

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)**

Reply Memorandum Of Amicus Wayne R. Gray To

**(i) “Appellee Novell, Inc.’s Opposition To Wayne R. Gray’s Motion For Leave
To File Amicus Brief” and (ii) “Appellant’s Response To Wayne R. Gray’s
Motion For Leave To File Amicus Brief In Support Of Defendant/Appellee
Novell, Inc.”**

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The Amicus, WAYNE R. GRAY (“the Amicus Mr. Gray” or “Mr. Gray”), by and through his undersigned counsel, hereby submits this his “Reply Memorandum Of Amicus Wayne R. Gray To (i) ‘Appellee Novell, Inc.’s Opposition To Wayne R. Gray’s Motion For Leave To File Amicus Brief’ and (ii) ‘Appellant’s Response To Wayne R. Gray’s Motion For Leave To File Amicus Brief In Support Of Defendant/Appellee Novell, Inc.’,” and in support of his reply Mr. Gray states:

Mr. Gray’s motion and proposed amicus brief plainly struck one or more of Novell’s corporate nerves. Mr. Gray urges this Court to “carry with the case” (i) his motion for leave to file an amicus brief, (ii) his proposed amicus brief, (iii) the oppositions of the Appellee Novell and the Appellant SCO, and (iv) this reply. This appeal is far, far too complex in some respects for this Court to ignore any meaningful point, analysis, or argument, especially the points listed in the numbered paragraphs, below.

With respect to Novell’s efforts to preclude this Court from reading and understanding the points made in Mr. Gray’s proposed amicus brief, Novell asserts in classic debate fashion one “straw man” argument after another. This Court should avoid the temptation to be impressed by the demolition of such “straw men.” Rather, it should focus on (i) what the relevant documents state (and don’t state) and (ii) what Novell says in what context. Because Novell will argue

any contention, true or not, consistent with previous positions or not, depending on the exigencies of the moment. For example, this Court should note these points:

1. Mr. Gray does not seek 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.” The 1995 “Asset Purchase Agreement” (as amended) is the focal point of all litigation here, including both appeals;¹ the operation and effect of the 1995 Asset Purchase Agreement (“the APA”) (as amended) control the outcome of all litigation; the so-called “Confirmation Agreement” of September, 1996, was either deliberately or otherwise intentionally withheld from the Utah district court; and the “Confirmation Agreement” of September, 1996, has a direct bearing upon issues common to both appeals. Indeed, both Novell and SCO perceive a clear link between the copyright issues and the trademark issue. Attached to this Reply is an unsigned document, in draft form produced by SCO, bearing the date of February 10, 2003, in which SCO sought an agreement from Novell to “interpret” the plain wording of the 1995 APA (as amended). This proposed (but most

¹ *The SCO Group, Inc. v. Novell, Inc.*, Appeal No. 08-4217, United States Court of Appeals for the Tenth Circuit; *Wayne R. Gray v. Novell, Inc., and The SCO Group, Inc., and X/Open Company, Limited*, Appeal No. 09-11374-C, United States Court of Appeals for the Eleventh Circuit.

probably never sent) letter amendment (i) would have changed the entire meaning and operation of the 1995 APA (as amended) and (ii) clearly was part of a proposed arrangement to have the 1995 APA (as amended) deal differently with the copyrights and trademarks than it already did. The 1995 APA (as amended) plainly and clearly demonstrates, as confirmed by the “Bill of Sale” of December 6, 1995, that Novell transferred its entire business, “lock, stock and barrel,” to quote an executive of Novell, to The Santa Cruz Operation, Inc. This draft letter agreement was sent by Christopher S. Sontag, Senior Vice President, Operating Systems Division. of SCO to Greg Jones of Novell on February 20, 2003.²

2. Mr. Gray unequivocally supports the arguments made by Novell in the Utah district court proceeding. Strangely, Novell now has reversed many of those positions in its appellate brief. Unquestionably, there now are “two Novells,” the Novell that appeared before District Judge Kimball and the Novell that submitted its appellate briefs to this Court in this appeal. Among the “new facts” are:

² Oddly, the draft letter is dated February 10, 1993, but it refers to the 1995 “Asset Purchase Agreement” (as amended). Equally odd, the transmittal email is dated February 20, 2003, but it bears an internal stamp date of “2/16/2006.”

- A. Novell has “recharacterized” the remarks of its then-General Counsel David Bradford, as set forth in the minutes of the meeting of Novell’s Board of Directors on September 18, 1995. Mr. Bradford’ statements are new; he originally characterized Novell’s intent to transfer certain “Intellectual Property” to sell to Santa Cruz pursuant to the 1995 APA (as amended) as marking the end of its UNIX business. No longer. (Gray Amicus Brief at 6-7)³
- B. Novell has recharacterized its “Seller Disclosure Statement” (at Attachment C to the 1995 APA (as amended)). It is new; Novell originally characterized the U.S. “UNIX” Trademarks as trademarks owned by Novell in 1995. No longer. (Gray Amicus Brief at 7)⁴
- C. Novell has recharacterized the 1995 APA (as amended). It is new; Novell originally characterized that Agreement as an integrated agreement. No longer. (Gray Amicus Brief at 19-20)⁵

³ “Gray Amicus Brief” refers to the proposed “Amicus Brief of Wayne R. Gray.” Also see Gray Amicus Brief 00356 (¶ 2); Gray Amicus Brief 00388 (¶ 1).

