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

<p>THE SCO GROUP, INC., by and through the Chapter 11 Trustee in Bankruptcy, Edward N. Cahn,</p> <p>Plaintiff/Counterclaim-Defendant,</p> <p>vs.</p> <p>NOVELL, INC., a Delaware corporation,</p> <p>Defendant/Counterclaim-Plaintiff.</p>	<p>SCO'S OPPOSITION TO NOVELL'S MOTION TO DETERMINE THAT FIRST AMENDMENT DEFENSES APPLY TO SLANDER OF TITLE AND REQUIRE PROOF OF CONSTITUTIONAL MALICE</p> <p>Civil No. 2:04 CV-00139</p> <p>Judge Ted Stewart</p>
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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 1

 I. THE NATURE OF SCO’S CLAIM DOES NOT WARRANT THE FIRST
 AMENDMENT PROTECTION NOVELL SEEKS 1

 A. The Relevant Rationales and Balance of Interests..... 2

 B. SCO’s Claim Implicates Unprotected Interests of the Defendant. 2

 C. Novell’s Line of Argument, and Citations, Are Misplaced..... 6

 II. THE NATURE OF NOVELL’S SPEECH DOES NOT WARRANT THE FIRST
 AMENDMENT PROTECTION NOVELL SEEKS 8

 III. SCO’S PROPOSED VERDICT FORM IS APPROPRIATE TO DEAL WITH FIRST
 AMENDMENT CONCERNS NOVELL HAS RAISED..... 11

CONCLUSION..... 11

TABLE OF AUTHORITIES

Cases

Bd. of Trustees of the State Univ. of N.Y. v. Fox,
492 U.S. 469 (1989)..... 9

Blatty v. New York Times Co.,
42 Cal. 3d 1033 (1986) 6

Bolger v. Youngs Drug Prods. Corp.,
463 U.S. 60 (1983)..... 9

Bose Corp. v. Consumers Union of U.S., Inc.,
466 U.S. 485 (1984)..... 6

Bose Corp. v. Consumers Union,
508 F. Supp. 1249 (D. Mass. 1981) 6

Eddy’s Toyota of Wichita, Inc. v. Kmart Corp.,
945 F. Supp. 220 (D. Kan. 1996)..... 8

Henderson v. Times Mirror Co.,
669 F. Supp. 356 (D. Colo. 1987)..... 7

Hustler Magazine v. Falwell,
485 U.S. 46 (1988)..... 3, 7

Jefferson County School District No. R-1 v. Moody’s Investor’s Services, Inc.,
175 F.3d 848 (10th Cir. 1999) 1, 2

Mast v. Overson,
971 P.2d 928 (Utah Ct. App. 1998) 5

Milkovich v. Lorain Journal Co.,
497 U.S. 1 (1990)..... 2, 7

Mueller v. Abdnor,
972 F.2d 931 (8th Cir. 1992) 5

Neuralstem, Inc. v. StemCells, Inc.,
2009 WL 2412126 (D. Md. Aug. 4, 2009) 9

New York Times Co. v. Sullivan,
376 U.S. 254 (1964)..... 2

<u>Ohralik v. Ohio State Bar Ass’n,</u> 436 U.S. 447 (1978).....	8
<u>Paterson v. Little, Brown & Co.,</u> 502 F. Supp. 2d 1124 (W.D. Wash. 2007).....	5
<u>Procter & Gamble Co. v. Amway Corp.,</u> 242 F.3d 539 (5th Cir. 2001)	9
<u>Proctor & Gamble Co. v. Haugen,</u> 222 F.3d 1262 (10th Cir. 2000)	9
<u>South Dakota v. Kansas City Southern Industries,</u> 880 F.2d 40 (8th Cir. 1989)	7
<u>Time, Inc. v. Hill,</u> 385 U.S. 374 (1967).....	4, 5
<u>Toyota of Wichita, Inc. v. Kmart Corp.,</u> 945 F. Supp. 220 (D. Kan. 1996).....	8
<u>U.S. Healthcare, Inc. v. Blue Cross,</u> 898 F.2d 914 (3d Cir. 1990).....	9
<u>Unelko Corp. v. Rooney,</u> 912 F.2d 1049 (9th Cir. 1990)	7
<u>Zacchani v. Scripps-Howard Broadcasting Co.,</u> 433 U.S. 562 (1977).....	3, 4, 5

