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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

THE SCO GROUP, INC., by and through the Chapter 11 Trustee in Bankruptcy, Edward N. Cahn, Plaintiff/Counterclaim-Defendant, vs. NOVELL, INC., a Delaware corporation, Defendant/Counterclaim-Plaintiff.	**SCO'S MEMORANDUM IN OPPOSITION TO NOVELL'S MOTION TO ALLOW EVIDENCE** Civil No. 2:04 CV-00139 Judge Ted Stewart

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INTRODUCTION

Novell seeks to present evidence to the jury in the form of snippets of text selectively lifted from prior judicial opinions in this case. Novell claims these snippets would be used to rebut the factually correct assertion, made in SCO's opening statement and the answer of one witness to a single question, that Novell's claim of ownership of the UNIX and UnixWare copyrights continues to appear on Novell's website "to this very day." As with Novell's previous attempts to introduce such evidence, the Court should reject this attempt to present the jury with judicial statements, not in context, that are not relevant to the claims and defenses presented here, but that would create jury confusion and be highly prejudicial to SCO.

The statements at issue were posted to Novell's website on or before December 22, 2003, before the lawsuit was filed in January 2004, and before all three of the statements that Novell purports affected its intent. Moreover, Novell's failure to remove the statements from its website after the reversal of the summary judgment order in its favor shows that there could not have been any reliance on the earlier favorable ruling in 2007, let alone the statements from the 2004 decision which *denied* Novell's motion to dismiss. They do not constitute relevant evidence.

Since 2007, Novell has been on notice of SCO's assertion that Novell continues its ownership claim via its website. Prior to and during this trial, Novell did not object to such assertions on at least six distinct occasions: 1) in its numerous motions in limine; 2) after being presented with the demonstratives that accompanied SCO's opening statement two days before the opening statements were delivered; 3) when each of the three statements cited by Novell in its motion was made during opening; and 4) when the single question on this topic was asked of Duff Thompson. SCO, therefore, did not "open the door" to the highly prejudicial form of evidence that Novell seeks to introduce. Instead, Novell did not object to the evidence and

argument, which it was obligated to do if it believed it was inconsistent with other rulings made by the Court.

The Court should deny Novell's request to present these snippets of prior judicial opinions to the jury, either through testimony or otherwise. Novell, like SCO, must present to the jury the relevant evidence at issue – as this Court has repeatedly referred to it, "the evidence used in making those decisions."

ARGUMENT

I. THE COURT HAS ALREADY DECIDED THIS ISSUE AND NOTHING HAS CHANGED

Since 2007, Novell has been on notice of SCO's assertion that Novell continues to assert its slander on the company's website. At that time, Novell sought summary judgment on SCO's unfair competition claim and argued that SCO had not alleged any tortious act after May 2004. (Docket No. 272 at 6.) In response, SCO argued that it could maintain its unfair competition claim because Novell's statements that it owned the UNIX copyrights appeared on Novell's website after May 2004. (Docket No. 299 at 16 ("Novell's continued claim of ownership of the UNIX Copyrights appears on its webpage.").) During oral argument on Novell's motion for summary judgment on SCO's Unfair Competition Claim, SCO attorney Brent Hatch noted that, via its website, "they [Novell] continue to this day to publish the fact that they own the copyrights." (Docket No. 355 at 96:16-17 (emphasis added).)[1] Despite this knowledge, Novell did not raise the issue in any of the nineteen motions in limine it filed before trial.

More importantly, Novell had advance notice, immediately prior to the commencement of the trial, that SCO intended to include in its opening statement the assertion that Novell "continues to assert ownership of the UNIX copyrights" and did not object to that assertion. On

[1] A copy of the relevant portion of the transcript of the hearing is attached as Exhibit A.

March 7, two days before opening statements were given, the parties exchanged the demonstratives that they intended to use during opening statements. The point of this exercise was to allow the parties to raise any objections to material presented in the demonstratives in time to remove or edit the disputed material rather than face an objection to the demonstrative. Pursuant to this exchange, several changes were made to the demonstratives.

As part of that exchange, SCO provided Novell with an advance copy of its demonstratives, including the demonstrative noting that "Novell maintains a public webpage in which it 'continues to assert ownership of the UNIX copyrights.'"[2] Novell did not object to this language before opening arguments, during opening argument, when both Mr. Singer and Mr. Hatch made this statement, or when Mr. Singer asked Mr. Thompson about Novell's website. Having decided not to object to these statements, as inconsistent with other rulings made repeatedly by the Court, Novell has waived the right to present to the jury the highly prejudicial evidence it now seeks to introduce. See, e.g., Cardiac Pacemakers, Inc. v. St. Jude Med., Inc., Case No. IP 96-1718-CH/K, 2002 WL 1801525, at *68 (S.D. Ind. Jul. 5, 2002) (noting that an objection during an opening statement is the moment "when any curative instruction would have had the greatest effect" and that a "failure to object in a timely manner" to an objectionable statement in an opening or closing statement "constitutes a waiver of any subsequent objection"), rev'd in part on other grounds, 381 F.3d 1371 (Fed. Cir. 2004).

