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Attorney for Plaintiff

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

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<b>The SCO Group, Inc.</b> by and through the	*	
Chapter 11 Trustee in Bankruptcy,	*	
Edward N. Cahn,	*	
	*	<b>PRETRIAL ORDER</b>
Plaintiff/Counterclaim-Defendant,	*	
	*	
vs.	*	<b>Case Number 2:04CV00139</b>
	*	
<b>NOVELL, INC.</b> , a Delaware corporation,	*	Judge Ted Stewart
	*	
Defendant/Counterclaim-Plaintiff.	*	

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**This matter having come before the Court on February 25, 2010, at a pretrial conference held before the Honorable Ted Stewart, pursuant to Fed. R. Civ. P. 16; and Brent O. Hatch, Stuart H. Singer, and Edward Normand, having appeared as counsel for plaintiff, and Sterling A. Brennan, Michael A. Jacobs, Eric Acker, and David Wright having appeared as counsel for defendant, the following action was taken:**

**1. JURISDICTION.** This is an action for slander of title, specific performance and breach of contract. Jurisdiction of the Court is invoked under 28 U.S.C. §§ 1331 and 1338(a). The jurisdiction of the Court is not disputed and is hereby determined to be present.

**VENUE.** Venue was determined by the Court to be proper pursuant to 28 U.S.C. § 1391(b), and is laid in the Central Division of the District of Utah. 28 U.S.C. § 125.

## **2. GENERAL NATURE OF THE CLAIMS OF THE PARTIES**

**(a) Plaintiff's claims:** SCO contends that Novell transferred the copyrights in the UNIX and UnixWare operating systems to SCO's predecessor-in-interest The Santa Cruz Operation, Inc. in 1995, pursuant to an amended Asset Purchase Agreement ("APA"). SCO contends that in publicly claiming to own the copyrights in the UNIX and UnixWare operating systems since 2003, Novell has acted recklessly and with the intent to gain a pecuniary advantage for itself and to harm SCO, and therefore has slandered SCO's title. SCO claims that Novell's claims of copyright ownership have been a substantial factor in harming SCO and its business. SCO had a licensing program, called SCOSource, to grant rights to use its copyrights. As a result of Novell's claims that it, rather than SCO, owned the UNIX and UNIXWARE copyrights, potential customers declined to purchase a license from SCO. (SCO claims in the alternative that if Novell did not transfer the copyrights in 1995, it must do so now under the APA.) SCO further claims that Novell has breached the implied covenant of good faith and fair dealing under the APA both in claiming to own the copyrights and in directing SCO to waive certain rights it had asserted against third parties for breaching rights owed to SCO. SCO also contends that Novell's attempted waiver of SCO's rights against IBM was outside the scope of its contractual authority.

**(b) Defendant's claims:** Novell contends that when it sold portions of its UNIX business to Santa Cruz in 1995, it retained (1) the UNIX copyrights, (2) the ongoing right to receive royalties from SVRX licenses, and (3) the right to direct SCO to amend, supplement, modify, or waive any rights under SVRX licenses. Amendment No. 2 to the APA did not effectuate a transfer of the UNIX copyrights to Santa Cruz. Novell's public statements regarding its ownership of the UNIX copyrights were truthful and based on Novell's good-faith interpretation of the APA and Amendment No. 2, as already determined by the Court. SCO's claims for slander of title and specific performance should, therefore, fail. SCO's claim for breach of the implied covenant of good faith and fair dealing also fails, because Novell has the right under the APA to direct SCO to waive its claims against IBM.

Novell asserts a counterclaim against SCO for slander of title. SCO made public statements claiming ownership of the UNIX copyrights with knowledge that title to the copyrights remained with Novell. SCO's slander of Novell's title has resulted in special damages, including Novell's costs and fees in preparing and filing copyright registrations and declarations correcting SCO's erroneous ownership claims and in prosecuting this action. Novell also seeks declaratory relief clarifying Novell's right under § 4.16(b) of the APA to direct SCO to waive claims against IBM and other SVRX licensees, Novell's right to waive such claims on SCO's behalf, and SCO's obligation to recognize such a waiver.

**3. UNCONTROVERTED FACTS. The following facts are established by admissions in the pleadings, by order pursuant to Fed. R. Civ. P. 56(d), or by stipulation of counsel:**

The SCO Group, Inc. is a Delaware corporation with its principal place of business in Linden, Utah. It has been in the business of developing and selling software products.

Novell, Inc. is a Delaware corporation with its executive offices in Waltham, Massachusetts, and its principal product development facility in Provo, Utah. Novell is also involved in the development and sale of software products.

UNIX is the name of a computer operating system originally developed in the late 1960s by engineers at AT&T's Bell Laboratories. Different versions of UNIX are in widespread use around the world.

In September 1995, Novell, Inc. and The Santa Cruz Operation, Inc. entered into an Asset Purchase Agreement, or "APA." The APA was signed on September 19, 1995, and was amended in December 1995 and October 1996.

The parties to the Asset Purchase Agreement were Santa Cruz and Novell, but SCO is now a party to the agreement in lieu of Santa Cruz. That is because several years ago SCO acquired from Santa Cruz all of the UNIX and UnixWare assets that Santa Cruz had acquired from Novell.