Plaintiff/counterclaim-defendant, The SCO Group, Inc. (“SCO”), respectfully submits this Memorandum in Opposition to Novell’s Motion to Determine That First Amendment Defenses Apply to Slander of Title and Require Proof of Constitutional Malice.

INTRODUCTION

The Court has asked for more authority, not more argument. Novell’s brief does not present any significant new cases. The fact remains that the only federal court squarely to confront the issue has concluded that a defendant is not entitled to the First Amendment standard of proof in defending a claim for slander of title. Novell also fails in its effort to distinguish the Supreme Court precedent providing the analysis that controls here. The Court should properly deny Novell’s motion, but recognizing the uncertainty on the issue, SCO asks the Court to structure the verdict form and jury instructions to avoid the need for a retrial, regardless of how the Court of Appeals may resolve the issue.

ARGUMENT

I. THE NATURE OF SCO’S CLAIM DOES NOT WARRANT THE FIRST AMENDMENT PROTECTION NOVELL SEEKS

Novell concedes that no federal court has applied to a claim for slander of title the First Amendment protection that Novell seeks. Novell tries to argue (at 2-5) from a sort of “transitive property” that in Jefferson County School District No. R-1 v. Moody’s Investor’s Services, Inc., 175 F.3d 848 (10th Cir. 1999), the Tenth Circuit applied the protection to a claim for “injurious falsehood,” and that it has generally been stated that a claim for slander of title is a type of claim for “injurious falsehood,” but Novell concedes that none of the actual claims the Tenth Circuit resolved was a claim for slander of title. Indeed, Novell’s citation (at 4) to Sack on Defamation confirms that claims for “injurious falsehood” do not concern a claim that a plaintiff has personally been defamed.

The Supreme Court has long held in the First Amendment context that “we are compelled by neither precedent nor policy to give any more weight to the epithet ‘libel’ than we have to other ‘mere labels’ of state law.” New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964). The mere label given to a state claim, in short, does not determine whether it does or does not implicate First Amendment concerns. Id. SCO addresses below the even more fundamental problems with Novell’s reliance on Jefferson.

A. The Relevant Rationales and Balance of Interests.

First Amendment protection applies to claims for defamation in cases against public figures, or limited-purpose public figures, because (i) there is an important state interest in permitting criticism of public officials in their conduct of governmental affairs; (ii) there is an important state interest in permitting criticism of individuals who are intimately involved in the resolution of important public questions or who shape events in areas of concern to society at large; and (iii) public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning themselves. Milkovich v. Lorain Journal Co., 497 U.S. 1, 10-18 (1990) (citing authority). The precedent thus reflects the Court’s balance of the state’s relatively weak interest in protecting individuals from defamatory falsehoods about themselves, where they have exposed themselves to public commentary and on public issues, against the First Amendment’s protection of “uninhibited, robust, and wide-open” debate about such public figures. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

B. SCO’s Claim Implicates Unprotected Interests of the Defendant.

The threshold question here is the following: Does SCO’s claim implicate the rationales and balance of interests at issue in the Supreme Court’s relevant precedent? If yes, the state interest in protecting such statements is implicated, and the First Amendment applies. If no, that

state interest is not implicated, and there is no basis for affording Novell any First Amendment protection. The answer to that threshold question is “no.”