II. THE JUDICIAL OPINIONS NOVELL SEEKS TO INTRODUCE ARE NOT RELEVANT

Novell claims that these statements from prior rulings of this Court and the Tenth Circuit are now relevant evidence that Novell may use to counter SCO's claim that Novell made its

[2] A copy of this demonstrative is attached as Exhibit B. SCO notes that Novell raised an objection to a different part of this very demonstrative—its reference to copyright registrations—but not to the reference to the website.

slanderous statements with the "requisite scienter," presumably because they show Novell had an innocent intent in maintaining the statements on its website up "to this day." This argument distorts both the relevance standard and SCO's claims.

Evidence is only relevant if it tends to make the existence of a fact that "is of consequence to the determination of the action" more probable or less probable. Fed. R. Evid. 401. That Novell continues to claim ownership of the copyrights on its website is of no consequence to the state of Novell's scienter in 2003 and early 2004, when all of Novell's slanderous statements were made, including the dates Novell first published these same statements on www.novell.com. In its slander of title claim, SCO alleges various statements, up to and including Mr. Stone's March 2004 statement that Novell "still own[s] UNIX," as the sources of Novell's slander. (Docket No. 115 ¶ 37.) Each of these statements predates all three of the rulings Novell seeks to admit into evidence. The rulings are therefore not relevant to the only "fact of consequence" that Novell put at issue: Novell's scienter.

At most, Novell's "evidence" merely serves to indicate the irrelevant point that Novell may have believed it was more likely to successfully defend against SCO's slander claim at certain times rather than others. Such evidence is irrelevant to the scienter that SCO is required to prove in order to prevail in this case. To prove slander of title, SCO must demonstrate that Novell acted with malice when it issued the slanderous statements. In order to overcome Novell's defense based on First Amendment privilege, SCO must prove that Novell acted recklessly or with knowing disregard for the truth at the time of the slander. Simply put, it is impossible for the prior rulings cited by Novell to have had any impact on Novell's scienter at

the time that the slanderous statements were made or posted, rendering them irrelevant to the issue of whether or not Novell has slandered SCO's title to the UNIX copyrights.[3]

Novell's own actions regarding the website belies its attempt to show that any judicial rulings influenced its decision to retain statements that Novell is the owner of the UNIX copyrights on www.novell.com. Novell posted these statements in 2003 and has simply left them on its website, regardless of the ebbs and flows in the litigation cycle of this case. Indeed, if Novell had been relying on Judge Kimball's order granting summary judgment on SCO's slander claim, it would have removed ownership claims from www.novell.com on August 24, 2009, when that summary judgment order was reversed by the Tenth Circuit. That did not happen. Novell also did not assert any defense based on the existence of positive rulings from this Court in its Answer to SCO's Second Amended Complaint and Counterclaims, dated more than a year after Judge Kimball's 2004 order denying SCO's motion to remand and refusing to dismiss SCO's slander of title claim, the first order at issue in the present motion.

Novell's argument also raises serious questions as to how decisions to retain the information on its website were made. Novell asserts (at 2) that the prior rulings are relevant evidence because the existence of "information supporting Novell's ownership claim," in the form of judicial opinions, influenced Novell's decision to continue to "assert 'ownership' and 'republish that slander' on Novell's website." Yet it is inconceivable that Novell would have made such decisions, based as they are on legal opinions, without the advice of counsel. If a party places advice of counsel at issue through a defense, then it waives the protection of the attorney-client privilege. Trudeau v. N.Y. State Consumer Protection Bd., 237 F.R.D. 325, 340

[3] Although SCO claims damages through October 31, 2007, these damages were submitted to the Court on May 2007, prior to the August 10, 2007 Order granting summary judgment that Novell seeks to introduce as evidence, and are based on the negative impact of the statements made in 2003 and early 2004.

n.10 (N.D.N.Y 2006) (citing Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851 (3d Cir.1994)). The first of the judicial opinions on which Novell allegedly relied was made in 2004 (in the context of the Court denying Novell's motion to dismiss). If Novell wished to rely on the legal significance of that opinion, it was incumbent upon Novell to assert a defense of advice of counsel in its subsequent answer. Novell declined to assert such a defense and waive privilege, which it would have to do to assert this defense. See Id. It would clearly be improper to now allow Novell to claim reliance on a sentence in the 2004 court decision—a decision that denied Novell's motion to dismiss—while having asserted the attorney-client privilege throughout this litigation.

