WORKMAN | NYDEGGER A PROFESSIONAL CORPORATION
Sterling A. Brennan (Utah State Bar No. 10060; E-mail: sbrennan@wnlaw.com)
David R. Wright (Utah State Bar No. 5164: E-mail: dwright@wnlaw.com)
Kirk R. Harris (Utah State Bar No. 10221; E-mail: kharris@wnlaw.com)
Cara J. Baldwin (Utah State Bar No. 11863; E-mail: cbaldwin@wnlaw.com)
1000 Eagle Gate Tower
60 E. South Temple
Salt Lake City, Utah 84111
Telephone: (801) 533-9800
Facsimile: (801) 328-1707

MORRISON & FOERSTER LLP
Michael A. Jacobs (Admitted *Pro Hac Vice;* E-mail: mjacobs@mofo.com)
Eric M. Acker (Admitted *Pro Hac Vice;* E-mail: eacker@mofo.com)
Grant L. Kim (Admitted *Pro Hac Vice*; E-Mail: gkim@mofo.com)
Daniel P. Muino (Admitted *Pro Hac Vice*; E-Mail: dmuino@mofo.com)
425 Market Street
San Francisco, California 94105-2482
Telephone: (415) 268-7000
Facsimile: (415) 268-7522

Attorneys for Defendant and Counterclaim-Plaintiff Novell, Inc.

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 MOTION TO STRIKE TESTIMONY OF DAMAGES AFTER JUNE 9, 2004** Judge Ted Stewart
AND RELATED COUNTERCLAIMS.	

I. INTRODUCTION

On March 21, Novell filed its "Motion for Leave to Examine Other Witnesses on Prior Rulings," seeking leave to elicit testimony regarding certain prior rulings, the earliest of which is dated June 9, 2004. (Dkt. No. 815.) As explained in that motion, one purpose for eliciting such testimony is to challenge SCO's damages theory, and in particular its underlying premise that *all* loss of sales between May 28, 2003 and October 31, 2007 is attributable to Novell's assertion of copyright ownership. On Monday, March 22, the Court denied that motion, holding that such testimony's "probative value is very slight, if there is any, for the time frame in question," and "the time frame that matters is the year 2003 and early 2004 prior to the first ruling by Judge Kimball in June 2004." (Tr. at 1793:24–1794:2.) The Court also agreed that testimony by SCO's last witness, Ryan Tibbitts, regarding post-June 2004 contact with potential licensees would be unfair and inappropriate. (*See* Tr. at 1803:19–1804:6.)

In view of the foregoing, Novell seeks an order correspondingly limiting SCO's damages to the time period established by this Court's March 22 ruling and striking irrelevant damages testimony. Specifically, Novell seeks (1) a jury instruction that limits potential damages to the time period from May 28, 2003 to June 9, 2004, and (2) to have stricken all testimony of damages after June 9, 2004.

II. ARGUMENT

On March 17, before the Court ruled that "the relevant time frame that matters is the year 2003 and early 2004," Dr. Christine A. Botosan testified that SCO had suffered between $114 million and $215 million in lost profits from sales that Novell caused SCO to lose. (Tr. at 1374.) Dr. Botosan calculated the lower figure by selectively combining annualized sales projections for time periods beginning in May 2003 and ending in October 2007, and then deducting costs. (Tr.

at 1357:15-23, 1362:5-17, 1374:4-9.) She calculated the higher figure by multiplying the number of licenses that Dr. Gary A. Pisano estimated SCO would have sold in the same period by $100, adding some of the same annualized projections used to calculate her lower figure, and again deducting costs. (Tr. at 1274:21–1275:4, 1367:5–1368:13, 1370:1–1371:7, 1374:14–1375:6.)

Under the Court's March 22 order, expert testimony regarding lost profits from sales that would have been made in some "but for" world after June 9, 2004 is irrelevant and thus inadmissible. *See* Fed. R. Evid. 402. Because Novell has not been allowed to answer such testimony with evidence that any such damages have other causes,[1] the jury should not be permitted to consider it if and when damages are awarded. More specifically, Novell requests that the Court strike (1) all of Dr. Botosan's testimony relating to damages allegedly sustained in 2005, 2006, and 2007, because those time periods are clearly outside what the Court's order of March 22 defines as "the relevant time frame," i.e., "the year 2003 and early 2004"; (2) all of Dr. Botosan's testimony relating to damages allegedly sustained in 2004, because her testimony provides no principled basis for segregating damages supposedly incurred before June 9, 2004 from those incurred after; and (3) all of Dr. Pisano's testimony relating to potential market size and anticipated volume of license sales in the "but for" world, because his testimony provides no principled basis for segregating sales that allegedly would have been realized in the "but for" world before June 9, 2004 from those that would have been realized after.

Exclusion of *evidence* of lost sales after June 9, 2004 necessarily precludes any award of damages therefor. Thus the jury should also be instructed that it may not award damages for any

[1] As explained by Instruction No. 36 in the Jury Instructions distributed on March 22, 2010, to "recover for the loss of the market," SCO must "eliminate other causes."

losses sustained after June 9, 2004, the date of Judge Kimball's first ruling (or before May 28, 2003, the date of Novell's first allegedly slanderous publication).

III. CONCLUSION

In the wake of Dr. Botosan's testimony that Novell caused SCO to lose hundreds of millions of dollars in profits after Judge Kimball began issuing favorable rulings, Novell asked this Court to permit Novell to elicit testimony related to those rulings both (1) from SCO's witnesses, to rebut the claim that Novell's statements were the sole cause of third-party purchasing decisions; and (2) from Novell's witnesses, to explain why Novell did not change course. (Dkt. No. 815.) By its March 22 ruling, the Court denied Novell the opportunity to do either because it determined that "the time frame that matters is the year 2003 and early 2004 prior to the first ruling by Judge Kimball in June 2004." (Tr. at 1793:25–1794:2.) If *that* is the time frame that matters, and Novell has been denied the opportunity to defend itself with respect to any *later* period of time because that is the time frame that matters, then the jury should be so instructed and testimony of damages allegedly arising thereafter should be stricken.

If Novell properly understands the jurisprudence developed and applied by the Court over the course of these proceedings, including its March 22 ruling, then granting this motion will simply make explicit what is already implicit in what the Court has already decided.

DATED: March 23, 2010

Respectfully submitted,

By: /s/ Sterling A. Brennan
WORKMAN NYDEGGER

MORRISON & FOERSTER LLP

Attorneys for Defendant and
Counterclaim-Plaintiff Novell, Inc.