

Appeal No. 08-4217

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

THE SCO GROUP, INC.,

Plaintiff-Appellant,

vs.

NOVELL, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Utah
The Honorable Dale A. Kimball, Judge Presiding
(Case No. 2:04-CV-00139-DAK)

**DEFENDANT-APPELLEE NOVELL, INC.'S RESPONSE TO
APPELLANT'S MOTION TO EXPEDITE APPEAL**

ANDERSON & KARRENBERG

Thomas R. Karrenberg
Heather M. Sneddon
700 Bank One Tower
50 West Broadway
Salt Lake City, Utah 84101
Telephone: 801.534.1700
Facsimile: 801.364.7697

MORRISON & FOERSTER LLP

Michael A. Jacobs
George C. Harris
David E. Melaugh
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522

Attorneys for Defendant-Appellee NOVELL, INC.

RESPONSE TO APPELLANT'S MOTION TO EXPEDITE APPEAL

1. Novell does not oppose expediting the due date for SCO's opening brief to March 6, 2009.

2. As Novell informed SCO, however, Novell does believe a reasonable extension is warranted for Novell's opposition brief. Novell therefore opposes the proposed April 6, 2009 deadline for the appellee's brief.

3. Novell requests a 30-day extension for its brief. In the event the Court adopts SCO's proposed opening deadline, Novell's brief would be due May 5, 2009.

4. Such an extension is warranted here. Though Novell believes that this appeal presents a straightforward matter of applying plain contract language to undisputed or established facts, the parties generated a considerable record below. SCO has identified seven issues on appeal. Four stem from an August 2007 ruling on the parties' motions for summary judgment. (Dec. 15, 2008 Docketing Statement at 5.) Those motions involved over 1,500 pages of briefing, numerous declarations, and many hundreds of pages of exhibits. The transcript for the summary judgment hearing is over 240 pages. The summary judgment order is itself 102 pages. The remaining three issues on appeal identified by SCO stem from a four-day bench trial, at which 10 witnesses were heard and over 550 exhibits introduced, resulting in a 43-page trial order. A 30-day extension will

enable Novell to effectively marshal this voluminous record and to respond to SCO's opening brief, which, even with expedition, SCO will have had over 3 months to draft.

5. A 30-day extension will not overly prejudice SCO. Though SCO discusses at length its supposed need to move quickly on this appeal, it ignores that:

- SCO voluntarily filed for bankruptcy the day before trial was scheduled to go forward, in September 2007. Had SCO instead simply proceeded to trial, this appeal would have been completed long ago.
- SCO *opposed* lifting the bankruptcy stay to proceed with trial. Again, had SCO simply sought a prompt lifting of the stay to proceed to trial, this appeal would be complete by now.
- SCO unnecessarily delayed the post-trial steps required for SCO to perfect its appeal. For months, SCO filed motions and debated with Novell about issues concerning the form of final judgment. In the end, SCO either conceded or lost essentially every such dispute.
- SCO's bankruptcy plan does not hinge on a rapid appeal. For example, there are no potential buyers waiting in the wings to hear the appellate results. Instead, SCO proposes to sell off assets it claims are entirely unrelated to its litigation, leaving an entity whose main

(perhaps sole) purpose is to press these suits against Novell, IBM, Red Hat, AutoZone, and others.

Respectfully submitted on this 27th day of January, 2009.

ANDERSON & KARRENBERG

Thomas R. Karrenberg
Heather M. Sneddon
700 Bank One Tower
50 West Broadway
Salt Lake City, Utah 84101
Telephone: 801.534.1700
Facsimile: 801.364.7697

MORRISON & FOERSTER LLP

Michael A. Jacobs
George C. Harris
David E. Melaugh
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522

/s/ Michael A. Jacobs

Attorneys for Defendant-Appellee
NOVELL, INC.

CERTIFICATE OF SERVICE

I, Michael A. Jacobs, hereby certify that on this 27th day of January, 2009, a true and correct copy of the foregoing DEFENDANT-APPELLEE NOVELL, INC.'S RESPONSE TO APPELLANT'S MOTION TO EXPEDITE APPEAL was electronically filed with the court and forwarded via electronic mail to the following recipients:

Edward Normand
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504

Stuart Singer
BOIES, SCHILLER & FLEXNER LLP
401 East Las Olas Blvd., Suite 1200
Fort Lauderdale, Florida 33301

Brent O. Hatch
Mark F. James
HATCH, JAMES & DODGE, PC
10 West Broadway, Suite 400
Salt Lake City, Utah 84101

s/ Michael A. Jacobs _____
MORRISON & FOERSTER LLP
Michael A. Jacobs
George C. Harris
David E. Melaugh
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522
MJacobs@mofocom

CERTIFICATE OF DIGITAL SUBMISSION

The undersigned certifies with respect to this filing that no privacy redactions were necessary. This DEFENDANT-APPELLEE NOVELL, INC.'S RESPONSE TO APPELLANT'S MOTION TO EXPEDITE APPEAL submitted in digital form is an exact copy of the written document filed with the Clerk.

This digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program (using Symantec AntiVirus v.10.1.4.4, last updated January 24, 2009) and, according to the program, is free of viruses.

Dated: January 27, 2009

s/ Michael A. Jacobs
MORRISON & FOERSTER LLP
Michael A. Jacobs
George C. Harris
David E. Melaugh
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522
MJacobs@mofocom