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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 **NOVELL'S BRIEF IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE OF PRIOR FACTUAL FINDINGS** Judge Ted Stewart

I. INTRODUCTION

Pursuant to the Court's Order of February 25, 2010, Novell submits this brief in support of its Request for Judicial Notice of Prior Factual Findings of February 24, 2010 ("Request for Judicial Notice," Dkt. No. 729).

As explained in the Request for Judicial Notice, Novell seeks judicial notice of seven factual findings previously made by Judge Kimball. Five of these findings (Nos. 1, 2, 3, 6, 7) were affirmed by the Tenth Circuit. The other two findings (Nos. 4 and 5) were not appealed by SCO or reversed by the Tenth Circuit. All of these findings are subject to judicial notice pursuant to Rules 201(b) and 201(g) of the Federal Rules of Evidence because (1) they are factual findings included in the records of this litigation; (2) they are binding on SCO under the doctrines of law of the case, issue preclusion, and the mandate rule.

II. THIS COURT MAY TAKE JUDICIAL NOTICE OF PRIOR FACTUAL FINDINGS IN THIS LITIGATION

As Novell noted in its Request for Judicial Notice, the Tenth Circuit has repeatedly held that a court may take judicial notice of factual findings in the records of the same case or closely related litigation. (Request for Judicial Notice at 3-4.) For example, the Tenth Circuit held that the district court properly took judicial notice of factual findings in an order and judgment in a prior case involving the same parties because "[j]udicial 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) (citation and internal quotation marks omitted). Similarly, the Tenth Circuit held that the district court properly informed the jury of a prior preliminary injunction "since the court may take judicial notice of its own records, especially in the same case." *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510, 521 (10th Cir. 1976). The Tenth Circuit has also held that judicial notice may be taken of findings in a prior case in dismissing a later case based on *res judicata*. *Merswin v. Williams*

Cos., No. 09-5096, 2010 U.S. App. LEXIS 2263, at *6 (10th Cir. Feb. 3, 2010) (unpublished); *see also Wilson v. Oklahoma*, No. 02CV323, 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); *Envoy Corp. v. Quintiles Transnational Corp.*, No. 3:03CV0539, 2007 U.S. Dist. LEXIS 54429, at *12 (M.D. Tenn. July 26, 2007) (court may take judicial notice of earlier summary judgment finding that party was entitled to recover for breach of contract).

The factual findings subject to Novell's Request for Judicial Notice are included in the records of this case, including Judge Kimball's prior orders and the Tenth Circuit's decision. Therefore, these findings are properly subject to judicial notice.

III. THE LAW OF THE CASE AND ISSUE PRECLUSION DOCTRINES, AS WELL AS THE MANDATE RULE, CONFIRM THAT THIS COURT MAY TAKE JUDICIAL NOTICE OF PRIOR FACTUAL RULINGS THAT HAVE NOT BEEN REVERSED.

The law of the case and mandate rule principles set forth in Novell's Motion In Limine No. 4 confirm that this Court should take judicial notice of prior factual rulings that have not been reversed. (*See* Novell's Motion In Limine No. 4, Dkt. No. 631, at 2-3).

The law of the case doctrine bars relitigation of "issues previously decided, either explicitly or by necessary implication." *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1183 (10th Cir. 1995) (citation omitted). This doctrine is similar to that of issue preclusion, although law of the case normally involves the same case, while issue preclusion involves two different cases. *McIlravy v. Kerr-McGee Coal Corp*., 204 F.3d 1031,1035 n.1 (10th Cir. 2000) (citation omitted). Indeed, the Tenth Circuit has referred to "issue preclusion" even in the context of the same case, holding that district court was bound by factual findings of the jury when ruling on equitable claims in the same case. *Ag Servs. of Am., Inc. v. Nielsen*, 231 F.3d 726, 732-33 (10th Cir. 2000), *reh'g denied* 235 F.3d 559 (10th Cir. 2000). The doctrine of issue preclusion bars a party from "relitigating an issue once it has suffered an adverse determination on the issue, even if the

issue arises when the party is pursuing or defending against a different claim." *Moss v. Kopp*, 559 F.3d 1155, 1161 (10th Cir. 2009).

In *Ag. Services*, the Tenth Circuit reversed the district court's ruling on equitable claims on the ground that they conflicted with factual findings that were necessarily implied by the jury verdict on a different claim. 231 F.3d. at 733. The Tenth Circuit emphasized that issue preclusion did not require the two claims to have identical elements; rather, the "true test" is whether the earlier decision "by necessary implication reflects the resolution of a common factual issue." *Id*. at 732. Thus, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action." *Id.* (*quoting Robinson v. Volkswagenwerk AG*, 56 F.3d 1268, 1272 (10th Cir. 1995)); *see also Pines v. EMC Mortgage Corp*., No. 2:08CV137, 2009 U.S. Dist. LEXIS 53122, *11, 19-21 (D. Utah June 15, 2009) (issue preclusion barred federal and state law claims based on allegedly false credit reports, when different court had previously denied separate claim for injunctive relief on the ground that the reports were accurate); *Frye v. United Steelworkers of Am.*, 767 F.2d 1216, 1220 (7th Cir. 1985) (factual findings made in prior administrative action under one labor law bars relitigation of same issue in later court action under different law, since "it is not the similarity between the types of litigation or actions involved but between the factual issues and their roles in the respective actions that is important").

