007 Summary Judgment Ruling: *Novell Owns the UNIX and UnixWare Copyrights.*

On August 10, 2007, Judge Kimball ruled on several summary judgment motions. (Dkt. No. 377.) Among other findings, the Court determined that Novell had retained the UNIX and UnixWare copyrights when it sold part of its UNIX business to SCO's predecessor-in-interest

[1] For the Court's convenience, copies of the three District Court orders and of the Tenth Circuit decision are submitted herewith as Exhibits 1 to 4 to the Declaration of Grant L. Kim.

pursuant to the 1995 Asset Purchase Agreement ("APA"). (*Id.* at 62, 99-100.) Based on the language of the APA and its subsequent amendments, the Court concluded that the UNIX and UnixWare copyrights did not pass to SCO's predecessor, but remained with Novell. (*Id.*) Accordingly, the Court granted judgment in Novell's favor on SCO's claims for slander of title and specific performance. (*Id.*)

The Court also held that Novell was entitled to 95% of royalties (100% minus a 5% administrative fee for SCO) from any license agreements between SCO and third parties covering UNIX System V, Releases 1-4 (collectively referred to as "SVRX Royalties"). (*Id.* at 4, 31-32, 89.) Under the APA, § 1.2(b), Novell retained "all rights to the SVRX Royalties notwithstanding the transfer of the SVRX Licenses to [SCO's predecessor]." (*Id.* at 31.) The APA listed as an excluded asset not transferred to SCO's predecessor "[a]ll right, title and interest to the SVRX Royalties, less the 5% fee for administering the collection thereof pursuant to Section 4.16." (*Id.* at 32 (APA at § 1.1(b)(VIII)).) Novell had retained the right to SVRX Royalties as part of the consideration it received for the sale of its UNIX business. (*Id.* at 11.)

On summary judgment, Novell argued that it was entitled to 95% of SVRX Royalties arising from certain licenses ("SCOsource Licenses") executed by SCO as part of its SCOsource initiative, an effort to license UNIX intellectual property rights to users of Linux, an operating system that SCO contends infringes the UNIX copyrights. (*Id.* at 29.) These SCOsource Licenses included (1) a 2003 license agreement with Sun Microsystems ("Sun Agreement"), (2) a 2003 license agreement with Microsoft ("Microsoft Agreement"), and (3) licenses to twenty-two other companies or individuals who were using Linux ("Other SCOsource Licenses"). (*Id.*; Dkt. No. 542 at 15-23.) The Court concluded that Novell was entitled to any SVRX Royalties arising from the Sun and Microsoft Agreements, but the amount of such royalties was a question

of fact to be determined at trial. (Dkt. No. 377 at 96, 101.) The Court did not address the Other SCOsource Licenses in its summary judgment ruling.

B. July 16, 2008 Bench Trial Ruling: *Novell Not Entitled to Royalties From SCOsource Licenses, Other Than Sun Agreement.*

In April and May 2008, Judge Kimball conducted a bench trial to determine, *inter alia*, the amount of SVRX Royalties owed to Novell arising from SCO's agreements with Sun and Microsoft, as well as the Other SCOsource Licenses. (Dkt. No. 542 at 3-4.) In a ruling issued on July 16, 2008, the Court concluded that Novell was entitled to royalties from the Sun Agreement, but not from the Microsoft Agreement or the Other SCOsource Licenses. (*Id.* at 31, 34, 42-43.)

The Court reasoned that because Novell had retained ownership of the SVRX copyrights and had not transferred those copyrights to SCO (as determined in the August 2007 summary judgment ruling), the Microsoft Agreement and the Other SCOsource Licenses were not SVRX Licenses. (*Id.* at 29, 31.) While the licenses purported to release claims for infringement of the SVRX copyrights, they could not actually release such claims because SCO did not own the SVRX copyrights and thus had no such rights to release. (*Id.*) Accordingly, because the Microsoft Agreement and Other SCOsource Licenses were not SVRX Licenses, Novell was not entitled to royalties from those agreements. (*Id.* at 31, 34.) As explained by the Court:

> Because the SCOsource licenses cannot be construed to include a release of SVRX copyright infringement, the court does not find the licenses to be SVRX Licenses that generated SVRX Royalties to Novell under the APA. SCO could not release Novell's rights to claims based on its ownership of the SVRX copyrights. Even if the releases contained in the SCOsource Agreements were considered SVRX Licenses, there is no value in the agreements with respect to Novell's SVRX interests. As such, Novell has no entitlement to monies SCO received with respect to a release of only SCO's rights.

