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**IN THE UNITED STATES DISTRICT COURT**

**DISTRICT OF UTAH, CENTRAL DIVISION**

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THE SCO GROUP, INC., a Delaware  
corporation,

Plaintiff,

vs.

NOVELL, INC., a Delaware corporation,

Defendant.

Case No. 2:04CV00139

**NOVELL, INC.'S TRIAL BRIEF**

Judge Ted Stewart

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Novell hereby submits this Trial Brief pursuant to the Court's January 6, 2010 Amended Scheduling Order. (Dkt. No. 613.) The brief includes an outline of the parties' claims and applicable law, and a list of each of the witnesses Novell plans to call with a short statement as to the substance of that witness's testimony.

## **I. STATEMENT OF THE CASE**

### **A. Background**

In this action, SCO asserts claims for slander of title, specific performance, and breach of the implied covenant of good faith and fair dealing. For its part, Novell asserts counterclaims for slander of title and declaratory relief.

One issue in this dispute is the scope of rights retained by Novell following the sale of part of its UNIX business to The Santa Cruz Operations, Inc. ("Santa Cruz"), a predecessor to SCO. Novell contends that when it sold portions of its UNIX business to Santa Cruz in 1995, it retained, among other things: (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.

In 1993, Novell paid over \$300 million to purchase the UNIX business, including the UNIX copyrights and licenses, from Unix Systems Laboratories, a spin-off from the UNIX operation system's first developer, AT&T. Two years later, Novell began negotiating with Santa Cruz for the sale of some of those same assets. Because Santa Cruz did not have the cash to purchase the entire UNIX business outright, the deal was structured so that Novell would retain a 95% interest in SVRX license royalties. The purpose for retaining ownership of the UNIX copyrights was to ensure that Novell was protected in the event Santa Cruz failed and Novell need to have unimpeded access to the SVRX royalties.

The parties' respective rights are determined by the "Asset Purchase Agreement" ("APA"), executed on September 19, 1995, as amended.<sup>1</sup> The APA expressly excludes all copyrights, including the UNIX copyrights, from the transferred assets. SCO contends, and Novell denies, that the UNIX copyrights were transferred by the APA as amended by Amendment No. 2.

SCO's claims for slander of title and specific performance fail because 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 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.

#### **B. Findings by the Court and Tenth Circuit**

The Court and the Tenth Circuit Court of Appeals have made the following findings in connection with prior motions for summary judgment:<sup>2</sup>

1. "[A]greements that postdate the APA may constitute SVRX Licenses."<sup>3</sup>
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."
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."

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<sup>1</sup> "Amendment No. 1" was signed by the parties in connection with the December 6, 1995 closing of the transaction, and "Amendment No. 2" was signed on October 16, 1996.

<sup>2</sup> These findings are the subject of Novell's Request for Judicial Notice of Prior Factual Findings. (Dkt. No. 729.) Per the Court's February 25, 2010 Order (Dkt. No. 735), Novell will submit further briefing in support of its request on March 2, 2010.

<sup>3</sup> See Novell's Motion in Limine No. 9 (Dkt. No. 650), which was granted by the Court. (Dkt. No. 711.)

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.”

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.”

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[.]”

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.”

## **II. CLAIMS AT ISSUE**

### **A. SCO’s Claim for Slander of Title**

SCO claims that Novell slandered SCO’s title to the UNIX copyrights by falsely and maliciously asserting that Novell, not SCO, owns the copyrights to UNIX.<sup>4</sup> To prevail on its claim for slander of title, SCO must prove all of the following four elements: (1) Novell made an unprivileged publication of a slanderous statement disparaging SCO’s ownership of the UNIX copyrights; (2) Novell’s statement was false; (3) Novell made the publication with malice; and (4) Novell’s publication caused SCO special damages.<sup>5</sup> Novell contends that SCO cannot meet its burden, and that Novell’s statements are also protected by the First Amendment and other privileges.

