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4 IN THE UNITED STATES DISTRICT COURT

5 FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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9 _____)
10 SCO GROUP, a Delaware corporation,)
11)
12 Plaintiff,) Case 2:04-CV-139
13 vs.)
14 NOVELL, INC., a Delaware corporation,)
15 Defendant.)
16 _____)

17

18 BEFORE THE HONORABLE DALE A. KIMBALL

19 JANUARY 25, 2007

20 REPORTER'S TRANSCRIPT OF PROCEEDINGS

21 MOTION HEARING
22 (Held telephonically)

23

24

25 Reported by: KELLY BROWN, HICKEN CSR, RPR, RMR

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SALT LAKE CITY, UTAH, THURSDAY, JANUARY 25, 2007

* * * *

5 THE COURT: All right. Can you hear me?

6 MR. JAMES: Loud and clear for me. This is
7 Mark James.

8 THE COURT: All right. Mark James and Mr. Normand.

9 MR. NORMAND: Yes, Your Honor.

10 MR. BRAKEBILL: This is Ken Brakebill.

THE COURT: Ken who?

12 MR. BRAKEBILL: Ken Brakebill.

13 THE COURT: How do you spell that?

14 MR. BRAKEBILL. IT IS BRAKEBILLE.

THE COURT. D R A R E D I B B.

Mr. BRADLEY. Right.

The Society will be pleased to receive applications for the post of Research Fellow.

21 hearing.

21 hearing.

1 MR. BRAKEBILL: Yeah. Like a car brake.

2 THE COURT: A car brake and then you send a bill
3 for it.

4 MR. BRAKEBILL: Right.

5 THE COURT: All right. We're here on the phone on
6 the record in the matter of SCO v. Novell, 2:04-cv-139. For
7 SCO, Mark James, and is it Edwin?

8 MR. NORMAND: It's Edward.

9 THE COURT: Edward Normand. And for Novell,
10 Mr. Ken Brakebill; is that correct?

11 MR. BRAKEBILL: That's correct.

12 THE COURT: All right. Now, when you talk, say
13 your name before you start. Who's talking first?

14 MR. NORMAND: Your Honor, it's Ted Normand. We
15 asked for the call, Your Honor, to address an issue that we
16 hope won't take too much of Your Honor's time. I'll give you
17 a minute of background, if I could, and then quickly make our
18 argument.

19 THE COURT: Yeah, go ahead.

20 MR. NORMAND: Your Honor may recall on
21 October 24th, 2006, you set a revised scheduling order in this
22 case, and that scheduling order had a date of February 1st for
23 the end of fact discovery. In the beginning of January,
24 Mr. Brakebill and I had a series of discussions in which we
25 agreed that we needed to extend the period in which to take

1 depositions.

2 THE COURT: To March 1st; right?

3 MR. NORMAND: It may be March 1st or
4 March 2nd. We have not entered a stipulation, but we do have
5 an agreement. I think it is March 2nd.

6 MR. BRAKEBILL: Yeah.

7 THE COURT: March 2nd is a Friday. Okay. All
8 right.

9 MR. NORMAND: And the area of dispute between the
10 parties now, Your Honor, is as follows. Although we've agreed
11 to extend that period to take depositions until March 2nd, we
12 have a disagreement on whether the March 2nd date should be
13 the date by which to measure the timeliness of any new
14 depositions that might be noticed. So that I think Novell's
15 position would be if we were to notice now a deposition for
16 the middle of February, it would be an untimely notice. And
17 SCO's position is it should be a timely notice because the
18 date that we've agreed to move the depositions back for is
19 March 2nd.

20 And there are several reasons we think it makes
21 sense to have the March 2nd date operate as the date to
22 measure timeliness rather than the February 1st date.