(*Id.* at 31.)[2] Following the July 2008 bench trial ruling, Final Judgment was entered in the case on November 20, 2008. (Dkt. No. 565.)

C. August 24, 2009 Tenth Circuit Opinion: *Reversing Summary Judgment on Copyright Ownership and Remanding for Trial.*

SCO appealed several aspects of the District Court's August 2007 summary judgment ruling and July 2008 bench trial ruling, including the District Court's conclusion that Novell owned the UNIX and UnixWare copyrights. *SCO Group,* 578 F.3d at 1208. In its opinion of August 24, 2009, the Tenth Circuit reversed the District Court's grant of summary judgment on copyright ownership. *Id.* at 1214-19, 1227. The Tenth Circuit concluded that genuine issues of triable fact existed concerning the interpretation of the APA and its amendments. *Id.* Accordingly, the court remanded the copyright ownership issue for trial. *Id.* at 1227.

The Tenth Circuit also examined and affirmed the District Court's judgment that Novell was entitled to SVRX royalties arising from the agreement between SCO and Sun. *Id.* at 1225-27. In particular, the Tenth Circuit affirmed the District Court's finding that "agreements that post-date the APA may constitute SVRX Licenses." *Id.* Consequently, Novell's entitlement to royalties from any SVRX Licenses that post-date the APA has been examined and affirmed by the Tenth Circuit. *Id.*

Novell filed a petition for rehearing en banc on September 9, 2009. The Tenth Circuit directed SCO to file a response, and then denied Novell's petition on October 20, 2009. The Tenth Circuit issued its mandate returning the case to this Court on October 29, 2009.

---

[2] With respect to the Sun Agreement, the Court found that although the 2003 agreement did not and could not grant any new SVRX Licenses to Sun (for the same reason that applied to the Microsoft Agreement and Other SCOsource Licenses), the Sun Agreement expanded Sun's rights under an earlier SVRX agreement between Sun and Novell. (Dkt. No. 542 at 34-35.) Accordingly, Novell was entitled to royalties arising from that portion of the Sun Agreement that expanded Sun's rights with respect to SVRX products. (*Id.* at 41-42.)

III. ARGUMENT

Novell moves this Court under Fed. R. Civ. P. 60(b) to set aside the portion of the Final Judgment holding that Novell is not entitled to royalties from the Microsoft Agreement and the Other SCOsource Licenses. Rule 60(b) states in relevant part:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> * * *
>
> (5) the judgment ... is based on an earlier judgment that has been reversed or vacated....

Fed. R. Civ. P. 60(b).

Rule 60(b) movants must make a showing that (a) exceptional circumstances justify granting the motion, (b) their position regarding the issue to be re-opened is meritorious, (c) the motion is timely presented, and (d) there is no unfair prejudice to the opposing party. *See Werner v. Carbo*, 731 F.2d 204, 206-207 (4th Cir. 1984). The Tenth Circuit has stated that "[a] litigant shows exceptional circumstances by satisfying one or more of Rule 60(b)'s six grounds for relief from judgment." *Van Skiver v. United States*, 952 F.2d 1241, 1243-44 (10th Cir. 1991). The Tenth Circuit has emphasized that Rule 60(b) "gives the court a grand reservoir of equitable power to do justice in a particular case" and "should be liberally construed when substantial justice will thus be served." *Pierce v. Cook & Co., Inc.*, 518 F.2d 720, 722 (10th Cir. 1975) (citation omitted).