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<sup>4</sup> Novell contends that, under the mandate rule, SCO should be precluded from presenting evidence or argument on its slander of title claim at trial. (*See* Novell’s Motion in Limine No. 1, Dkt. No. 627.) The Court denied Novell’s motion in limine on this issue. (Order at 9, Dkt. No. 674.)

<sup>5</sup> *First Sec. Bank of Utah, N.A. v. Banberry Crossing*, 780 P.2d 1253, 1256-1257 (Utah 1989).

The following publications and statements by Novell are at issue: May 28, 2003 letter; June 6, 2003 letter;<sup>6</sup> June 26, 2003 letter; August 4, 2003 letter; December 22, 2003 press release; and March 2004 trade show remarks. SCO's allegations also include applications for copyright registration submitted by Novell to the United States Copyright Office in September and October 2003.

### **1. Unprivileged Publication of a Disparaging Statement**

To meet this element, SCO must show that Novell made an unprivileged public statement that disparaged SCO's title or ownership of the UNIX copyrights. In addition, to be actionable, the statement must also contain an objective assertion of fact about copyright ownership that is capable of being proven to be true or false.<sup>7</sup>

Novell contends that only the May 28, 2003 letter contains an assertion about ownership of the UNIX copyrights that is capable of being proved true or false, and that the subsequent statements should therefore not be considered by the jury.<sup>8</sup> As further discussed below, Novell also contends that each of its publications was privileged: (1) at least the private letters (June 6,

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<sup>6</sup> SCO has conceded that the statement in Novell's June 6, 2003 press release that Amendment No. 2 appears to support SCO's claim of ownership cannot constitute slander of title. (SCO's Opposition to Novell's Motion in Limine No. 5 at 1-2, Dkt. No. 685.)

<sup>7</sup> *Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Servs. Inc.*, 175 F.3d 848, 852 (10th Cir. 1999) (applying First Amendment "provably false" standard for defamation claims to state law claim for injurious falsehood) (*quoting Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) ("a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection")); *West v. Thomson Newspapers*, 872 P.2d 999, 1018-20 (Utah 1994) (Utah law requires the Court to distinguish fact from opinion by analyzing, among other things, "whether the statement is capable of being objectively verified as true or false").

<sup>8</sup> *See* Novell's Motions in Limine Nos. 5 and 6, Dkt. Nos. 632, 651. The Court has ruled that, as with defamation claims, the question of whether a statement is capable of sustaining a disparaging meaning is a question for the Court. (Order at 5, Dkt. No. 710 (citing *West v. Thomson Newspapers*, 872 P.2d 999, 1008 (Utah 1994)). However, the Court did not explicitly consider whether Novell's statements contained any statements that were provably false at the time they were made. To the extent the Court declines to rule on this issue, Novell believes the jury should be instructed accordingly.

June 26, and August 4, 2003) are subject to the absolute litigation privilege; (2) the May 28, 2003 letter, December 22, 2003 press release (and accompanying republication of private correspondence), and March 2004 trade show remarks are each subject to both the recipient's interest and rival claimant's privileges; and (3) the applications for copyright registration are subject to the rival claimant's and First Amendment right to petition privileges.

## **2. False Statement**

To meet this element, SCO must prove that the APA, as amended, in fact transferred ownership of the UNIX copyrights to SCO or its predecessor. Novell contends that when it sold portions of its UNIX business to Santa Cruz in 1995, it retained the UNIX copyrights. The copyright exclusion language of the APA itself has been found to be unambiguous.<sup>9</sup> Novell contends that Amendment No. 2 did not transfer the UNIX copyrights to Santa Cruz either.

The jury will decide what the parties intended at the time the contract was created. Although this intention should be inferred, if possible, from the written provisions of the contract, the Tenth Circuit has ruled that the jury may also consider extrinsic evidence of the negotiators' intent concerning the APA and its amendments to interpret ambiguous terms.<sup>10</sup>

Novell will show that the deal between Novell and Santa Cruz was not structured to transfer all of the UNIX assets to Santa Cruz because Santa Cruz did not have the cash to buy the entire UNIX business. Novell will also show that the copyright exclusion language in the APA was intended to protect Novell's future SVRX revenues, and also to protect Novell's other UNIX-related interests by strengthening Novell's rights to negotiate buyouts of the SVRX licenses. The parties' intent was that Novell would retain the copyrights in the original code, while Santa Cruz would own the copyrights in any code that it wrote.