It is clear that Novell has not monitored the decisions of various courts and made conscious decisions as to the whether to continue to post ownership claims on its website based on those decisions. In the context of its motion for summary judgment on SCO's unfair competition claim, Novell instead represented to Judge Kimball the exact opposite position – that it has left the slanderous statements untouched on its website since they were posted. At oral argument on that motion, Novell attorney Grant Kim told Judge Kimball that Novell's website postings were not a "continuing publication" because the "website was posted before the act became effective and [it has] just stayed the same since then." (Ex. A at 82:6-7.) Rather than open the door to new evidence, Novell's motion is merely another attempt to gain admission of carefully selected excerpts of judicial opinions that have been reversed on appeal and a single line from the appellate opinion in this case that does not reflect the overall holding of the Tenth Circuit.[4] The court should reject this approach and deny Novell's motion.

[4] Novell cites only one case, United States v. Chavez, 229 F.3d 946 (10th Cir. 2000), in support of its motion, and that case involves a much different situation. In Chavez, the Court found that certain out of court statements were admissible because counsel for defendant had

III. NOVELL'S PROPOSED USE OF LANGUAGE FROM PRIOR TRIAL COURT AND APPELLATE RULINGS IS HIGHLY PREJUDICIAL AND HAS LITTLE PROBATIVE VALUE

On multiple occasions, this Court has noted that the relevance of prior judicial opinions "is substantially outweighed by their prejudicial effect and their potential to confuse and mislead the jury under Fed. R. Evid. 403." (See, e.g., Docket No. 763 at 3; Docket No. 709 at 2 ("the Court finds that any relevance is substantially outweighed by the danger of unfair prejudice and confusion on these issues").) This prejudicial effect remains and does not come close to being outweighed by any probative value of the snippets that Novell has selected.

As SCO noted previously, "[p]ulling snippets out of a lengthy judicial opinion without the surrounding context elevates those snippets above other evidence the jury will hear, guarantees confusion, and creates prejudice." (Docket No. 758 at 7-8; Docket No. 763 at 4 (quoting the cited passage).) This statement is even more relevant in this context, where Novell seeks to introduce snippets that do not conform to the entirety of the cited opinions.

The two statements from Judge Kimball's June 2004 opinion denying Novell's motion to dismiss would inevitably create confusion and unfair prejudice among members of the jury. These snippets quote previous findings that "the APA did not transfer any copyrights" and that the agreements raise doubt whether Amendment No. 2 is a sufficient writing under 17 U.S.C. 204(a). Admission of the former statement creates confusion and is prejudicial to SCO because it reflects Judge Kimball's consideration of the APA and Amendment No. 2 separately, an approach expressly rejected by the Tenth Circuit. The SCO Group, Inc. v. Novell, Inc., 578 F.3d 1201, 1211 (10th Cir. 2009) ("Having closely considered the parties' arguments, as well as the

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"opened the door" to their admittance by referring "to the exact content of those statements in his opening statement." Id. at 952. The case might be applicable if SCO had quoted these judicial statements in its opening; obviously that did not happen.

district court's reasoning, we find that Amendment No. 2 must be considered together with the APA as a unified document."). The latter statement also was reversed expressly by the Tenth Circuit, which squarely held that the APA, as amended, satisfies the writing requirement of Section 204 of the Copyright Act. As noted before, the appellate reversal did not lead Novell to remove any statements from its website, so it is difficult to envision how the district court statement—made in the course of denying a motion to dismiss—is probative.

The statement from Judge Kimball's 2007 summary judgment order that "Novell is the owner of the UNIX and Unixware copyrights," would be overwhelmingly prejudicial to SCO and confusing to the jury. That finding was expressly overruled by the Tenth Circuit and is one of the primary issues of fact that the jury will be expected to resolve during its deliberations. If the jury were to only be informed that another judge found that Novell was the owner of the UNIX and UnixWare copyrights, it would severely prejudice SCO. Moreover, to put that statement in context it would be necessary to then get into the appellate reversal, leading to yet more jury confusion and prejudice. Finally, to quote one sentence from the appellate decision otherwise in SCO's favor on these issues, would obviously be prejudicial and unwarranted. Finally, other, far less prejudicial remedies are available to the Court if it is concerned about SCO's statement and the single question posed to Mr. Thompson. Such remedies include ordering SCO to refrain from future references to the fact that Novell's website still has statements that Novell is the owner of the UNIX copyrights, or instructing the jury to focus on Novell's scienter at the times any and all statements were initially made. See United States v. Falls, 90 Fed. Appx. 351, 358 (10th Cir. 2004) (approving of trial court's decision to instruct both parties to avoid reference to evidence that would have rebutted the assertion of a defense that allegedly "opened the door," when evidence in question was of "dubious value to the jury.").

CONCLUSION

SCO respectfully requests, for the reasons set forth above, that the Court should deny Novell's Motion to Allow Evidence Responding to SCO's Allegation that Novell's Slander Continues "To This Very Day."

DATED this 15th day of March, 2010.

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CERTIFICATE OF SERVICE

I, Brent O. Hatch, hereby certify that on this 15th day of March, 2010, a true and correct copy of the foregoing SCO's Memorandum in Opposition to Novell's Motion to Allow Evidence was filed with the court and served via electronic mail to the following recipients:

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