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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.	Case No. 2:04CV00139 **REQUEST FOR JUDICIAL NOTICE OF PRIOR FACTUAL FINDINGS** Judge Ted Stewart

Pursuant to Federal Rule of Evidence 201, Defendant and Counterclaim-Plaintiff Novell, Inc. ("Novell") respectfully requests that the Court take judicial notice of certain factual findings that were previously made by this Court and affirmed by the Tenth Circuit or not appealed. These factual findings are relevant to the issues to be decided by the jury at the upcoming trial and should be presented to the jury in a jury instruction (Novell will submit a proposed instruction) and on the list of uncontroverted facts to be read at the outset of trial.

This Court previously made the following relevant factual findings which were either affirmed by the Tenth Circuit or not appealed:

> **Factual Finding 1.** "[A]greements that postdate the APA may constitute SVRX Licenses." *The SCO Group, Inc. v. Novell, Inc.*, 578 F.3d 1201, 1227 (10th Cir. 2009).

This factual finding was made by Judge Kimball in his August 10, 2007 summary judgment ruling (Summary Judgment Order at 100-101, Dkt. No. 377), affirmed by the Tenth Circuit on appeal (*SCO Group*, 578 F.3d at 1227), and again recognized by the Court in the recent order granting Novell's Motion in Limine No. 9 (Dkt. 711). This finding is relevant to Novell's defense against SCO's claim for damages in connection with its slander of title claim. SCO claims that Novell's statements regarding copyright ownership caused SCO to lose licensing opportunities under its SCOsource licensing program. Novell disputes this contention, but even if licensing opportunities were lost, 95% of the SVRX revenues from such licenses would have belonged to Novell in any event under the APA. Factual finding 1 is relevant to establishing that the prospective SCOsource licenses that SCO claims to have lost may have constituted SVRX licenses.

> **Factual Finding 2.** "Although Novell may have initially intended to sell the complete UNIX business, both parties agree that Santa Cruz was either unwilling or unable to commit sufficient financial resources to purchase the entire UNIX business outright." *SCO Group*, 578 F.3d at 1205.

Factual Finding 3. "If [one] were to interpret the contract based initially only on the APA itself – without regard to Amendment No. 2 – . . . its language unambiguously excludes the transfer of copyrights." *SCO Group*, 578 F.3d at 1210.

Factual findings 2 and 3 were made by Judge Kimball in his August 10, 2007 summary judgment ruling and affirmed by the Tenth Circuit on appeal. *SCO Group*, 578 F.3d at 1205, 1210. These findings are relevant to establishing the circumstances of the APA negotiations and the unambiguous quality of the copyright exclusion language in the original APA.

Factual Finding 4. "[T]here is no evidence that Novell's public statements [regarding copyright ownership] were based on anything but its good faith interpretation of the contracts." (Summary Judgment Order at 64, Dkt. No. 377.)

Factual Finding 5. "[T]here is no evidence to demonstrate that Novell's position [regarding copyright ownership] was contrary to its own understanding of the contractual language or objectively unreasonable given the history of the dispute between the parties." (Summary Judgment Order at 65, Dkt. No. 377.)

Factual findings 4 and 5 were made by Judge Kimball in his August 10, 2007 summary judgment ruling in connection with the Court's disposition of SCO's claims for unfair competition and breach of the implied covenant of good faith and fair dealing based on Novell's copyright ownership statements. (Dkt. No. 377 at 64-65.) Although those specific claims are no longer in the case (as recognized in the Court's recent order granting Novell's Motion in Limine No. 4), the factual findings are relevant to SCO's slander of title claim as well. To prove slander of title, SCO must show, *inter alia*, that Novell's statements regarding copyright ownership were made with constitutional malice. Factual findings 4 and 5 undermine that assertion, thus making them highly relevant to Novell's defense.

Factual Finding 6. "SCO breached its fiduciary duties to Novell by failing to account for and remit the appropriate SVRX Royalty payments to Novell for the SVRX portions of the 2003 Sun . . . Agreement[]." (Summary Judgment Order at 96, Dkt. No. 377.)

Factual Finding 7. "SCO was not authorized under the APA to amend, in the 2003 Sun Agreement, Sun's 1994 SVRX buyout agreement with Novell, and SCO needed to obtain Novell's approval before entering into the amendment." (Final Judgment at 2, Dtk. 565.)

Factual findings 6 and 7 were made by Judge Kimball in his August 10, 2007 summary judgment ruling and the November 20, 2008 final judgment. (Dkt. No. 377 at 96; Dkt. 565 at 2.) These findings were affirmed by the Tenth Circuit on appeal. *SCO Group*, 578 F.3d at 1227 ("we affirm the district court's ruling with respect to SCO's liability from its 2003 agreement with Sun"). These findings are relevant to establishing that SCO did not substantially perform its own obligations under the Asset Purchase Agreement ("APA"). Substantial performance is a required element of SCO's contract claim that Novell breached the implied covenant of good faith and fair dealing by directing SCO to waive its claims against IBM. *See* Judicial Council of Cal. Civ. Jury Instr. 303 ("To recover damages … for breach of contract, [plaintiff] must prove … [t]hat [plaintiff] did all, or substantially all, of the significant things that the contract required").

The Court may take judicial notice of the above facts because they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). A court may take judicial notice of documents filed and orders entered in any federal or state court, and judicial notice is "particularly applicable to the court's own records in prior litigation related to the case before it." *Amphibious Partners, LLC v. Redman*, 534 F.3d 1357, 1361-62 (10th Cir. 2008). This includes a court's own decisions, viewed as a "settled" issue in the 10th Circuit. *See, e.g., Merswin v. Williams Cos.*, 2010 U.S. App. LEXIS 2263, at *6 (10th Cir. Feb. 3, 2010); *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510, 521 (10th Cir. 1976) (not error for trial court to take judicial notice of preliminary injunction); *Wilson v. Oklahoma*, 2008 U.S. Dist. LEXIS 39215, at *32 (N.D. Ok. May 13, 2008) (proper for court to read from and rely on opinion and findings of other judge in prior stage of same case); *cf. Envoy Corp v. Quintiles Transnational Corp.*, 2007 U.S. Dist.

LEXIS 54429, at *12 (M.D. Tenn. July 26, 2007) (district court in 6th Circuit holding that court may take judicial notice of earlier summary judgment finding that party was entitled to recover for breach of contract).[1]

Novell further requests that, in accordance with Fed. R. Evid. 201(g), the Court instruct the jury to accept as conclusive the above judicially-noticed facts, by including them in a jury instruction and on the list of uncontroverted facts to be read to the jury at the outset of trial. Fed. R. Evid. 201(g) ("In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed.")

Dated: February 24, 2010

Respectfully submitted,

By: /s/ Sterling A. Brennan

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[1] Taking judicial notice of the above facts is not inconsistent with the Court's Order on Plaintiff's Motion in Limine No. 2, as findings 1-3 and 6-7 were affirmed by the Tenth Circuit, and findings 4 and 5 were not appealed. *See SCO Group*, 578 F.3d at 1205.