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<sup>9</sup> *SCO Group, Inc. v. Novell, Inc.*, 578 F.3d 1201, 1210 (10th Cir. 2009).

<sup>10</sup> *Id.* at 1210-1211.

Amendment No. 2 was not intended to alter the original APA's exclusion of the UNIX copyrights and did not effectuate a transfer of those copyrights from Novell to Santa Cruz. When Santa Cruz approached Novell regarding Amendment No. 2, it was seeking to change the APA to give Santa Cruz ownership of the copyrights, but Novell did not agree to that proposal.

### **3. Constitutional Malice**

To meet this element, SCO must prove by clear and convincing evidence that Novell either (i) knew the statement was false or (ii) acted with reckless disregard for the truth when it made the statement.<sup>11</sup>

Novell will show that its statements regarding copyright ownership were not knowingly false, and were based on a reasonable interpretation of the APA. Prior to making its May 28, 2003 statement, Novell reviewed the APA and confirmed that the UNIX copyrights had not been transferred. Subsequently, Novell reviewed Amendment No. 2 to the APA and confirmed that the amendment did not effectuate a transfer of the UNIX copyrights from Novell to SCO. The Court has previously determined that Novell's interpretations of the agreements were made in good faith: "[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." (Order at 64, Dkt. No. 377.) Novell contends that SCO should be precluded, based on the law of the case and the mandate rule, from contesting that Novell had an objectively reasonable, good faith basis for its statements regarding copyright ownership.<sup>12</sup>

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<sup>11</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 280-81 (1964).

<sup>12</sup> See Novell's Motion in Limine No. 4, Dkt. No. 631. The Court ruled that SCO was precluded from litigating the copyright ownership portion of its claim for breach of the implied covenant of good faith and fair dealing. (Order at 5, Dkt. No. 724.) The Court did not rule on Novell's request in its Motion in Limine No. 4 that SCO be precluded from presenting evidence or argument that Novell lacked an objectively reasonable, good faith basis for its statements regarding copyright ownership. Per the Court's February 25, 2010 Order (Dkt. No. 735), Novell will submit further briefing on March 2, 2010, in support of its Request for Judicial Notice (Dkt. No. 729) of the prior factual findings that Novell's public statements regarding copyright ownership were based on its good faith interpretation of the contracts.

Novell contends that the constitutional malice (also called “actual malice”) standard applies because the First Amendment applies to SCO’s slander of title claim, and SCO was a “limited purpose public figure” at the time Novell’s statements were made.<sup>13</sup> These are questions of law that the Court has requested supplemental briefing on.<sup>14</sup> Although Novell believes that its own slander of title claim against SCO should not be subject to this heightened malice standard, it will not press the issue and instead agrees to have its own claim tried by the same standard.

#### **4. Special Damages**

To meet this element, SCO must prove that it suffered actual economic damage as a direct and immediate result of the slanderous false statement.<sup>15</sup> In other words, SCO must establish that the harm complained of resulted from the false statement and not from other factors.<sup>16</sup> The Court has ruled that a decline in stock price is not an appropriate claim for special damages.<sup>17</sup> Novell contends that SCO cannot meet its burden because, among other things, other factors contributed to the failure of the SCOSource campaign.

#### **5. Privileges**

Novell contends that it cannot be held liable for any of the allegedly slanderous statements because Novell was privileged to make those statements, and it has not abused the

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<sup>13</sup> See Novell’s Motions in Limine Nos. 2 and 3, Dkt. Nos. 629, 630.