⁴ See Gray Amicus Brief 00044.

⁵ See Gray Amicus Brief 00287 (¶ 2); Gray Amicus Brief 00288 (¶¶ 1-3); Gray Amicus Brief 00427 (¶ 3); Gray Amicus Brief 00428 (¶ 1).

- D. Novell has recharacterized the transfer of the U.S. “UNIX” Trademarks by the 1995 APA (as amended). The nature of the transfer is new; Novell originally characterized these Marks as unencumbered. No longer. (Gray Amicus Brief at 23-24)⁶
- E. Novell’s characterization of Item III in Schedule 1.1(a) and Schedule 1.1(b) to the 1995 APA (as amended) is now new; Novell originally characterized Schedule 1.1(a) and Schedule 1.1(b) as meaning what they say as to all UNIX licenses and agreements without limitation transferring to Santa Cruz. No longer. (Gray Amicus Brief at 15)⁷
- F. Novell’s interpretation of the wording of Item V in Schedule 1.1(a) and in Schedule 1.1(b) to the 1995 APA (as amended) is new; Novell originally characterized that wording as listing the UNIX Intellectual Property transferred by Novell to Santa Cruz. No longer. (Gray Amicus Brief at 15-17)⁸
- G. Novell’s characterization of the December 1, 1995 “Bill of Sale” is new; Novell originally characterized that wording as

⁶ See Gray Amicus Brief 00682 (¶ 1); Gray Amicus Brief 00811 (¶ 2).

⁷ See Gray Amicus Brief 00851 (¶ 3); Gray Amicus Brief 00854 (¶ 3).

⁸ See Gray Amicus Brief 00379 (¶ 1); Gray Amicus Brief 00419 (¶ 1); Gray Amicus Brief 00423 (¶ 2); Gray Amicus Brief 00425 (¶ 2); Gray Amicus Brief 00426 (¶ 2); Gray Amicus Brief 00428 (¶ 3).

transferring title to all assets identified in Schedule 1.1(a) to the 1995 APA (as amended). No longer. (Gray Amicus Brief at 7)⁹

H. Novell has adopted the brand-new position that it remained in the UNIX business after December 6, 1995; contrary to its previous statements that it left the UNIX business in its entirety after the “Bill of Sale” on December 1, 1995, Novell now contends that it did not transfer its entire UNIX business to Santa Cruz pursuant to the 1995 APA (as amended). (Gray Amicus Brief at 13-14)¹⁰

I. Contrary to its previous arguments, Novell now contends that there are three, not two, amendments to the 1995 APA (as amended); contrary to its previous statements that only Amendment Nos. 1 and 2 amended the 1995 APA (as amended), Novell now asserts that Amendment No. 1 and Amendment No. 2 to the 1995 APA (as amended) related to

⁹ See Gray Amicus Brief 00380 (¶ 2); Gray Amicus Brief 00426 (¶ 2); Gray Amicus Brief 00434 (¶ 3).

¹⁰ See Gray Amicus Brief 00057; Gray Amicus Brief 00241 (¶¶ 2-4); Gray Amicus Brief 00242 (¶¶ 1-4); Gray Amicus Brief 00395 (¶ 2); Gray Amicus Brief 00396 (¶ 2); Gray Amicus Brief 00397 (¶ 3); Gray Amicus Brief 00398 (¶ 2).

UNIX Intellectual Property, as did the “Confirmation Agreement.” (Gray Amicus Brief at 4, 17)¹¹

- J. According to Novell, amendments to the 1995 APA (as amended) operated to amend the APA (as amended) retroactively. (Gray Amicus Brief at 4)¹²
- K. The as-yet-never-produced May 14, 1994, Novell-X/Open Agreement (as expressly identified in the “Confirmation Agreement”), not the 1995 APA (as amended), now controls UNIX Intellectual Property ownership and is the operative document. (Gray Amicus Brief at 26-27)
- L. Novell’s position in the Utah district court -- that the intent of the 1995 APA (as amended) was to transfer its U.S. “UNIX” Trademarks to Santa Cruz -- is no longer true and has been disavowed by Novell. (Gray Amicus Brief at 16)¹³
- M. Novell’s position in the Utah district court -- that pursuant to the 1995 APA (as amended), it transferred the U.S. “UNIX”

¹¹ See Gray Amicus Brief 00383 (¶ 4); Gray Amicus Brief 00384 (¶ 1); Gray Amicus Brief 00399 (¶¶ 2-3); Gray Amicus Brief 00400 (¶ 1).

