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VIGILANT INSURANCE COMPANY

UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH - CENTRAL DIVISION

NOVELL, INC., a Delaware corporation, )  
) Plaintiff, )  
) vs. )  
) VIGILANT INSURANCE COMPANY, a )  
) New York corporation; )  
) Defendant. )  
\_\_\_\_\_ )

Case No.: 2:09-cv00496 TS  
Assigned to: Stewart, Ted

**VIGILANT INSURANCE COMPANY'S  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO STRIKE PRAYER FOR  
ATTORNEYS' FEES (RULE 12(f))**

## **INTRODUCTION**

Defendant VIGILANT INSURANCE COMPANY (“VIGILANT”) submits this Memorandum of Points and Authorities in support of its motion to strike the prayer for attorneys’ fees in the Complaint For Declaratory Judgment filed by plaintiff NOVELL, INC. (“NOVELL”), pursuant to Federal Rule of Civil Procedure 12(f).

Plaintiff NOVELL brings this action against VIGILANT seeking a judgment declaring that VIGILANT had a duty to defend NOVELL against the claims asserted in the action entitled The SCO Group v. Novell, Inc. and that VIGILANT must pay to NOVELL the attorneys and costs it incurred in defense of those claims. In its prayer for relief, NOVELL also seeks a judgment for its attorneys fees incurred in bringing the action against VIGILANT as well as interest on said fees. NOVELL has alleged that the parties disagree about whether VIGILANT has a duty to defend NOVELL and to pay NOVELL’s defense fees and costs under the involved insurance policies. The Complaint filed by NOVELL does not assert a claim for bad faith nor does it seek a determination that VIGILANT has breached the covenant of good faith and fair dealing. Further, there is no provision for an award of NOVELL’s attorneys’ fees either by statute or by contract. Accordingly, attorney fees are not available to NOVELL as a matter of law. The prayer for an award of attorneys’ fees is immaterial to the declaratory judgment sought by NOVELL and should be stricken.

### **I. FACTUAL BACKGROUND**

In its Complaint for Declaratory Judgment, NOVELL alleges that VIGILANT issued a commercial general liability insurance policy to NOVELL (Complaint for Declaratory Judgment, ¶¶ 11-17) and that these policies obligated VIGILANT to defend the underlying litigation, styled as The SCO Group v Novell, Inc., initially filed in state court and later removed to this Court.

NOVELL asserts that the SCO Complaint asserted a single claim for slander of title and cites to various sections of the SCO Complaint which state that NOVELL claimed it, and not SCO, owned certain copyrights. (*Id.* at ¶¶ 18-19.) NOVELL alleges that it requested that VIGILANT defend it in the SCO action and that VIGILANT denied NOVELL a defense. (*Id.* at ¶ 21.) A portion of the letter setting forth VIGILANT's coverage position is quoted. (*Id.* at ¶ 22.) In part, it was VIGILANT's position that the slander of title allegations did not constitute "personal injury" in as much as there had been no libel or slander to a person or organization and that the Intellectual Property Law or Right exclusion would apply to the underlying copyright dispute and would further remove the claims from coverage. (*Id.*)

The crux of NOVELL's argument for coverage is that NOVELL's conduct defamed SCO because it claimed ownership rights to the software copyright, thus triggering a defense by potentially alleging libel and slander within the scope of the insuring agreement of the VIGILANT policies. (*Id.* at ¶26.) VIGILANT disagrees with NOVELL's position. As NOVELL alleges: "the parties disagree about whether Vigilant has a duty to defend Novell in the SCO Action and to pay all of the attorneys' fees and costs it has incurred and will incur to defend that Action." (*Id.* at ¶37.) In its prayer for relief, NOVELL requests that the Court issue a judgment declaring that VIGILANT had a duty to defend NOVELL and that it must pay all attorneys fees and costs incurred by NOVELL in defense of the claims asserted by SCO. (*Id.* at p. 11.) NOVELL also seeks recovery of its attorneys fees incurred in filing the action as well as interest on said fees. (*Id.*) It is this last claim for attorneys' fees that is the subject of VIGILANT's motion to strike.

## II. LEGAL STANDARD

### A. Requested Relief May Be Stricken Pursuant To FRCP 12(f) If It Seeks Damages That Are Not Available.

Federal Rule of Civil Procedure 12(f) empowers a Court to “order stricken from any pleading ... any redundant, immaterial, impertinent, or scandalous matter.” The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial. United States v. 416.18 Acres of Land, 514 F.2d 627, 637 (7th Cir. 1975); Sidney-Vinsein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir.1983). Motions to strike “provide a useful and appropriate tool where the parties disagree only on the legal implications to be drawn from uncontroverted facts, or where questions of law are involved.” Dixon v. Americall Group, Inc., 390 F.Supp.2d 788, 790 (C.D.Ill.2005). In this regard, a Rule 12(f) motion “admits only facts well pleaded, and mere conclusions of law, not warranted by the asserted facts have no efficacy.” United States v. Certain Parcels of Land in Cheyenne, Wyo., 141 F.Supp. 300, 305 (D.Wyo.1956). Finally, motions to strike requests for certain types of relief are generally granted if such relief is not recoverable under the applicable law. 2 Moore’s Federal Practice, § 12.37[3], p. 12-130-131, fn 17 (Matthew Bender 3d ed.).

