

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)**

**MOTION OF *AMICUS CURIAE* WAYNE R. GRAY FOR
LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF
DEFENDANT/APPELLEE NOVELL, INC.**

Thomas T. Steele, Atty.
Florida Bar No. Florida Bar No. 158613
Email: tsteele@steelehale.com
Steele + Hale, P.A.
201 East Kennedy Boulevard, Suite 425
Tampa, Florida 33602
Telephone (813) 223-2060
Facsimile (813) 223-2065
Counsel for Amicus

The Amicus, WAYNE R. GRAY (“the Amicus Mr. Gray” or “Mr. Gray”), by and through his undersigned counsel and pursuant to Rule 29 of the Federal Rules of Appellate Procedure, hereby moves this Court for leave to file his proposed amicus curiae brief in support of certain positions taken, and arguments made, by the Defendant/Appellee, NOVELL, INC. (“the Defendant/Appellee Novell” or “Novell”), in connection with the above-styled and numbered appeal pending before this Court and in the underlying Utah district court action, and in support of his motion states:

1. *Amicus* Mr. Gray is the plaintiff in a Florida district court civil action styled and numbered *Wayne R. Gray, plaintiff, v. Novell, Inc., The SCO Group, Inc., and X/Open Company Limited, defendants*, Case No. 8:06-cv-01950-VMC-TGW, United States District Court, Middle District of Florida, Tampa Division.

2. The defendant/appellee Novell not only is a defendant in the Florida district court action, but also is the defendant in the underlying Utah district court action that is pending before this Court and that is scheduled for oral argument on Wednesday, May 6, 2009, in Denver, Colorado.

3. This Court should grant leave to the *Amicus* Mr. Gray to file his proposed amicus brief (and its accompanying appendix) for the following listed reasons:

a. The Utah and Florida disputes arise out of the same series of

transactions, involve many of the same documents, and focus on the same question: What “Intellectual Property” was conveyed by the 1995 “Asset Purchase Agreement” (as amended)? More fundamentally, the key question is: What documents make up the 1995 “Asset Purchase Agreement” (as amended), and what are their interrelationships (if any)?

- b. Those fundamental questions, and the facts and law employed to answer them, now have been answered by the Utah and Florida district courts in two (2) inconsistent, and diametrically-opposed, ways, with sharply-different results.
- c. In the underlying Utah district court case, Novell stipulated, and the Utah district court ruled, that the U.S. “UNIX” trademarks, along with the business and good will associated with those marks, were transferred from Novell to The Santa Cruz Operation, Inc. (“Santa Cruz”), in that 1995 asset purchase transaction. Moreover, the Utah district court concluded, again with the knowing concurrence of Novell and its counsel in that case, that the transaction in question involved four (4) essential documents:
 - i. The “Asset Purchase Agreement,” September 19 1995;
 - ii. The “Bill of Sale,” December 6, 1995;

- iii. “Amendment No. 1 To Asset Purchase Agreement,” December, 1995; and
 - iv. “Amendment No. 2 To Asset Purchase Agreement,” October 16, 1996.
- d. In the subsequent Florida district court action, Novell reversed itself and joined with a co-defendant, X/Open Company Limited (“X/Open”), in arguing that the U.S. “UNIX” trademarks, along with the business and good will associated with those marks, were not transferred by way of the 1995 “Asset Purchase Agreement” (as amended) transaction to Santa Cruz. Moreover, Novell stood by mute while X/Open argued that, contrary to Novell’s stipulations in the Utah district court action and to the conclusions reached by that same Utah court, the 1995 asset purchase transaction included two (2) additional documents:
- i. A document entitled “Agreement” and dated May 10, 1994, whereby Novell purported to, among other things, (i) license one or more “UNIX” trademarks to X/Open and (ii) promised to assign one or more “UNIX” trademarks to X/Open; and
 - ii. A document entitled “Confirmation Agreement,” dated September 4, 1996, whereby Novell, Santa Cruz, and X/Open

stipulated, in effect, that the 1995 APA, as amended, never happened with respect to the specified U.S. “UNIX” trademarks. The Florida district court apparently misunderstood, or failed to appreciate, that:

- a. Novell already had stipulated, and the Utah district court already had concluded, that the 1995 APA (as amended) in fact did transfer the two (2) specified U.S. “UNIX” trademarks to Santa Cruz;
- b. The later so-called “Confirmation Agreement” contained no wording of any kind that could be construed as transferring the specified U.S. “UNIX” trademarks back to Novell;
- c. No document has been produced by any person that reflects any such transfer or assignment from Santa Cruz back to Novell;
- d. Novell never offered in the Florida district court action to explain how (or when) Santa Cruz transferred or assigned back to Novell the U.S. “UNIX” trademarks;
- e. Novell never registered any such transfer or assignment with the United States Patent and Trademark Office; and

f. Neither Novell nor X/Open could (or would) produce the May 14, 1994, “Agreement” specified in the “Confirmation Agreement,” let alone explain how that “agreement” affected either the May 10, 1994, “Agreement” or the 1995 APA (as amended).