<sup>14</sup> Order at 2, Dkt. No. 730. Per the Court’s February 25, 2010 Order (Dkt. No. 735), Novell will submit further briefing in support of its contention that the First Amendment applies to slander of title on March 2, 2010. SCO did not contest, in its “opposition” to Novell’s Motion in Limine No. 3, that it was a limited purpose public figure. (Dkt. No. 683.)

<sup>15</sup> Order at 11-12, Dkt. No. 621; Restatement (Second) of Torts §633 (2009); *Stoody Co. v. Royer*, 374 F.2d 672, 680 (10th Cir. 1967).

<sup>16</sup> *Dowse v. Doris Trust Co.*, 208 P.2d 956, 958 (Utah 1949); *Macia v. Microsoft Corp.*, 152 F. Supp. 2d 535, 541 (D. Vt. 2001).

<sup>17</sup> Order at 12, Dkt. No. 621.

applicable privileges. The privileges Novell asserts are the litigation privilege, the recipient's interest privilege, the rival property claimant's privilege, and the right to petition the government.<sup>18</sup>

**a. Litigation Privilege**

A party to litigation is privileged to publish slanderous statements during a lawsuit and even before a proposed lawsuit, so long as the statements have some relation to the lawsuit.<sup>19</sup> The litigation privilege is absolute, and the question of whether it applies is ordinarily a question of law for the Court.<sup>20</sup> However, the Court has ruled that the applicability of the privilege and whether it has been lost due to excessive publication will be questions for the jury.<sup>21</sup> A pre-litigation communication, such as a letter, would be excessively published if it was published to those who did not have a legitimate role in resolving the dispute, or if it was published to persons who did not have an adequate legal interest in the outcome of the proposed litigation.<sup>22</sup>

**b. Recipient's Interest Privilege**

Novell was privileged to publish the allegedly slanderous statements if they affect a legitimate interest of the recipient or audience.<sup>23</sup> This privilege is abused if the statement was made with constitutional malice, if the statement was made solely out of spite or ill will, or if the

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<sup>18</sup> Novell's Motion in Limine Nos. 7 and 8, Dkt. Nos. 633, 634.

<sup>19</sup> *Price v. Armour*, 949 P.2d 1251, 1256 (Utah 1997); Restatement (Second) of Torts § 587.

<sup>20</sup> *Krouse v. Bower*, 2001 UT 28, P19 (Utah 2001) (determining, on review of the district court's dismissal for failure to state a claim, that the litigation privilege applied and the statement was not excessively published).

<sup>21</sup> Order at 3, Dkt. No. 704.

<sup>22</sup> *Krouse v. Bower*, 2001 UT 28, P15 (Utah 2001).

<sup>23</sup> *Brehany v. Nordstrom*, 812 P.2d 49, 59 (Utah 1991).

statement was published to persons that did not have a legitimate interest in the statement.<sup>24</sup> The Court declined to rule whether this privilege applies, leaving it for the jury to decide.<sup>25</sup>

**c. Rival Property Claimant's Privileges**

Novell was privileged to assert ownership of the copyrights unless Novell abused that privilege.<sup>26</sup> This privilege is abused if the person claiming ownership does not believe that it owns the property.<sup>27</sup> The Court declined to rule whether this privilege applies, leaving it for the jury to decide.<sup>28</sup>

**d. Right to Petition the Government**

Novell was privileged to make statements in its applications for copyright registration unless Novell's applications were baseless and Novell filed those applications without regard to whether it was entitled to registration.<sup>29</sup> The Court denied Novell's motion to preclude SCO from relying on Novell's applications for copyright registration, reasoning that the filing of an application for copyright registration is akin to recording a lis pendens against property at issue in litigation.<sup>30</sup> At a time and in a manner convenient for the Court, Novell will present argument and authority demonstrating that the filing of an application for copyright registration is a

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<sup>24</sup> *Ferguson v. Williams & Hunt, Inc.*, 221 P.3d 205, 214–15 (Utah 2009); *Brehany v. Nordstrom*, 812 P.2d 49, 58 (Utah 1991); Restatement (Second) of Torts Section § 594, cmt b (1977).