In March 2003, SCO filed a lawsuit against International Business Machines Corp. (“IBM”), alleging that (among other things) IBM had breached contracts that SCO has the right to enforce. SCO subsequently terminated those contracts for the alleged breach.

Linux is the name of a computer operating system that was published as open-source software in the early 1990s.

**Novell submits that the following statements should be included on the list of uncontroverted facts because they are factual findings made by the Court and affirmed by the Tenth Circuit or not appealed. SCO objects to these proposed statements which are not agreed facts. Some are not facts at all, others are not relevant, several are inaccurate, and all of them are unduly prejudicial. If the Court determines to include some or all of the following statements, SCO reserves the right to propose a similar list of legal conclusions that this Court and the Tenth Circuit previously, and recently, have reached.**

[SCO breached its contractual obligations under the APA by failing to comply with the terms imposed by Amendment No. 2 relating to buy-outs. SCO was therefore without authority under the APA to enter into the 2003 Sun Microsystems agreement.

The APA created a fiduciary relationship between Novell and SCO whereby SCO was required to “collect, administer and deliver to Novell” SVRX royalties. SCO breached its fiduciary duty and was liable for conversion based on its failure to pay Novell a share of the SVRX royalties that SCO collected under its agreement with Sun Microsystems.

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.

The APA itself – without regard to Amendment No. 2 – unambiguously excludes the transfer of copyrights.

Even if SCO owned the copyrights, there is no evidence that Novell’s public statements were based on anything but its good faith interpretation of the contracts.

There is no evidence that Novell’s position that it owns the UNIX copyrights was contrary to its own understanding of the contractual language or that Novell’s position was objectively unreasonable.

SVRX licenses are not limited to pre-APA agreements.]

**4. CONTESTED ISSUES OF FACT. The contested issues of fact remaining for decision are:**

1. Did the amended APA transfer the UNIX and UnixWare copyrights from Novell to SCO?
2. Did Novell assert after May 28, 2003, that it and not SCO owned the UNIX and UnixWare copyrights?
3. Did Novell know that its statements regarding copyright ownership were false? Did Novell act recklessly in claiming that it owns the UNIX and UnixWare copyrights?
4. Did Novell act with the intent to harm SCO in claiming that it owns the UNIX and UnixWare copyrights?
5. Did Novell’s statements regarding copyright ownership cause SCO special damages?
6. Did Novell have the authority to direct SCO to waive contract rights with respect to the contracts with IBM, and then to waive those rights on SCO’s

behalf? Did Novell act fairly and in good faith in directing SCO to waive the contract rights SCO asserted against IBM, and then waiving those rights on SCO's behalf?

7. Did SCO publicly assert in 2003 and thereafter that it and not Novell owned the UNIX and UnixWare copyrights?
8. Did SCO know that its claims to copyright ownership were false? Did SCO act recklessly in claiming that it owns the UNIX and UnixWare copyrights?
9. Did SCO act with the intent to harm Novell in claiming that it owns the UNIX and UnixWare copyrights?
10. Did SCO's factual assertion(s) to own the UNIX and UnixWare copyrights cause Novell special damages?

**5. CONTESTED ISSUES OF LAW. The contested issues of law, in addition to those implicit in the foregoing issues of fact, are:**

1. Does SCO have to prove under the First Amendment that Novell made its public statements concerning ownership of the UNIX and UnixWare copyrights with constitutional malice?
2. Did SCO inject itself into the public controversy about SCO's alleged UNIX rights and thus become a "limited purpose public figure" for First Amendment purposes?
3. Are certain of Novell's statements regarding ownership of the UNIX and UnixWare copyrights subject to an absolute litigation privilege? Did Novell abuse its privilege?
4. Are certain of Novell's statements concerning ownership of the UNIX and UnixWare copyrights, subject to qualified privileges? Did Novell abuse its privileges?
5. Is Novell liable for punitive damages?
6. Does Novell have to prove under the First Amendment that SCO made its public statements concerning ownership of the UNIX and UnixWare copyrights with constitutional malice?

**6. EXHIBITS. The parties are exchanging objections to their respective exhibits lists on February 24, 2010.**

**(a) Exhibits received in evidence and placed in the custody of the clerk may be withdrawn from the clerk's office upon signing of receipts therefor by the respective parties offering them. The exhibits shall be returned to the clerk's office within a reasonable time and in the meantime shall be available for inspection at the request of other parties.**

**(b) Exhibits identified and offered that remain in the custody of the party offering them shall be made available for review by the offering party to any other party to the action that requests access to them in writing.**

**(c) Except as otherwise indicated, the authenticity of received exhibits has been stipulated but they have been received subject to objections, if any, by an opposing party at the trial as to their relevancy and materiality. If other exhibits are to be offered, the necessity for which reasonably cannot now be anticipated, they will be submitted to opposing counsel at least five (5) days prior to trial.**