23 THE COURT: By timeliness, what do you mean?
24 Timeliness of what?

25 MR. NORMAND: I think, Your Honor, Novell's

1 position would be that a notice of deposition is untimely
2 under the February 1st date if we were to, although notice it
3 now, if we were to notice it to be taken after February 1st.
4 Because if the February 1st date were, in fact, the end of
5 discovery and you wanted to notice a deposition, you would
6 have to notice it in time to be completed by the February 1st
7 date.

8 THE COURT: Why did you extend it to March 2nd,
9 then?

10 MR. NORMAND: That is part of the reason I've asked
11 for the conference, Your Honor. I think it makes sense to
12 extend it to March 2nd, because the reason we agreed to extend
13 the time to take the depositions in the first place was
14 because the parties recognized that we couldn't get the
15 depositions done in January as partially a result of the work
16 both parties were doing throughout December, partially a
17 result comes from an extended holiday season.

18 So my first point, the first reasons that compelled
19 us to pick the March 2nd date are the same reason that both
20 sides were not finished deciding who we think it would be
21 relevant to depose including as disclosed in depositions that
22 are being taken. We have not finished reviewing documents.
23 We have not furnished reviewing Novell's responses to the
24 discovery. That's one.

25 Two, I can tell you we're not contemplating

1 noticing what I would call a very significant number of new
2 depositions. We're not talking about noticing a dozen or
3 probably even a half-dozen more depositions. I think part of
4 Novell's concern is they don't want us to notice 10
5 depositions and start double and triple tracking through
6 February. I can't promise there won't be some double tracking
7 if we do notice three or four new depositions, but it won't be
8 overwhelming.

9 Third, we're not seeking to make the March 2nd date
10 the new deadline for all the fact discovery. We're not going
11 to send out any more document requests. We're not going to
12 send out any more interrogatories, so that kind of discovery
13 would not get in the way of the depositions that are currently
14 scheduled.

15 And then last, Your Honor, I understand, and I
16 don't want to mischaracterize Mr. Brakebill's position, I
17 understand him to have said that Novell would be willing to
18 have discussions on a sort of one off basis, if someone's name
19 came up in a deposition or if someone just found a new name in
20 a document and decided we needed a deposition at that point,
21 and we could have a discussion.

22 My concern about that approach is, one, if we can't
23 reach agreement, it presents the threat of having to go to
24 Your Honor with a series of sort of one off arguments as to
25 the merits of deposing one person or another.

1 THE COURT: Or to Judge Wells.

2 MR. NORMAND: Or to Judge Wells. I should have
3 said at the beginning, I appreciate you hearing this, Your
4 Honor. I took it because it was your scheduling order you
5 were the first in line, so to speak.

6 But the second point in connection with that last
7 issue is I think as a technical matter if we were to approach
8 Novell in the first or second week of February and say, we'd
9 like to depose X person, at that point we're out of time. And
10 if they disagree with us and don't allow us to go forward,
11 when we go to your court Novell simply has to say, the
12 February 1st date has passed.

13 So as a technical matter, we would like to have the
14 issue resolved now up front.

15 THE COURT: What date do you think ought to be the
16 last date upon which you can say, hey, we want to depose X and
17 Y?

18 MR. NORMAND: Well, what I proposed to Novell, Your
19 Honor, was all depositions at least according to our agreement
20 now would be taken by March 2nd. And the issue of whether
21 there's any flexibility between the parties on that date is
22 not one before Your Honor. But as of now, we would say, let's
23 aim to finish all depositions by March 2nd. And the periods
24 for notice needs to be an appropriate notice period under the
25 federal rules given the March 2nd date. In other words, as

1 Your Honor knows, with respect to some third parties, there
2 are no hard and fast rules. 10 days, two weeks, seems to be
3 the standard period of time.

4 So as a practical matter, we would notice any new
5 deposition by mid February. And as an aside to that, we don't
6 have any more interest than Novell does in stacking
7 depositions at the end of the February. We have three
8 arguments coming up in the IBM case essentially the first week
9 of March, and both sides are planning to do their 30(b)6
10 depositions in the last week in February at this point.

