

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)**

**APPELLEE NOVELL, INC.'S OPPOSITION TO
WAYNE R. GRAY'S MOTION FOR LEAVE TO FILE AMICUS BRIEF**

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INTRODUCTION

Wayne Gray seeks leave to file an amicus brief. Gray seeks to do so to inject issues into this appeal that have no relevance to the dispute between SCO and Novell and that were not addressed by the district court's decisions below. As the 855 pages of "attachments" to Gray's amicus brief demonstrate, evaluation of Gray's arguments would require extensive additions to the record, the majority of which was not even presented to the district court in this matter. In addition, though characterized as "in support of" Defendant-Appellee Novell, Gray's position is in fact opposed to both Novell and SCO. His motion to file an amicus brief therefore should have been filed March 13, not April 20, and is untimely. For these reasons, Novell opposes Gray's motion to file an amicus brief.

RESPONSE

I. GRAY'S AMICUS IS AN IRRELEVANT ATTEMPT TO RE-LITIGATE SEPARATE ISSUES BEST LEFT TO THE ELEVENTH CIRCUIT

Gray's amicus brief is a transparent attempt to relitigate unrelated issues he lost before another federal court, which are now on appeal before the Eleventh Circuit. Courts routinely reject amicus briefs by parties who are litigants in other cases and are merely attempting to re-litigate issues from such cases. *See, e.g., American Satellite Co. v. United States*, 22 Cl. Ct. 547, 549 (1991) (disallowing amicus brief by party who had already made claim, noting "courts have frowned

on participation which simply allows the amicus to litigate its own views or to simply present its version of the facts”); *Fluor Corp. v. United States*, 35 Fed. Cl. 284, 285-86 (1986) (similar). Thus, the federal district court in *Dow Chemical Co. v. United States* denied leave to file an amicus brief where (as here) the purported amicus was a party in “a separate lawsuit,” who “ought not to be permitted to relitigate its own lawsuit” in another case. *Dow Chemical Co.*, Case No. 00-CV-10331-BC, 2002 U.S. Dist. LEXIS 11657, at *3-4 (E.D. Mich. May 24, 2002).

As reflected in Novell and SCO’s briefing, this appeal concerns: (i) who owns the UNIX SVRX copyrights; (ii) the extent of Novell’s waiver rights concerning SVRX Licenses; and (iii) whether Novell is entitled to any of the royalties from SCO’s SVRX License with Sun — issues on which Gray admits he takes “no position.” (GB4.)¹ In contrast, Gray’s Florida litigation concerns the ownership of UNIX *trademarks* and a purported conspiracy between Novell, SCO and X/Open (not a party to this litigation) to conceal the true ownership of those trademarks. The UNIX trademarks in question were transferred from Novell to X/Open by way of a 1993 term sheet between Novell, X/Open, Digital, HP, IBM,

¹ Citations to GB refer to Gray’s “Brief *Amicus Curiae* for Wayne R. Gray,” attached to Gray’s Motion of *Amicus Curiae* Wayne R. Gray for Leave to File Amicus Brief.

and Sun; a 1994 licensing agreement between Novell and X/Open; a 1996 confirmation agreement between Novell, SCO, and X/Open; and 1998 deed of assignment between Novell and X/Open. *None* of those agreements, nor any of the surrounding evidence, was presented to the Utah district court, as none had any relevance to the issues in dispute at the district court or on this appeal.

At bottom, Gray's amicus brief is an attempt to get this Court to "confirm" supposed Utah district court holdings that were not in fact part of that court's rulings in this matter and that are, in any event, irrelevant to the issues on appeal here. Gray's motion to file an amicus should be denied.

II. GRAY'S AMICUS BRIEF DOES NOT "SUPPORT" NOVELL AND IS THEREFORE UNTIMELY

Gray characterizes his amicus brief as "in support" of Novell because, nominally, he "urges this Court to affirm the findings and conclusions of the Utah district court" (GB2.) On the contrary, Gray's proposed amicus brief makes clear he is antagonistic to both Novell and SCO, just as Gray is in his Florida litigation. (*See, e.g.*, GB26 (accusing Novell of "widespread false representations").) Gray repeatedly accuses Novell and its representatives of withholding documents from the Florida and Utah district courts (GB24-28) and goes so far as to accuse Novell's in-house counsel of perjury (GB21-22). Because Gray "does not support either party," his brief was due within seven days of the

filing of Appellant's brief and is accordingly untimely and should be denied. Fed. R. App. P. 29(e).

CONCLUSION

For the reasons stated above, Novell requests that this Court deny Gray's motion to file an amicus brief "in support of" Novell.

Respectfully submitted on this 30th day of April, 2009.

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CERTIFICATE OF SERVICE

I, Michael A. Jacobs, certify that on this 30th day of April, 2009, a true and correct copy of the foregoing APPELLEE NOVELL, INC.'S OPPOSITION TO WAYNE R. GRAY'S MOTION FOR LEAVE TO FILE AMICUS BRIEF was served via electronic mail to the following recipients:

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CERTIFICATE OF DIGITAL SUBMISSION

I, Michael A. Jacobs, certify that no privacy redactions were necessary for this filing. This APPELLEE NOVELL, INC.'S OPPOSITION TO WAYNE R. GRAY'S MOTION FOR LEAVE TO FILE AMICUS BRIEF 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 April 25, 2009) and, according to the program, is free of viruses.

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