On February 20, 2009, the Florida district court granted X/Open’s motion for summary judgment, (i) ruling that all five (5) documents were parts of a single transaction, (ii) declaring that the 1996 “Confirmation Agreement” somehow amended or modified the 1995 APA (as amended), and (iii) giving short shrift to (a) Mr. Gray’s arguments (as set forth above), and (b) long-established trademark law. Novell and X/Open never could explain how the U.S. “UNIX” trademarks (the marks that were transferred by Novell to Santa Cruz) made the return trip to Novell; the Florida district court never made the effort.

The judgment of the Florida district court now is on appeal to the United States Court of Appeals for the Eleventh Circuit, but a briefing schedule has not been announced. Accordingly, the opinion of this Court likely will be before the Eleventh Circuit when it considers Mr. Gray’s appeal from the rulings, and the resulting judgment, of the Florida district court.

To ensure uniformity among the circuits on the meaning, effect, and operation of the 1995 “Asset Purchase Agreement” (as amended), as well as the

components of that “Agreement,” this Court should grant leave to the *Amicus* Mr. Gray (i) to file his proposed amicus curiae brief (and its accompanying attachment) and (ii) to have his counsel present oral argument of no more than six (6) minutes on the importance of this Court’s ruling in connection with this appeal and with the pending Eleventh Circuit appellate proceeding.

And, to ensure that this Court has access to all of the pertinent documents, this Court should order counsel for Novell (the same counsel representing Novell in the Florida district court action and, presumably, in the Eleventh Circuit appeal) to produce prior to oral argument the following listed documents:

- A. May 10, 1994, Novell - X/Open Agreement
- B. May 14, 1994, Novell - X/Open Agreement
- C. September 1996 Novell - Santa Cruz - X/Open Confirmation Agreement

Dated this 20th day of April, 2009.

Respectfully submitted,

s/Thomas T. Steele

Thomas T. Steele

Steele + Hale, P.A.

201 East Kennedy Boulevard, Suite 425

Tampa, Florida 33602

Telephone (813) 223-2060

Facsimile (813) 223-2065

Counsel for Amicus

CERTIFICATE OF SERVICE

I, Thomas T. Steele, certify that on this 20th day of April, 2009, the foregoing MOTION OF AMICUS CURIAE WAYNE R. GRAY FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF DEFENDANT/APPELLEE NOVELL, INC., was electronically filed with the Clerk of the United States Court of Appeals for the Tenth Circuit, and a true and correct copy of the foregoing MOTION OF AMICUS CURIAE WAYNE R. GRAY FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF DEFENDANT/APPELLEE NOVELL, INC., was served via electronic mail on April 21, 2009, to the following recipients:

Thomas R. Karrenberg
Heather M. Sneddon
ANDERSON & KARRENBERG
50 West Broadway, Ste. 700
Salt Lake City, Utah 84101
*Counsel for Defendant-Appellee
Novell, Inc.*

David Bois
Robert Silver
Edward Normand
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504
*Counsel for Plaintiff-Appellant The SCO
Group, Inc.*

Michael A. Jacobs
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
*Counsel for Defendant-Appellee
Novell, Inc.*

Stuart Singer
BOIES, SCHILLER & FLEXNER LLP
401 East Las Olas Blvd., Suite 1200
Fort Lauderdale, Florida 33301
*Counsel for Plaintiff-Appellant
The SCO Group, Inc.*

Brent O. Hatch
Mark F. James
HATCH, JAMES & DODGE, PC
10 West Broadway, Ste.400
Salt Lake City, Utah 84101
*Counsel for Plaintiff-Appellant
The SCO Group, Inc.*

Devan V. Padmanabhan
DORSEY & WHITNEY LLP
50 South Sixth Street, Suite 1500
Minneapolis, Minnesota 55402
*Counsel for Plaintiff-Appellant
The SCO Group, Inc.*

s/ Thomas T. Steele
Attorney