11 THE COURT: I thought double and triple stacking
12 depositions is a lawyer's dream.

13 MR. NORMAND: Well, we certainly grew accustomed to
14 it in the IBM case, but I don't think it's anyone's dream, and
15 I do appreciate Novell's interest in trying to avoid that
16 scenario. And I think to some extent it's inevitable. And
17 that part as a result that we weren't able to get as many
18 depositions that we wanted to get done even in the first half
19 of January.

20 But we are where we are now. And in short, you
21 know, we think those are all reasons why we should move the
22 March 2nd date as sort of the operative date.

23 THE COURT: Thank you, Mr. Normand.

24 Mr. Brakebill?

25 MR. BRAKEBILL: Thank you, Your Honor.

1 THE COURT: Speak up a little, will you?

2 MR. BRAKEBILL: Yes. Prior to this call, I thought
3 there were two issues on the table, and I think Mr. Normand
4 has taken one of the issues off this table that was on the
5 table. Novell's primary position was that what we did not
6 want is we did not want to have discovery on fact issues
7 extended as a general matter through March 2nd. I take it
8 from Mr. Normand's opening that that is no longer an issue,
9 that that issue has gone away.

10 THE COURT: Is that right, Mr. Normand?

11 MR. NORMAND: That's right, Your Honor.

12 THE COURT: All right.

13 MR. BRAKEBILL: What we wanted to avoid primarily
14 was is what he says that SCO does not plan to do is serve out
15 new document requests, new interrogatories. That issue has
16 gone away.

17 But the second issue on the table which is one that
18 Mr. Normand has addressed is the extent to which any specific
19 discovery might be conducted after February 1st.

20 THE COURT: Or might be noticed and conducted after
21 February 1st.

22 MR. BRAKEBILL: Sorry?

23 THE COURT: Or might be noticed and conducted after
24 February 1st.

25 MR. BRAKEBILL: Right. I believe the narrow issue

1 for Your Honor, at least correct me if I'm wrong, Mr. Normand,
2 I believe the narrow issue now is whether or not a party will
3 have the ability to notice new depositions after February 1st
4 with a reasonable deadline that would be tied to March 2nd.

5 MR. NORMAND: That's right, Mr. Brakebill. I'm
6 sorry to speak directly to counsel, Your Honor.

7 THE COURT: That's all right.

8 MR. NORMAND: But to clarify, I thought Novell's
9 position was if we even want to send out notices tomorrow but
10 we noticed them, these depositions, for a date after
11 February 1st, that that would be untimely. We can send out
12 notices tomorrow or Monday, but they will be notices for
13 depositions to occur in February.

14 THE COURT: What's your position on that,
15 Mr. Brakebill?

16 MR. BRAKEBILL: I think Novell's position would be
17 that it may be possible that there would could be, you know, a
18 handful of deponents that the party could notice tied to
19 February 1st. I realize that's still a week way, that in all
20 likelihood that that deposition will probably not take place
21 by February 1st with the understanding that we're talking
22 about a limited number of depositions. Novell wouldn't have a
23 problem with that, per se.

24 But what Novell is opposed to is once we get into
25 February of a party noticing new depositions of witnesses

1 whose identities were known long ago on topics they knew about
2 long ago. And so we would be left in a situation where we are
3 trying to accomplish a fair number of depositions now between
4 the end of January and March 2nd. And all that would be doing
5 is we believe unfairly compounding the schedule with
6 depositions set for whatever reason the parties decided not to
7 notice back in December and earlier in January.

8 THE COURT: So your view is that the last time a
9 deposition ought to be able to be noticed would be what date?
10 The 31st? The 1st? Tomorrow?