As discussed below, Novell's request to re-open a portion of the Final Judgment falls directly under the fifth ground of Rule 60(b), thereby qualifying as an exceptional circumstance justifying the motion. The issue that Novell seeks to re-open – its entitlement to royalties from the Microsoft Agreement and the Other SCOsource Licenses – is a meritorious claim and one that Novell is entitled to present at the upcoming trial. Finally, the motion is timely presented

and poses no unfair prejudice to SCO, since both parties have already prepared and presented this issue at the 2008 bench trial.

A. Novell's Request For Relief Fits Squarely Under Rule 60(b)(5).

Rule 60(b)(5) authorizes relief from a judgment that "is based on an earlier judgment that has been reversed or vacated." Fed. R. Civ. P. 60(b)(5). This test is indisputably met here. The Final Judgment regarding the Microsoft Agreement and Other SCOsource Licenses was based on the Court's earlier summary judgment ruling concerning ownership of the UNIX and UnixWare copyrights, a ruling that was subsequently reversed on appeal. In its August 10, 2007 summary judgment ruling, the Court held that Novell owned the UNIX and UnixWare copyrights (including SVRX copyrights). (Dkt. No. 377 at 62, 99-100.) In its bench trial ruling of July 16, 2008, the Court held that the Microsoft Agreement and Other SCOsource Licenses were not SVRX Licenses that generated SRVX Royalties for Novell. (*Id.* at 29, 31.) The Court found that the purported release of claims for infringement of SVRX copyrights in the Microsoft Agreement and Other SCOsource Licenses could not constitute an SVRX license because SCO could not release claims based on copyrights that it did not own. (*Id.*) The Tenth Circuit's reversal of the summary judgment ruling on copyright ownership vacates the basis for the Final Judgment on the Microsoft Agreement and Other SCOsource Licenses. Accordingly, it is necessary for that part of the judgment to be re-opened under Rule 60(b)(5).

The Tenth Circuit has held that relief from judgment is authorized when one of Rule 60(b)'s six grounds for relief is satisfied. *See Van Skiver*, 952 F.2d at 1243-44; *see also Federal Deposit Ins. Corp. v. United Pac. Ins. Co.*, 152 F.3d 1266 (10th Cir. 1998) (finding that the district court abused its discretion by denying Rule 60(b) relief). Moreover, the Fourth Circuit has applied Rule 60(b)(5) to grant relief from judgment when — as here — the judgment at issue

is based on a ruling by the same court that has been reversed on appeal. *Werner,* 731 F.2d at 208-209. *Werner* involved a negligence claim against Dr. Carbo, Dr. Carbo's professional corporation, and Upjohn Company (the drug manufacturer), for failing to provide adequate warnings in connection with a certain prescribed drug. *Id.* at 206. After the jury found both Dr. Carbo and Upjohn negligent, the court entered judgment against all three defendants, finding that the professional corporation's liability was coextensive with that of Dr. Carbo. *Id.* Dr. Carbo and Upjohn filed appeals and the Fourth Circuit vacated the judgments against them. *Id.* The professional corporation then filed a motion under Rule 60(b) to set aside the judgment against it, which the district court denied. *Id.* The Fourth Circuit held that the district court abused its discretion by failing to set aside the judgment under Rule 60(b)(5). *Id.* at 209. The Fourth Circuit explained that "when one judgment rests upon a contemporaneous judgment which has been reversed or otherwise vacated," Rule 60(b)(5) should be applied to set aside the judgment. *Id.* at 208.

Here, the Final Judgment of November 20, 2008, was based on the earlier summary judgment ruling on copyright ownership that was reversed on appeal, thus falling precisely under Rule 60(b)(5).