The mandate rule requires the same result. As this Court noted, the mandate rule "provides that a district court must comply strictly with the mandate rendered by the reviewing court," and "prevents a court from considering an argument that could have been, but was not, made on appeal." (2/18/2010 Order on Novell's Motion In Limine No. 1, Dkt. No. 674 at 7 (citing *Huffman v. Saul Holdings Ltd. P'ship*, 262 F.3d 1128, 1132 (10th Cir. 2001), and *United States v. Webb*, 98 F.3d 585, 589 (10th Cir. 1996)).)

IV. JUDICIAL NOTICE SHOULD BE TAKEN OF THE FACTUAL FINDINGS IDENTIFIED BY NOVELL

The above principles compel the conclusion that Novell's Request for Judicial Notice should be granted. The factual findings identified by Novell were either affirmed by the Tenth Circuit (Nos. 1, 2, 3, 6, and 7), or were not appealed by SCO and hence not reversed by the Tenth Circuit (Nos. 4 and 5). Therefore, those findings are binding on SCO under the law of the case, issue preclusion, and the mandate rule. Novell's Request for Judicial Notice explains the specific reasons for taking judicial notice of each Factual Finding. Novell has no further comments about Factual Finding Nos. 1 to 3, but submits the following additional comments concerning Factual Finding Nos. 4 to 7.

A. Factual Finding Nos. 4 and 5: Judicial Notice Should Be Taken of the Unchallenged Rulings that There Is No Evidence that Novell Lacked an Objectively Reasonable, Good Faith Basis for its Statements Regarding Copyright Ownership

As Novell explained in its Request for Judicial Notice and in its Motion In Limine No. 4, Factual Finding Nos. 4 and 5 are based on Judge Kimball's ruling that Novell was entitled to summary judgment on SCO's unfair competition and covenant of good faith claims on the alternative ground that there was no evidence that Novell lacked an objectively reasonable, good faith basis for its statement concerning copyright ownership. (Novell's Request for Judicial Notice at 2, Dkt. No. 729; Novell's Motion In Limine No. 4 at 1-2, Dkt. No. 631 (citing 8/10/2007 Summary Judgment Order at 64-65, Dkt. No. 377).) SCO did not challenge these rulings in its appeal, and the Tenth Circuit did not reverse them. (*See* Novell's Motion In Limine No. 4 at 2, Dkt. No. 631.) On the contrary, the Tenth Circuit held that Novell had "powerful arguments" on copyright ownership, and that this issue presented "ambiguities" that "could legitimately be resolved in favor of either party." *SCO Group, Inc. v. Novell, Inc.*, 578 F.3d 1201, 1215 (10th Cir. 2009).

This Court noted in its Order granting Novell's Motion In Limine No. 4, that SCO had conceded that "there were independent grounds for dismissal of its [unfair competition] claim that were not appealed." (2/23/2010 Order on Novell's Motion In Limine No. 4 at 1, Dkt. No. 724.) Therefore, Judge Kimball's dismissal of that claim on the ground that "there is no evidence that Novell's public statements [regarding copyright ownership] were based on anything but its good faith interpretation of the contracts" constitutes binding law of the case that is properly subject to judicial notice. (8/10/2007 Summary Judgment Order at 64, Dkt. No. 377).)

As to SCO's covenant of good faith claim, SCO previously argued that the Tenth Circuit implicitly reversed Judge Kimball's finding that "there is no evidence to demonstrate that Novell's position was contrary to its own understanding of the contractual language or objectively unreasonable given the history of the dispute between the parties." (SCO's Opposition to Novell's Motion In Limine No. 4 at 2, Dkt. No. 684.) This Court rejected SCO's argument, holding that Judge Kimball's rulings "were not appealed and, thus, not reversed, [so] this Court is without authority to revisit them on remand." (2/23/2010 Order on Novell's Motion In Limine No. 4 at 4, Dkt. No. 724.) Therefore, those rulings are law of the case and thus subject to judicial notice.

While the copyright ownership portions of SCO's unfair competition and covenant of good faith claims are no longer part of this case, Judge Kimball's finding that there was no evidence that Novell lacked an objectively reasonable, good faith basis for its statements is relevant to SCO's claim for slander of title. SCO's claim requires proof of "malice." Whether Novell had a reasonable basis for its statements is obviously relevant to this issue.

Moreover, as discussed above, it is well established that a factual ruling made in the context of one claim bars relitigation of the same issue in the context of a different claim. *See, e.g., Ag Servs.*, 231 F.3d at 732 ("once a court has decided an issue of fact or law necessary to its

judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action"); *Moss*, 559 F.3d at 1161 (issue preclusion bars party from "relitigating an issue once it has suffered an adverse determination on the issue, even if the issue arises when the party is pursuing or defending against a different claim"). Thus, the prior rulings on "good faith" and "objectively reasonable" bar SCO from relitigating these issues in the context of slander of title.