11 MR. BRAKEBILL: What assumption we're operating on
12 is again a reasonable standard. And I don't know whether Your
13 Honor -- how Your Honor comes out on this. But if a party is
14 to notice a deposition now for a deposition -- a deponent for
15 deposition on February 1st, is that reasonable? If I say in
16 response to your question that Novell believes that tomorrow
17 would be the appropriate month, appropriate deadline, I
18 realize what's going to happen is that tomorrow we're going to
19 get a deposition notice for X-number of people. And so
20 Novell's position --

21 THE COURT: But wasn't that somewhat contemplated
22 by extending the discovery to March 2nd?

23 MR. BRAKEBILL: What was contemplated by extending
24 the period to conduct depositions to March 2nd we believe was
25 a realization by both Mr. Normand and myself and SCO and

1 Novell that the parties had already noticed more than enough
2 depositions that could feasibly be accomplished by
3 February 1st. So with respect to trying to actually schedule
4 them in an efficient and appropriate manner considering
5 counsel availability, witness availability, that we would
6 extend the period of those depositions to March 2nd. And so
7 we are now working together on this trying to diligently come
8 up with a schedule for depositions that had been noticed.

9 So what is forming Novell's concern with respect to
10 noticing up new depositions tied to a March 2nd date is the
11 notion that again, we're going to be receiving -- and this
12 cuts both ways, Your Honor -- - but either side can be
13 receiving deposition notices of witnesses who identities were
14 known long ago, and not really new information that had
15 surfaced. Depositions in many cases occur all the way up
16 until the close of discovery. But the fact of a deposition
17 preceding the final days of discovery doesn't necessarily mean
18 that you're going (inaudibles) should new information surface
19 (inaudibles) deposition.

20 MR. NORMAND: Your Honor, this is Mr. Normand. If
21 I could speak a little bit more specifically, maybe that would
22 be helpful, Your Honor, and maybe help Mr. Brakebill.

23 If we were permitted to do so, we would do the
24 following on Monday. We would send out a notice with probably
25 two or three additional 30(b)6 topics for Novell, and we would

1 send out probably three or four notices for new fact
2 depositions. And in addition to that, just out of reluctance
3 and obligation to my client, I probably would want to reserve
4 the right to be able to send out two more notices sometime in
5 February. So that would be a maximum of six new fact
6 depositions.

7 THE COURT: Okay. Mr. Brakebill, what's your
8 reaction to that?

9 MR. BRAKEBILL: My response to the specific
10 proposal to add new 30(b)6 topics as opposed to the issues in
11 the lawsuit have been around for many, many months and a
12 realization a week before the close of fact discovery that
13 they want to take 30(b)6 topic to me is not good cause and not
14 (inaudibles) for additional 30(b)6 topics.

15 THE COURT: All right. Mr. Normand, you said how
16 many more would you send out, four by when?

17 MR. NORMAND: I guess I missed the beginning part
18 of your question, Your Honor, I'm sorry.

19 THE COURT: How many deposition notices do you
20 contemplate if I let you do it sending out in the next couple
21 of days to be taken in February?

22 MR. NORMAND: Well, if it would help, Your
23 Honor -- well, the answer to Your Honor's question is three or
24 four, and we could do that by Monday. And with respect to the
25 30(b)6 position, my response would be it's true that those

1 30 (b) 6s would -- well, they would be a limited new number of
2 topics, and they would concern issues that have been in the
3 litigation. But the reason we agreed to the March 2nd date
4 was because we had trouble finishing discovery pursuant to
5 Your Honor's schedule. So the same reasons that in my view
6 precluded us from finishing that discovery are the same reason
7 there are some issues floating around that we would like to
8 address with these additional notices.

9 THE COURT: And then with the three or four, you
10 maybe want two more possibilities in case you learn something.
11 And with those two, you would want the right to notice them
12 sometime in February, to be taken in February.