B. Novell's Position Regarding The Microsoft Agreement and Other SCOsource Licenses Is Meritorious.

Rule 60(b) movants must also show that their position on the issue they seek to re-open is meritorious (or viable) if the underlying facts are established – *i.e.*, that it constitutes a viable claim or defense. *See Olson v. Stone*, 588 F.2d 1316, 1319 (10th Cir. 1978). When reviewing a Rule 60(b) motion, the court "examines the allegations contained in the moving papers to

determine whether the movant's version of the factual circumstances surrounding the dispute, if true, would constitute a defense to the action." *Id.*

Novell has already demonstrated and the Court has found that Novell is contractually entitled to 95% of SVRX Royalties (100% minus a 5% administrative fee for SCO) arising from any SVRX Licenses executed by SCO. (Dkt. No. 377 at 4, 31-32, 89.) The Tenth Circuit affirmed Novell's entitlement to SVRX Royalties from the 2003 Sun Agreement. *SCO Group*, 578 F.3d at 1225-27. The upcoming trial will decide the issue of whether the UNIX and UnixWare copyrights (including SVRX copyrights) are owned by Novell or SCO. If it is determined that SCO owns the SVRX copyrights, then the Microsoft Agreement and Other SCOsource Licenses include SVRX Licenses, and Novell should be awarded the SVRX Royalties from those licenses.

C. Novell's Motion Is Timely and Poses No Unfair Prejudice To SCO.

Rule 60(b) motions must be submitted within a reasonable time. *See* Fed. R. Civ. P. 60(c)(1). When analyzing the timeliness of a Rule 60(b) motion, the court examines "the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." *Ashford v. Steuart*, 657 F.2d 1053, 1055 (9th Cir. 1981) (citations omitted). In *Werner*, the court found no prejudice where the "[t]he only prejudice claimed by Werner is that present when any judgment is vacated: the protraction of proceedings, the time and expense of a new trial, the loss of post-judgment interest." *Werner*, 731 F.2d at 207.

Novell's Rule 60(b)(5) motion is timely submitted within two months of the Tenth Circuit's mandate returning the case to this Court. The motion does not prejudice SCO, since both SCO and Novell have already prepared and presented their evidence and arguments on the

issue of Novell's entitlement to royalties from the Microsoft Agreement and Other SCOsource Licenses at the 2008 bench trial. Re-opening the judgment will not require delay or extension of the trial proceeding in any way.

IV. CONCLUSION

For the reasons set forth herein, Novell respectfully requests that the Court grant its Rule 60(b) motion to set aside the portion of the November 20, 2008 Final Judgment holding that Novell is not entitled to royalties from the Microsoft Agreement and the Other SCOsource Licenses. Novell's entitlement to royalties from these licenses should be determined at the March 2010 trial in this case, along with the issue of copyright ownership.

DATED: December 22, 2009

ANDERSON & KARRENBERG

By: /s/ Heather M. Sneddon

Thomas R. Karrenberg
Heather M. Sneddon

-and-

MORRISON & FOERSTER LLP
Michael A. Jacobs, *admitted pro hac vice*
Eric M. Acker, *admitted pro hac vice*
Grant L. Kim, *admitted pro hac vice*

Attorneys for Defendant and Counterclaim-Plaintiff Novell, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of December, 2009, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF NOVELL'S RULE 60(b) MOTION FOR RELIEF FROM FINAL JUDGMENT** to be served to the following:

Via CM/ECF:

Brent O. Hatch
Mark F. James
HATCH JAMES & DODGE, P.C.
10 West Broadway, Suite 400
Salt Lake City, Utah 84101

Stuart H. Singer
William T. Dzurilla
Sashi Bach Boruchow
BOIES, SCHILLER & FLEXNER LLP
401 East Las Olas Blvd., Suite 1200
Fort Lauderdale, Florida 33301

David Boies
Edward J. Normand
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504

Devan V. Padmanabhan
John J. Brogan
DORSEY & WHITNEY, LLP
50 South Sixth Street, Suite 1500
Minneapolis, Minnesota 55401

Via U.S. Mail, postage prepaid:

Stephen Neal Zack
BOIES, SCHILLER & FLEXNER LLP
100 Southeast Second Street, Suite 2800
Miami, Florida 33131

/s/ Heather M. Sneddon