In particular, Novell misapprehends the significance of the Supreme Court’s decision in Zacchani v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977). Zacchani speaks directly to a critical question in this case: How does the Supreme Court analyze the First Amendment issue when the plaintiff has not brought a claim implicating the plaintiff himself, and where in fact there is a strong state interest in protecting the plaintiff’s right to pursue his claim? The relevant question is whether the Supreme Court’s analysis of the claim for misappropriation of property in that case, rather than the analysis of a defamation-type claim about an individual that Novell proposes, is the relevant one here. The answer is “yes.”

The Court explained that whereas the “interest protected” in a defamation claim is “permitting recovery for placing the plaintiff in a false light,” the interest in permitting a right to the fruits of one’s property, concerning the plaintiff’s circus act, “is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment.” Id. at 572-73. The interest is thus “closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation.” Id. at 573 (emphasis added). Where the Constitution empowered Congress to enact laws “intended definitely to grant valuable, enforceable rights in order to afford greater encouragement to the production of works of benefit to the public,” the Constitution does not prevent the full use of state law similarly “to protect the entertainer’s incentive in order to encourage the production of this type of work.” Id. at 576-77; see also Hustler Magazine v. Falwell, 485 U.S. 46, 53 (1988) (reaffirming the ruling in Zacchani “that the ‘actual malice’ standard does not apply to the tort of appropriation of a right of publicity”).

It bears emphasis moreover, that the Supreme Court's analysis in Time, Inc. v. Hill, 385 U.S. 374 (1967), presaged the holding in Zacchani. In Time, which Novell (at 2-3) concedes to be relevant, the Court considered whether the defendant could invoke a First Amendment defense against the plaintiff's claim under a New York right of privacy statute. The Court noted that the particular grounds on which plaintiff invoked the statute was the right of action that exists where the defendant's "name, picture, or portrait is the subject of a 'fictitious' report or article." Id. at 384-85. The Court described the plaintiff's claim as one for "calculated falsehood." Id. at 390. In addition, critical to the analysis here, the Court initially observed that the text of the New York statute appeared to proscribe only "the appropriation and use in advertising or to promote the sale of goods, of another's name, portrait or picture without his consent." Id. at 381. The Court stated: "An application of that limited scope would present different questions of violation of the constitutional protections for speech and press." Id. (emphasis added). The Court's analysis thus underscores the need for a court to analyze and understand the particular scope of the plaintiff's claims, in order to consider the appropriate "questions" and "constitutional protections" at issue.

Considering its decision in Time, the Zacchani Court then took care to emphasize the very particular scope of the claim at issue in that case. The Zacchani Court thus emphasized that the Time Court "was aware that it was adjudicating a 'false light' privacy case involving a matter of public interest, not a case involving 'intrusion,'" or "'appropriation' of a name or likeness for the purposes of trade." Zacchani, 433 U.S. at 571-72. The Court further emphasized: "It is also abundantly clear that Time, Inc. v. Hill did not involve a performer, a person with a name having commercial value, or any claim to a 'right of publicity.' This discrete kind of 'appropriation' case was plainly identified in the literature cited by the Court and had been adjudicated in the

reported cases.” Id. at 572 (citing Time, 385 U.S. at 383-85). The Zacchani Court then compared (i) the Time Court’s assessment of the “false light” claim (the claim that the Time Court called a “calculated falsehood” claim, such as for defamation) with (ii) the plaintiff’s claim for misappropriation of the fruit’s of his property, and explained: “The differences between these two torts are important.” Id. at 573.

Novell’s heavy reliance on labels such as “injurious falsehood” thus seeks to obscure the appropriate analysis. The substance of SCO’s claim for slander of title, under the facts of this case, plainly implicates the same state interest at issue in Zacchani. SCO’s claim seeks to enforce not just any proprietary interest, and not only its proprietary interest in the UNIX and UnixWare businesses, but also its particular proprietary interest in the UNIX and UnixWare copyrights. SCO’s claim is not one to redress injury to its “feelings or reputation.” The Eighth Circuit’s decision in Mueller v. Abdnor, 972 F.2d 931, 937 (8th Cir. 1992), in cogent fashion, reflects the same fundamental distinction between defamation of “land” and defamation of “an individual’s reputation.”¹ SCO’s claim directly concerns the “valuable, enforceable rights” that the Constitution empowered Congress to afford copyright owners. SCO is entitled to the full use of state law to protect all of SCO’s interests in the rights and benefits of copyright ownership.