13 MR. NORMAND: Yes, Your Honor.

14 THE COURT: Anything else, Mr. Brakebill?

15 MR. BRAKEBILL: Again, on the 30(b) 6 points, I was
16 already served two 30(b) 6 depositions, an original one in
17 December and a revised one in January again without any
18 specifics. I believe Mr. Normand --

19 THE COURT: Without specific what?

20 MR. BRAKEBILL: -- good cause necessary. It would
21 permit (inaudible) 30(b) 6 notice. We've already had 30, close
22 to 30 topics. He acknowledges that they are not topics and
23 issues floating around. That will depose --

24 THE COURT: We are having a very hard time hearing
25 you, Mr. Brakebill. I don't know if it's your speaker phone

1 or your phone.

2 MR. BRAKEBILL: Can you hear me better now?

3 THE COURT: I little better. Some of you were
4 breathing into your phones. It sounds like Darth Vader.

5 MR. BRAKEBILL: Can you hear me okay now?

6 THE COURT: Better.

7 MR. BRAKEBILL: Okay.

8 THE COURT: Say again what you just said.

9 MR. BRAKEBILL: Certainly.

10 To the extent that SCO was seeking to add two or
11 three or multiple 30(b)6 deposition topics, we would note that
12 SCO has already served one 30(b)6 in December and sent us a
13 revised 30(b)6 this month. And Mr. Normand has conceded that
14 there is no good cause for an additional two or three or four
15 topics in that they relate to issues that have been in the
16 litigation dating way back.

17 To the extent that Your Honor is inclined to permit
18 SCO, however, to add two, three, four topics to their 30(b)6,
19 we would also ask that the Court permit Novell the same
20 opportunity.

21 THE COURT: Thank you.

22 Anything else, Mr. Normand?

23 MR. NORMAND: No, Your Honor. It would be okay
24 with us if Novell wanted to add a similar number of topics. I
25 think as Your Honor is aware, 30(b)6s are often used as a way

1 it avoid fact discovery in the way of document requests and as
2 a way to avoid depositions of third parties. And as a
3 practical matter, they often are burdensome of the companies.
4 I think they already are. I think they would be incremental
5 burdens on both companies.

6 THE COURT: All right. Here's my ruling. You get
7 what you want, Mr. Normand. You get to designate three or
8 four by Monday. Mr. Brakebill, you can, too, if you want to.
9 And I'll give each until February 9th to designate one other
10 one if you happen upon some other person that you just can't
11 get by without deposing before March 2nd, okay?

12 MR. JAMES: Judge, how about the 30(b)6?

13 MR. BRAKEBILL: I didn't hear that completely.

14 THE COURT: I said he gets what he wants and you
15 do, too, three or four designated by Monday to be taken
16 whenever before March 2nd. And you each get one more if you
17 need it to be designated by the end of the day on February the
18 9th.

19 MR. JAMES: And, Your Honor, how about the 30(b)6?

20 THE COURT: Remind me. What about the 30(b)6?

21 MR. JAMES: Well, the question was whether the
22 parties could add three or four additional -- amend their
23 30(b)(6) notices to add additional topics.

24 THE COURT: Yeah, you can both do that.

25 MR. JAMES: Okay.

1 THE COURT: All right. Thank you.
2 MR. JAMES: Thank you, Your Honor.
3 MR. NORMAND: Thank you, Your Honor.
4 MR. BRAKEBILL: Thank you, Your Honor.
5 (Whereupon, the court proceedings were concluded.)

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1 STATE OF UTAH)
2) ss.
3 COUNTY OF SALT LAKE)

4 I, KELLY BROWN HICKEN, do hereby certify that I am
5 a certified court reporter for the State of Utah;

6 That as such reporter, I attended the hearing of
7 the foregoing matter on January 25, 2007, and thereat reported
8 in Stenotype all of the testimony and proceedings had by
9 telephone, and caused said notes to be transcribed into
10 typewriting; and the foregoing pages number from 3 through 18
11 constitute a full, true and correct report of the same.

12 That I am not of kin to any of the parties and have
13 no interest in the outcome of the matter;

14 And hereby set my hand and seal, this _____ day of
15 _____ 2007.

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KELLY BROWN HICKEN, CSR, RPR, RMR

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