<sup>25</sup> Order at 4, Dkt. No. 704.

<sup>26</sup> Restatement (Second) of Torts § 647.

<sup>27</sup> Restatement (Second) of Torts § 647 cmt. d; *O'Connor v. Burningham*, 165 P.3d 1214, 1224 (Utah 2007).

<sup>28</sup> Order at 4, Dkt. No. 704.

<sup>29</sup> *Anderson Devel. Co. v. Tobias*, 2005 UT 36, ¶¶ 26, 27; *Professional Real Estate Inv., Inc. v. Columbia Pictures Ind., Inc.*, 508 U.S. 49, 57 (1993).

<sup>30</sup> Order at 3, Dkt. No. 725.

petition to an agency of the Government to take certain action (viz., register a copyright), and is not the mere recording of an interest in property.<sup>31</sup>

**B. Novell’s Claim for Slander of Title**

Novell claims that SCO slandered Novell’s title to the UNIX copyrights by falsely and maliciously asserting that SCO, not Novell, owns the copyrights to UNIX. To prevail on its claim for slander of title, Novell must prove all of the following four elements: (1) SCO published a slanderous statement disparaging Novell’s ownership of the UNIX copyrights; (2) SCO’s statement disparaging the ownership of the UNIX copyrights was false; (3) SCO made the statement with malice; and (4) SCO’s statement caused Novell special damages.<sup>32</sup>

The following statements by SCO are at issue: March 7, 2003 press release; May 14, 2003 press release; June 6, 2003 press release; January 13, 2004 statement; January 28, 2004 Form 10-K filing. Novell’s allegations also include copyright applications submitted by SCO to the United States Copyright Office in June and July 2003.

Novell’s burden of proof on these elements is the same as outlined above with respect to SCO’s slander of title claim. (*See* section II.A.1-4)

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<sup>31</sup> *See, e.g.*, 17 U.S.C. § 410(a)–(c) (granting the authority to the Copyright Office to register copyrights “after examination,” which involves a “determination” that the subject matter of the copyright is copyrightable); U.S. Copyright Office, *Compendium II: Copyright Office Practice*, § 108.01 (“Examination is made to determine (1) whether or not the work for which registration is sought constitutes copyrightable subject matter and (2) whether or not the other legal and formal requirements have been met, including those set forth in the Copyright Office Regulations and in the Compendium of Copyright Office Practices.”); *id.* at § 108.09 (“[t]he Copyright Office will not register a claim where (1) the material deposited does not constitute copyrightable subject matter or (2) the claim is invalid for any other reason.”); *Black’s Law Dictionary* 1145 (6th ed. 1990) (defining “petition” as “A written address, embodying an application . . . from the person . . . preferring it, to the . . . person to whom it is presented, for the exercise of his . . . authority in the . . . grant of some favor, privilege, or license. A formal written request addressed to some governmental authority.”).

<sup>32</sup> *First Sec. Bank of Utah*, 780 P.2d 1253, 1256-1257 (Utah 1989).

**C. SCO's Claim for Specific Performance**

SCO claims it is entitled to specific performance of the amended APA, and seeks an order requiring Novell to transfer the UNIX copyrights to SCO. SCO is not entitled to this remedy because the APA does not require Novell to transfer ownership of the UNIX copyrights to SCO. This claim is to be decided by the Court, if necessary, following the jury verdict.

**D. SCO's Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing**

SCO contends that Novell breached the implied covenant of good faith and fair dealing under the APA by directing SCO to waive certain claims it had asserted against IBM for allegedly breaching rights owed to SCO. SCO argues that Novell's attempted waiver of SCO's claims against IBM was outside the scope of Novell's contractual authority.<sup>33</sup> The parties have agreed that this claim will be decided by the Court.<sup>34</sup>

Novell will show that it has the right under the APA to direct SCO to waive its claims against IBM. Under Section 4.16(b) of the APA, Novell retained the sole discretion to direct SCO to waive any rights under any SVRX licenses. Novell exercised its right to take action on behalf of SCO because it believed that SCO's threats to terminate the agreement with IBM implicated Novell's interests.