¹ Novell’s brief argument and citations (at 6-7) against the relevance of Mueller are of little moment. Novell first argues that Mueller acknowledges that First Amendment protection is needed to avoid inhibiting public discussion of public figures or public issues, but the court of course held that the claim for slander of title did not implicate any such concerns. If Novell means to argue that the Court must carefully examine the particular claim at issue in assessing whether First Amendment protection applies, rather than relying solely on labels, SCO agrees. Novell then cites two cases that address only claims for defamation. Paterson v. Little, Brown & Co., 502 F. Supp. 2d 1124, 1140-42 (W.D. Wash. 2007); Mast v. Overson, 971 P.2d 928, 929-32 (Utah Ct. App. 1998). The analysis in those cases, which are in any event subordinate to the Supreme Court’s controlling precedent with respect to defamation claims, does not advance the argument on whether the First Amendment should apply to a claim for slander of title.

C. Novell's Line of Argument, and Citations, Are Misplaced.

The authority Novell cites does not, at least not in any controlling or even persuasive fashion, favor the relief that Novell seeks with respect to the particular claim that SCO has brought here, with respect to the UNIX and UnixWare copyrights. The decisions arising from Bose Corp. v. Consumers Union, 508 F. Supp. 1249 (D. Mass. 1981), contrary to Novell's characterization, do not support Novell. Novell suggests(at 3), for example, that the district court held that "First Amendment applies to product disparagement claim," and that the Supreme Court affirmed that holding "in relevant part." Not so. The Supreme Court specifically declined to take any position on whether First Amendment protection "should be applied to a claim of product disparagement," because the Court did not need to reach the issue. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 513 (1984).²

Novell's heavy reliance on the Tenth Circuit's decision in Jefferson is similarly misplaced. The Tenth Circuit there addressed the separate question – not implicated in Novell's motion – of whether a defendant should have full First Amendment protection (that is, immunity) where the plaintiff has brought suit on the basis of a statement of opinion, rather than a statement of fact. The court reasoned that where the defendant had not made a statement of fact, it was entitled to full First Amendment protection with respect to all of the plaintiff's claims that were based solely on the defendant's statements. Jefferson, 175 F.3d at 56-61. The court reasoned, in short, that it would not make sense to afford a defendant First Amendment immunity with respect to only certain of the plaintiff's claims based on the statements at issue,

² Novell then (at 3) cites Blatty v. New York Times Co., 42 Cal. 3d 1033, 1042-43 (1986), for the proposition that the First Amendment applies to a claim concerning the plaintiff's property, but Blatty relies on the district court's decision in Bose. In sum, in the face of the indisputably relevant Supreme Court precedent on the issues here, Novell asks this Court to place dispositive weight on a California decision interpreting a District of Massachusetts decision on which the Supreme Court declined to opine.

because however the plaintiff recovered against the defendant, the prospect of such recoveries would impose a chilling effect on the prospect of a market-place of opinions. Id. at 857.

The rationales and interests in that analysis are significantly distinct from the rationales and interests here. The relevant authority in that discrete area of First Amendment jurisprudence start from the premise that the First Amendment affords important protection for statements of opinion. Milkovich, 497 U.S. at 21 (citing authority). The rationale is that robust and even competing statements of opinion are important to the free discussion of public issues and public figures. Id.; see also Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988). It follows that when a plaintiff brings a claim based on the claim that is not verifiably true or false, the First Amendment affords the defendant maximum protection. Milkovich, 497 U.S. at 21. The Supreme Court has thus distinguished between statements of opinion and statements of fact, or between statements that cannot be proven false and those that can. Id. at 21-22. That is because the state has very little (if any) interest in having people publicly making false factual statements. Id. at 18 (citing authority).