**7. WITNESSES.**

**(a) In the absence of reasonable notice to opposing counsel to the contrary:**

**(i) plaintiff will call as witnesses:**

1. Christine Botosan
2. William Broderick
3. Ed Chatlos
4. Gervaise Davis
5. Robert Frankenberg
6. Jeff Hunsaker
7. John Maciaszek
8. Darl McBride

9. Jack Messman (as adverse witness)
10. Paul Moxley
11. Gary Pisano
12. Chris Sontag
13. Duff Thompson
14. Ryan Tibbitts

**(ii) plaintiff may call as witnesses:**

1. Jean Acheson
2. Tom Cargill
3. Troy Keller
4. Kimberlee Madsen
5. Ty Mattingly
6. Doug Michels
7. Andy Nagle
8. Michael Olson
9. Ralph Yarro
10. Lee Johnson

**(iii) plaintiff may use the following depositions:<sup>1</sup>**

1. Aaron Alter
2. Mike Danaher
3. Larry Gasparro
4. Greg Jones
5. Philip Langer
6. Joe LaSala

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<sup>1</sup> Plaintiff reserves the right to designate deposition testimony of witness whom Plaintiff plans to call as live witnesses but who become unavailable to be called. Exhibits referenced in designated portions of depositions may be presented along with the referenced testimony.

7. Burt Levine
8. Alok Mohan
9. Greg Pettit
10. Steve Sabbath
11. Chris Stone
12. Maureen O’Gara
13. Jim Wilt

**(b) In the absence of reasonable notice to opposing counsel to the contrary:**

**(i) defendant will call as witnesses:**

1. Aaron Alter
2. Allison Amadia
3. David Bradford
4. Tor Braham
5. Gregory Jones
6. Joseph LaSala
7. Jack Messman
8. Terry Musika
9. Chris Stone
10. James Tolonen

**(i) defendant may call as witnesses:**

1. Jean Acheson
2. Michael Anderer
3. Mike Bready
4. Kellie Carlton
5. Greg Collier
6. Robert Frankenberg
7. Sandeep Gupta

8. Cindy Lamont
9. Bruce Lowry
10. James Ludwick
11. Robert Marsh
12. Patrick McBride
13. James McKenna
14. Steve Sabbath
15. Duff Thompson
16. Steve Welker
17. David Wright

**(iii) defendant may use the following depositions:**

1. Edward Chatlos
2. Michael Danaher
3. Michael DeFazio
4. Larry Gasparro
5. Samuel Greenblatt
6. Scott Handy
7. Burt Levine
8. Greg Pettit
9. Steve Sabbath
10. Blake Stowell
11. Jim Wilt

**(c) In the event that witnesses other than those listed are to be called to testify at the trial, a statement of their names, addresses, and the general subject matter of their testimony will be served upon opposing counsel and filed with the Court at least five (5) days prior to trial. This restriction shall not apply to rebuttal witnesses whose testimony, where required, cannot reasonably be anticipated before the time of trial.**

**8. REQUESTS FOR INSTRUCTIONS.** Requests for instructions to the jury and special requests for voir dire examination of the jury shall be submitted to the Court pursuant to DUCivR 51-1. Counsel may supplement requested instructions during trial on matters that could not reasonably be anticipated prior to trial.

**9. AMENDMENTS TO PLEADINGS.** There were no requests to amend pleadings.

**10. DISCOVERY.** Discovery has been completed on the claims that the parties agreed, and the Court ordered, are to be resolved prior to certain claims that the parties agreed, and the Court ordered, are not stayed. Discovery may commence on the stayed claims depending on the resolution of the instant trial and any appeal(s) therefrom.

**11. TRIAL SETTING.**

The case was set for trial with a jury on March 8, 2010, at 8 o'clock a.m. in Salt Lake City. 28 U.S.C. § 1404(b). The case is set for trial for three weeks from 8:30 a.m. to 1:30 pm. The parties have agreed that the hours available for trial shall be split evenly between them with each party's arguments, direct examinations and cross-examinations counting against its share of the allotted time. The parties further agree that the jurors may take notes during the trial.

With respect to SCO's claim that Novell breached the implied covenant of good faith and fair dealing by directing SCO to waive certain claims against IBM, Novell believes that the jury should decide this claim. SCO contends that the claim should be resolved by the Court.

With respect to Novell's request for declaratory judgment regarding Novell's rights under § 4.16 of the APA, Novell contends that the underlying factual issues are to be resolved by the jury, but the questions of whether declaratory judgment should issue and its precise language are

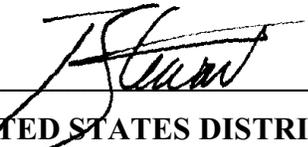
for the Court to resolve. SCO contends that the underlying factual issues, including the third and fourth issues identified in the Tenth Circuit's mandate, should also be resolved by the Court.

With respect to SCO's claim for specific performance, the parties agree that the Court should resolve that issue, if necessary, following the jury verdict.

**12. POSSIBILITY OF SETTLEMENT. Poor.**

**DATED: February 25, 2010**

**BY THE COURT**

  
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**UNITED STATES DISTRICT JUDGE**

**The foregoing proposed pretrial order (prior to execution by the court) is hereby submitted by all counsel of record this 23rd day of February, 2010.**

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