**E. Novell's Contract Performance Excused by Substantial Breach**

Novell contends that, to the extent it is obligated to transfer the UNIX copyrights under the APA or has breached its duty of good faith and fair dealing (which Novell denies), it is excused from performance because SCO materially breached the APA by entering into its 2003

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<sup>33</sup> SCO is precluded from litigating the copyright ownership portion of its claim for breach of the implied covenant of good faith and fair dealing. (*See* Order Granting Novell's Motion in Limine No. 4 at 4, Dkt. No. 724.)

<sup>34</sup> Per the Court's minute order of February 25, 2010 (Dkt. No. 733), Novell's position with respect to trial of issues by the Court and the jury will be explained in more detail in a March 2, 2010 submission on that topic.

agreement with Sun Microsystems without consulting Novell or obtaining its approval. The facts constituting SCO's breach are law of the case.<sup>35</sup>

Substantial performance requires that any "departure from the terms of a contract . . . be such as may be easily remedied or compensated."<sup>36</sup> To establish this as an excuse, Novell need show only one of the following: (1) that SCO breached an important part of the contract; *or* (2) that SCO's conduct was the type of breach that made it likely that SCO would breach important parts of the APA in the future.<sup>37</sup> SCO's breach was important because Novell did not receive essentially what the contract called for and SCO's failures were not so trivial or unimportant that they could have been easily fixed or paid for.<sup>38</sup>

#### **F. Novell's Unclean Hands Defense**

Novell claims that SCO should be denied relief on all of its claims because it has unclean hands. SCO has unclean hands if it (1) acted unconscientiously, or in bad faith, or unfairly,<sup>39</sup> and (2) the bad conduct was connected with the subject matter of the lawsuit.<sup>40</sup> Novell bears the burden of proving the conduct, while SCO bears the burden of proving either that its conduct was not unconscientious, or unfair, and that SCO was not acting in bad faith; or that the conduct

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<sup>35</sup> See Novell's Motion in Limine No. 11, Dkt. No. 636. The court denied Novell's request to preclude, in limine, evidence of SCO's substantial performance. (Dkt. No. 728.) Per the Court's February 25, 2010 Order (Dkt. No. 735), Novell will submit on March 2, 2010, further briefing in support of its request, raised in its Request for Judicial Notice (Dkt. No. 729), that the Court take judicial notice of the Court's prior finding that SCO breached the contractual terms of the APA.

<sup>36</sup> *Posner v. Grunwald-Marx, Inc.*, 56 Cal. 2d 169, 187 (Cal. 1961).

<sup>37</sup> 1-3D Cal. Forms of Jury Inst. MB 300D.78 (2009 ed.).

<sup>38</sup> CACI 312.

<sup>39</sup> *DeGarmo v. Goldman*, 19 Cal. 2d 755, 765 (1942); *Kendall-Jackson v. The Superior Court of Stanislaus County*, 76 Cal. App. 4th 970, 978; see also *Katz v. Karlsson*, 84 Cal. App. 2d 469, 474 (1948).

<sup>40</sup> *Kendall-Jackson*, 76 Cal. App. 4th at 974.

complained of was not connected with the subject matter of the lawsuit. Novell will show that, even if, arguendo, SCO owns the copyrights, it misused them by trying to collect royalties from companies that might not infringe the copyrights, and by refusing to give those companies the information they needed to either decide if they infringe the copyrights or change their code so they would not infringe.

**G. Novell's Claim for Declaratory Relief**

Novell 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. Novell agrees that its request for declaratory relief should be resolved by the Court.

**III. WITNESSES**

Novell presently plans to call the following witnesses at trial:

1. **Aaron Alter.** Mr. Alter was an attorney at Wilson Sonsini Goodrich & Rosati, Novell's outside counsel, who assisted Tor Braham with the negotiation and drafting of the APA in 1995. He will testify about the negotiation and drafting of the APA, including the copyright exclusion language. He will testify that the APA was not intended to transfer the UNIX copyrights to Santa Cruz.