Accordingly, in the key cases on which Novell relies, in assessing whether the defendant is entitled to First Amendment protection, the courts ask this, different, threshold question: Is the plaintiff bringing a claim based solely on the defendant's statements of opinion? If so, regardless of the particular tort under which the plaintiff has brought his claim, the claim implicates the foregoing rationale for applying First Amendment protections. That is not at issue here.³

³ The exact same problem inheres in the other cases Novell cites, including the cases the court in Jefferson cited, which also concern the application of First Amendment principles that are entirely separate from the considerations at issue here. In Unelko Corp. v. Rooney, 912 F.2d 1049, 1057-58 (9th Cir. 1990), the court held that the plaintiff could not prove that the defendant had made false assertions of fact. In Henderson v. Times Mirror Co., 669 F. Supp. 356, 362 (D. Colo. 1987), the court held that the plaintiff could not prove that the defendant had made false assertions of fact. In South Dakota v. Kansas City Southern Industries, 880 F.2d 40, 50-54 (8th Cir. 1989), the court held that the defendant was immune under the Noerr-Pennington doctrine. In Eddy's Toyota of Wichita, Inc. v. Kmart Corp., 945 F.

This Court's prior decision in this case, in contrast, reflects that the various claims of ownership here are objectively verifiable ones that can be disproven. (Order Denying Defendant's Motions in Limine No. 5 and 6 (Feb. 25, 2010).) Considering all of the foregoing, the Court will recognize how the fundamental analysis in Jefferson is inapplicable here. This case does not present the crucial consideration in that case that led the court to conclude that where the plaintiff has made "protected speech" the subject of his claims, it would not make sense – at least not with respect to the causes of action at issue in that case – to permit the plaintiffs to recover on any of them. The linchpin of the court's analysis was the need to avoid "the chilling effect on protected speech that might ensue if damages could be recovered on emotional distress claims for publications that were not provably false." Id. at 857 (emphasis added). On the plaintiff's antitrust claim, in turn, the court's concern was that the plaintiff's contention was that the publication at issue "itself constituted a violation of the antitrust laws," id. at 860, and the court saw no reason for federal antitrust law interests to trump First Amendment protections. These considerations and balancing of interests, at the risk of redundancy, are simply not at issue here.

II. THE NATURE OF NOVELL'S SPEECH DOES NOT WARRANT THE FIRST AMENDMENT PROTECTION NOVELL SEEKS

Commercial speech occupies a "subordinate position in the scale of First Amendment values." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). Accordingly, as Novell appears to concede, where a defendant's defamatory statements constitute "commercial speech," they are not entitled to the First Amendment protection necessary to require proof that the defendant acted with "actual malice." New York Times, 376 U.S. at 265-66 (making threshold determination that speech at issue was "editorial" rather than "commercial"); Procter & Gamble

Supp. 220, 224 (D. Kan. 1996), the court held that the plaintiff could not prove that the defendant had made false assertions of fact.

Co. v. Amway Corp., 242 F.3d 539, 547-59 (5th Cir. 2001) (declining to apply “actual malice” standard concerning commercial speech); U.S. Healthcare, Inc. v. Blue Cross, 898 F.2d 914, 928-39 (3d Cir. 1990) (same).

The main factors are whether the speech was contained in an advertisement, referred to a product, and was made with an economic motive. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983); accord Proctor & Gamble Co. v. Haugen, 222 F.3d 1262, 1274 (10th Cir. 2000). A statement containing those elements, even if it also contains “discussions of important public issues,” is commercial speech. Bolger, 463 U.S. at 67-68; accord Haugen, 222 F.3d at 1275. There is no general rule, in other words, that the “pure speech” and “commercial speech” in a single publication are “inextricably intertwined” such that they constitute only protected speech. Bd. of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 473-74 (1989). A press release may constitute an “advertisement.” Neuralstem, Inc. v. StemCells, Inc., 2009 WL 2412126, at *5 (D. Md. Aug. 4, 2009).