SCO suggested in its opposition to Novell's Motion In Limine No. 4 that the issue of whether Novell had a reasonable basis for its statements was not squarely presented to Judge Kimball. (*See* SCO's Opposition to Motion In Limine No. 4 at 1-2, Dkt. No. 684.) However, *SCO itself* raised this issue. SCO argued that summary judgment should be denied because the covenant of good faith can be breached by "objectively unreasonable conduct," and by "asserting an interpretation contrary to one's own understanding." (SCO's 5/18/2007 Opposition to Partial Summary Judgment at 18, Dkt. No. 299 (emphasis in original).) SCO asserted that "the evidence shows that Novell has asserted an interpretation of the APA and related documents contrary to its own understanding," relying on "its concurrently filed and forthcoming memoranda and the evidence cited therein."[1] (*Id.* at 18-19.)

Having urged Judge Kimball to find that Novell's statements were "contrary to its own understanding" and lacked an "objectively reasonable basis," SCO has no basis for complaining that Judge Kimball proceeded to consider and reject SCO's argument. Moreover, SCO failed to challenge these rulings in its appeal to the Tenth Circuit, and thus has no one to blame but itself for the fact that it is now bound by these rulings.

[1] By "concurrent" memoranda, SCO was apparently referring to its briefs on the parties' cross-motions for summary judgment on copyright ownership, which argued that the evidence showed that Novell knew that the copyrights had transferred to SCO but nevertheless claimed ownership in order to cause financial harm to SCO. (*See, e.g.*, SCO's 4/9/2007 Summary Judgment Motion at 2-3, 17-18, 28-30, Dkt. No. 259; SCO's 5/18/2007 Opposition to Summary Judgment at 67-74 (filed under seal as Dkt No. 306; redacted version available at Dkt. No. 325).)

In sum, Judge Kimball's unchallenged findings that there was no evidence that Novell's statements were "contrary to its own understanding" and lacked an "objectively reasonable basis" are relevant to SCO's slander of title claim and are properly subject to judicial notice as binding law of the case.

B. Factual Finding Nos. 6 and 7: Judicial Notice Should Be Taken of the Rulings that SCO Breached Its Fiduciary Duties and Was Not Authorized to Amend the Sun Agreement Without Novell's Approval

As Novell explained in its Request for Judicial Notice, Factual Finding Nos. 6 and 7—adjudicating SCO's failure to remit royalty payments and its unauthorized amendment of the Sun Microsystems agreement, respectively—were included in Judge Kimball's prior rulings and affirmed by the Tenth Circuit. (Novell's Request for Judicial Notice at 2, Dkt. No. 729.) Therefore they, too, are subject to judicial notice as binding law of the case.

Those findings are relevant because SCO continues to assert two claims against Novell for breach of APA, one for specific performance and the other for breach of the implied covenant of good faith and fair dealing. "Under a breach of contract theory" — *any* breach of contract theory — "the plaintiff must demonstrate … *plaintiff's performance* or excuse for nonperformance" under the contract. *Amelco Elec. v. City of Thousand Oaks*, 27 Cal. 4th 228, 243, 38 P.3d 1120 (2002) (emphasis added).[2] Although Findings 6 and 7 were made in the course of adjudicating a different claim, they are relevant to SCO's contract claims because they establish that SCO did not perform its obligations under the APA to (1) remit SVRX royalties and (2) refrain from making unauthorized amendments to SVRX licenses. *See SCO Group*, 578

[2] Novell's Motion in Limine No. 11 also referenced California Civil Code § 3392, under which specific performance is not available to "a party who has not fully and fairly performed all the conditions precedent on his part to the obligation of the other party." Here, by contrast, the issue is not conditions precedent but the general requirement that any plaintiff asserting breach of contract "must plead and prove … plaintiff's performance or excuse for nonperformance." *See Walsh v. West Valley Mission Comm. College Dist.*, 66 Cal. App. 4th 1532, 1545, 78 Cal. Rptr. 2d 725 (1998).

F.3d at 1225-26, 1227 ("First, the court held as a matter of law that the 2003 Agreement [with Sun Microsystems] constituted an 'SVRX License' within the meaning the APA, to which Novell was due royalties under the APA. Second, in a bench trial, the district court concluded that the 2003 agreement was an unauthorized amendment to an SVRX License (Novell and Sun's 1994 agreement) expressly prohibited by Article 4.16(b) of the APA." [citation omitted]; "SCO neglected to challenge … that its 2003 agreement with Sun represented an impermissible amendment to an SVRX License"; "we affirm the district court's ruling").

Novell is not by this submission seeking a ruling that SCO's claims are barred because SCO failed to perform its contractual obligations. That will come later. For now, Novell is seeking judicial notice only of previously adjudicated facts relevant to that determination. If notice is not taken then Novell will have to put on the underlying evidence to prove those facts—again—at trial.

V. CONCLUSION

For the reasons set forth above, Novell respectfully requests that the Court take judicial notice of Factual Finding Nos. 1 to 7 and provide an appropriate instruction to the jury.

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Respectfully submitted

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