2. **Alison Amadia.** Ms. Amadia was employed by Novell as in-house corporate counsel from 1995 through 1997, and was Novell's legal representative in the negotiations with Santa Cruz that led to Amendment No. 2. She will testify about the negotiation and drafting of Amendment No. 2, and the intent behind that amendment. She will testify that Amendment No. 2 was not intended to alter the original APA's exclusion of the UNIX copyrights or to effectuate a transfer of those copyrights from Novell to Santa Cruz.

3. **David Bradford.** Mr. Bradford was employed by Novell from 1985 to 2000 in various legal and business capacities, including Senior Vice-President, General Counsel. Mr. Bradford supervised Wilson Sonsini Goodrich & Rosati, the law firm retained to negotiate and

draft the APA. Mr. Bradford will testify about the negotiation and drafting of the APA, the intent behind the agreement at the time it was negotiated, the reasons that Novell retained the UNIX copyrights, the approval of the APA by Novell's board of directors, and the valuation of the deal memorialized in the APA. Mr. Bradford may also testify regarding Novell's acquisition of the UNIX business from AT&T in 1993.

4. **Tor Braham.** Mr. Braham was a partner at Wilson Sonsini Goodrich & Rosati, Novell's outside counsel, from 1989 to 1997. Mr. Braham led, oversaw, and managed the team that negotiated the terms of the APA under the direction of David Bradford. He was also the primary drafter of the language of the APA. Mr. Braham will testify about the negotiation and drafting of the APA, the parties' intent at the time the APA was negotiated, and the reasons Novell retained ownership of the UNIX copyrights.

5. **Gregory Jones.** Mr. Jones is the Vice President of Technology Law at Novell, and has been employed as counsel in Novell's Legal Department since 1992. Mr. Jones will testify about the communications between SCO and Novell regarding the UNIX copyrights. Mr. Jones will also testify as to Novell's expenses in securing copyright registrations and otherwise protecting its ownership of the UNIX copyrights.

6. **Joseph LaSala.** Mr. LaSala was Senior Vice President and General Counsel at Novell at the time SCO approached Novell about the UNIX copyrights in 2002. Mr. LaSala will testify about the communications between SCO and Novell regarding the UNIX copyrights, including Novell's basis for stating that it owned the UNIX copyrights, and the reasons for making its position public. Mr. LaSala will also testify as to the basis for Novell's waiver of claims against IBM on behalf of SCO.

7. **Jack Messman.** Mr. Messman was Novell's Chief Executive Officer from 2001 to 2006. Mr. Messman will testify about the communications between SCO and Novell regarding the UNIX copyrights, including Novell's basis for stating that it owned the UNIX copyrights and the reasons for making its position public.

8. **Terry Musika.** Mr. Musika, Novell's damages expert, will testify as to the contents of his rebuttal expert report, in which he reviewed and analyzed the expert reports submitted by SCO's damages experts, Christine A. Botosan and Gary Pisano. Mr. Musika will also testify about any opinions offered by Drs. Botosan or Pisano at trial.

9. **Chris Stone.** Mr. Stone was a Senior Vice President at the time SCO approached Novell about the UNIX copyrights in 2002. Mr. Stone will testify about the communications between SCO and Novell regarding the UNIX copyrights, including Novell's basis for stating that it owned the UNIX copyrights.

10. **James Tolonen.** Mr. Tolonen was Novell's Chief Financial Officer from 1989 to 1998, and was actively involved in the preparation of the APA. He was also the Novell executive who signed Amendment No. 2. Mr. Tolonen will testify regarding the negotiation of the APA and the parties' intent at the time the agreement was negotiated, including Novell's intent to retain the UNIX copyrights in order to protect its business interests. Mr. Tolonen will also testify that it was not Novell's intent to transfer the copyrights by way of Amendment No. 2.

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Respectfully submitted,

By: /s/ Sterling A. Brennan

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