In this case, NOVELL is seeking a declaration regarding VIGILANT’s duty to defend. Attorneys’ fees are not authorized by statute or by contract. Nor does NOVELL allege, or seek a judicial declaration, that VIGILANT did not act in good faith. An award of attorneys’ fees is immaterial to NOVELL’s Complaint for Declaratory Judgment filed by NOVELL and, accordingly, that portion of the prayer requesting attorneys’ fees should be stricken.

**B. There Is No Basis For An Award of Attorneys' Fees.**

“Utah adheres to the well-established rule that attorney’s fees generally cannot be recovered unless provided for by statute or by contract.” Turtle Management, Inc. v. Haggis Management, 645 P.2d 667, 671 (Utah 1982). The Utah courts have also followed the position that attorneys’ fees in a declaratory judgment action are recoverable only where it appears that the insurer “acted in bad faith or fraudulently or was stubbornly litigious.” Crist v Insurance Company of North America, 529 F. Supp 601, 607 (D. Utah 1987); American States Insurance Company v. Walker, 486 P.2d 1042, 1044 (Utah 1971). See also Saleh v. Farmers Ins. Exchange, 133 P.3d 428, 435 (Utah 2006) (“It is settled law that in order to recover attorney fees for breach of contract, they must be authorized by a statute or a contract provision ... or there must have been bad faith.”) In Espinoza.v. Safeco Title Insurance Company, 598 P.2d 346 (1979), the court noted that attorneys’ fees were recoverable as damages in a tort action against the insurer where the insurer breached its duty of good faith and fair dealing. Id. at 349, n. 7.

As a corollary, there is no basis to award fees when there is a good faith dispute between the insurer and the insured, as there is here. In Farmers Insurance Exchange v Call, 712 P.2d 231 (Utah 1985), an insurance company filed a declaratory judgment action to determine whether an exclusion negated its duty to defend its insured. The Supreme Court of Utah held that the insurer had a duty to defend the underlying action (id. at 232), but it refused to award the insured the fees incurred in defending the declaratory judgment action (id. at 237-238). The court reasoned:

When faced with a decision as to whether to defend or refuse to defend, an insurer is entitled to seek a declaratory judgment as to its obligations and rights.... An award of attorney fees is not warranted “where the plaintiff merely

stated its position and initiated this action for determination of what appears to be a justiciable controversy.

Id. Moreover, an insurance company does not act in bad faith when its denial of a claim is “fairly debatable.” Prince v. Bear River Mut. Ins. Co., 2002 UT 68, ¶ 28, 56 P.3d 524; see also Saleh v. Farmers Ins. Exch., 2006 UT 20, ¶ 24, 133 P.3d 428 (restating the principle that when an insurer’s denial of a claim is fairly debatable, it “cannot form the basis of bad faith”).

Here, NOVELL has not brought a tort claim for breach of the duty of good faith and fair dealing against VIGILANT nor has it alleged that VIGILANT acted in bad faith. It is VIGILANT’s contention that there is no basis for such a claim. Rather, NOVELL has filed a declaratory judgment action seeking a declaration that it is entitled to a defense of the SCO action and reimbursement of the defense fees and costs incurred therein. At most, there is a good faith disagreement between the parties about the scope of VIGILANT’S obligations under the VIGILANT policies. There is no contractual or statutory basis for an award of NOVELL’s attorneys’ fees incurred in bringing this action nor is any bad faith by NOVELL. Accordingly, the demand for attorneys’ fees is immaterial to the dispute as alleged, legally unavailable to NOVELL and should be stricken from the prayer of the Complaint.

## CONCLUSION

Based on the foregoing, VIGILANT’s motion to strike the prayer for an award of attorneys’ fees incurred by NOVELL in bringing this action should be granted.

DATED: July 1, 2009

NEWTON REMMEL

By: /s/ Stephen L. Newton  
Stephen L. Newton  
Lenell Topol McCallum  
Attorneys for Defendant  
VIGILANT INSURANCE COMPANY

**CERTIFICATE OF SERVICE**

I hereby certify that on this 1st day of July, 2009, I electronically filed the foregoing **VIGILANT INSURANCE COMPANY'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE PRAYER FOR ATTORNEYS' FEES (RULE 12(f))** with the Clerk of Court using the CM/ECF system which sent notification of such filing to the following:

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