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MAR 05 2010

U.S. DISTRICT COURT

March 5, 2010

Please lodge

2:04-cv-139

Via Hand Delivery

Honorable Ted Stewart
United States District Judge
350 South Main, Room 148
Salt Lake City, Utah 84101

Rec'd

UNITED STATES DISTRICT
COURT, DISTRICT OF UTAH

MAR 05 2010

D. MARK JONES, CLERK

DEPUTY CLERK

Re: The SCO Group v. Novell, Inc., Civil No. 2:04-cv-00139

Dear Judge Stewart:

We are in receipt of Novell's letter to the Court regarding Novell's "Brainshare" technical conference at the Salt Palace Convention Center in Salt Lake City on March 21-25, 2010, which is during the final week of the scheduled trial. Novell's conference was cancelled last year and restarted again this year, with IBM as a lead sponsor. Given that the conference is being held only a few blocks from the courthouse. We believe that at a minimum there should be absolutely no mention of it by Novell or its witnesses in the presence of the jury. Novell must ensure that neither it nor its presenters reference the trial at the conference to minimize the chance that conference participants may interfere with the trial.

We would like to raise one additional matter with Your Honor. As you may recall, at the final pretrial conference last week we raised the issue of Novell producing witnesses under its control during our case in chief. You instructed us that if we could not agree, that we should bring the issue to you for a decision. A few days ago, Novell informed us that its former CEO, Jack Messman, will only be available after March 24, 2010, one of the final days of trial because he will be out of the country and well after SCO will have put on its case in chief. Novell emphasizes that Mr. Messman is outside the subpoena power of the Court, but Novell does have sufficient control over Mr. Messman that he is coming to appear live in Novell's defense. Obviously, as Mr. Messman is the author of the May 28, 2003, letter that is central to SCO's claims of slander of title, it would be highly prejudicial for Novell to present him live in their defense and require SCO to present him by deposition or, perhaps worse, not until more than a week after its case in chief has been put on.

The trial has been set since December 2009. Mr. Messman was listed on Novell's will call list for trial and has been viewed as a key witness by both parties for a long time. When I raised this issue at the final pretrial conference, Novell did not raise any issue with the Court as to Mr. Messman's availability. This is odd in that both parties listed Mr. Messman as a "will call" witness. If Mr. Messman had made plans to be out of the country long ago, Novell should have informed us and the Court at the pretrial conference.

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It is clear that the Court has the power to control the presentation of evidence. *See, e.g.,* Fed. R. Evid. 611(a) ("the Court shall exercise reasonable control over the mode and order of interrogating witnesses."); Garcia v. Lee, 976 F.2d 1344, 1345 (10th Cir. 1992) (recognizing "the district court's fundamental control over the trial process"). We ask that Novell be ordered to produce Mr. Messman for any day convenient to Mr. Messman during the first week of trial, March 9-12.

In the alternative, although we believe it is prejudicial to our case, we ask the Court to permit SCO to begin the examination of Mr. Messman in SCO's case through deposition testimony and leaving his direct open until he appears on the 24th live to complete the examination by both SCO and Novell. Novell could propose "completeness" additions to SCO's designations under F. R. Civ. P. 32(a)(6), but not counter-designations for at least two reasons: (1) the direct examination will still be open and the witness will not have been passed for Novell's cross-examination, and (2) Novell has already indicated that it will be putting Mr. Messman on live, so he is available to testify obviating the need to read his deposition. Since SCO will not have rested until Mr. Messman is completed, Novell would not bring any motion for directed verdict on any ground before Mr. Messman has testified.

We proposed this arrangement to Novell, but it has declined to accept. Novell has made a counter-proposal that would deny SCO any opportunity for live testimony from Mr. Messman, a key witness, during SCO's case in chief, while Novell is able to put him on live in its case, with SCO only allowed cross-examination.¹ Such a proposal would be inequitable. It is well within the Court's discretion to require the alternative scenario proposed by SCO under F. R. Civ. P. 32(a)(4)(E), Fed. R. Evid. 611(a), and cases such as Garcia.

If Novell cannot agree to the alternative proposed by SCO above, the only fair solution remaining is to require Mr. Messman to appear as requested during March 9-12 in SCO's case. Since SCO intends to call Mr. Messman early in its case, SCO requests that the Court resolve this issue prior to the beginning of trial.

Sincerely yours,



Brent O. Hatch

c: Sterling Brennan
Michael Jacobs
Stuart Singer

¹ Novell's proposal is to allow SCO only deposition testimony (which obviously is limited as to the exact questions asked in the deposition and no follow-up) and Novell gets live testimony (with full freedom of questions and follow-up). Specifically, Novell proposed that SCO be limited to playing Mr. Messman's video testimony (with Novell's counter-designations) during its case. Mr. Messman will then be called as a live witness in Novell's case on March 24, with Novell examining him on direct and SCO on cross.