Novell is in the Linux business and everything it has said regarding the ownership of these copyrights must be viewed as part and parcel of its economic interest in Linux. Novell’s press releases on May 28 and June 6, 2006, were it issued the press releases to “gain credibility with the OpenSource community” and the press releases say that Novell is an “ardent supporter of Linux.” Novell begins the first press release by explaining that it is “[d]efending its interests in developing services to operate on the Linux platform,” and has a “leading proponent of open source” state that Novell had made “recent announcements to support Linux with NetWare services,” a Novell product. Both press releases state that Novell “is a leading provider of information services” and specifically identify Novell’s “Nsure™”, “exteNd™”, “Nterprise™”, and “Ngage™” products. They address other subjects as well, but they were indisputably made

with an economic motive, they refer to multiple products, and they seek to advertise their value and relevance to the subject matter otherwise addressed.

Novell's arguments against these facts (at 8-11) are that Novell was not proposing any commercial transaction; that any commercial aspects of its statements were "incidental" to protected speech; and that any corporation has an "economic motive" when it makes statements, and it cannot be that any time a corporation speaks it will be afforded the lesser protection for "commercial speech." SCO submits that these arguments are unavailing.

First, Novell included the multiple references to its multiple products in an effort to advertise and sell them. There is no other logical explanation for their presence. Among the particular products that Novell sought to sell, moreover, were ones directly related to the subject matter of what Novell contends was protected speech – namely, the question of whether SCO had the right even to claim that Linux infringes on the UNIX and UnixWare copyrights. Novell took care to state that it had made "recent announcements to support Linux with NetWare services," a Novell product.

Second, Novell obviously was not required to convey such information, and it ignores the distinct and prominent nature of the commercial components. To borrow the Supreme Court's language, "[n]o law of man or of nature makes it impossible" for a company to claim to own particular property without at the same time advertising its products. Fox, 492 U.S. at 475.

Third, SCO agrees that the courts must draw a line on what corporate speech does and does not constitute "commercial speech," but submits that in this case Novell seeks to draw that line in the wrong place. Novell did not have merely a general economic motive to do well as a company; it had a discrete and particular interest in offering products and services that directly related to the subject matter of the statements.

III. SCO'S PROPOSED VERDICT FORM IS APPROPRIATE TO DEAL WITH FIRST AMENDMENT CONCERNS NOVELL HAS RAISED

SCO recognizes that there is no controlling Tenth Circuit authority on the relationship of the First Amendment to a slander of title claim in this context. In these circumstances, SCO believes it is appropriate to structure the verdict form, and the jury questions, so as to avoid the need for any retrial of the case. This can be accomplished, as reflected in the verdict form SCO has proposed, by having a separate question on the issue of "constitutional malice," while requiring the jury (assuming it has answered other questions in the affirmative) to proceed to determine damages, regardless of how they answer the question on "constitutional malice." Accordingly, while Novell's motion should be denied, SCO does not oppose appropriate instructions and a verdict form so as to avoid the need for a retrial of the case on this ground.

CONCLUSION

SCO respectfully submits, for the reasons set forth above, that the Court should deny Novell's Motion to Determine that First Amendment Defenses Apply to Slander of Title and Require Proof of Constitutional Malice.

DATED this 5th day of February, 2010.

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CERTIFICATE OF SERVICE

I, Brent O. Hatch, hereby certify that on this 4th day of March, 2010, a true and correct copy of the foregoing **SCO'S MEMORNANDUM IN OPPOSITION TO NOVELL'S MOTION TO DETERMINE THAT FIRST AMENDMENT DEFENSES APPLY TO SLANDER OF TITLE AND REQUIRE PROOF OF CONSTITUTIONAL MALICE** was filed with the court and served via electronic mail to the following recipients:

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