¹² See Gray Amicus Brief 00399 (¶ 3); Gray Amicus Brief 00400 (¶ 1); Gray Amicus Brief 00434 (¶ 2).

¹³ See Gray Amicus Brief 00272 - Gray Amicus Brief 00273 (¶ 3); Gray Amicus Brief 00278 (¶ 17); Gray Amicus Brief 00285 (¶ 6).

Trademarks that it owned to Santa Cruz -- is no longer true and has been disavowed by Novell. (Gray Amicus Brief at 16)¹⁴

N. The many statements of the Utah district court in its August 10, 2007, Opinion -- that the U.S. “UNIX” Trademarks owned by Novell transferred to Santa Cruz pursuant to the 1995 APA (as amended) -- are no longer true and have been disavowed by Novell. (Gray Amicus Brief at 16-17)¹⁵

3. Mr. Gray’s amicus brief and accompanying attachments provide undisputed additional background facts about Novell’s conduct in 1993 and after concerning UNIX Intellectual Property licensing and ownership (improper or otherwise), and those undisputed facts (some of which may have been withheld intentionally from the Utah district court). Providing such undisputed facts does not run contrary to, and indeed is entirely consistent with, Mr. Gray’s strong support for the positions asserted by Novell in the Utah district court case, especially those positions pertaining to the 1995 APA (as amended) and its transfer of the UNIX business, the U.S. “UNIX” Trademarks, and the goodwill associated with those Marks to Santa Cruz, and the conduct

¹⁴ See Gray Amicus Brief 00372 (¶ 2)

¹⁵ See Gray Amicus Brief 00379 (¶ 1); Gray Amicus Brief 00388 (¶ 1); Gray Amicus Brief 00419 (¶ 1); Gray Amicus Brief 00423 (¶ 2); Gray Amicus Brief 00425 (¶ 2); Gray Amicus Brief 00426 (¶ 2); Gray Amicus Brief 00428 (¶ 3).

of Novell subsequent to the 1995 APA (Amendment No. 1, Amendment No. 2, and the so-called “Confirmation Agreement”).

4. Mr. Gray’s proposed amicus brief and accompanying attachments are not an attempt to re-litigate the case styled and numbered Wayne R. Gray v. Novell, Inc., The SCO Group, Inc., and X/Open Company Limited, Case No. 8:06-cv-01950-JSM-TGW, United States District Court, Middle District of Florida, Tampa Division (“the Florida Federal Action”). Mr. Gray is not asking this Court to decide any issue in the Florida Federal Action. Such a request would be as ludicrous as the characterization of his proposed amicus brief as an attempt to have this Court conduct an appellate review of the Tampa Federal Action. What concerns Mr. Gray, and what should concern this Court, is that Novell clearly has taken contradictory positions, either expressly or by implication, before the Utah district court, before the Florida district court, and now in its brief, before this Court. Such “gamesmanship” simply cannot be tolerated in any rational multi-jurisdictional court system. No matter what positions Novell may choose to argue in the current Eleventh Circuit proceeding (a proceeding involving Novell, SCO, and a U.K. company named X/Open Company Limited), some if not all of those

positions will be contrary to positions previously taken by Novell in earlier proceedings. A partial list of those contrary positions is set forth in Paragraph 2, above.

5. Mr. Gray and his undersigned counsel have a duty to notify this Court about Novell's intellectual gymnastics (a polite term for "intellectual chicanery") in dealing with these various documents, their contents, their deficiencies, and their contradictions. Nowhere in the Rules of Professional Conduct is there a prohibition against notifying this Court that a party appearing before it has taken multiple contrary positions in a related case.

In sum, the key question before this Court in this appeal is why Novell would engage in what amounts to a virtual abandonment of its positions in the Utah district court. That question may only be answered if this Court orders District Judge Kimball to review (i) the "Confirmation Agreement" of September, 1996, and (ii) the agreement of May 14, 1994, upon which the "Confirmation Agreement" is predicated.

Accordingly, this Court should disregard the baseless objections of the oppositions submitted by Novell and SCO. It should review the parties' briefs and oral argument in light of the points outlined in the proposed amicus brief of Wayne R. Gray.

DATED this 6th day of May, 2009.

/s/ Thomas T. Steele

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 6th day of May, 2009, the foregoing “Reply Memorandum Of Amicus Wayne R. Gray To (i) ‘Appellee Novell, Inc.’s Opposition To Wayne R. Gray’s Motion For Leave To File Amicus Brief’ and (ii) ‘Appellant’s Response To Wayne R. Gray’s Motion For Leave To File Amicus Brief In Support Of Defendant/Appellee Novell, Inc.’” was filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to:

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/s/ Thomas T. Steele

Thomas T. Steele

EXHIBIT A

[SCO letterhead]

February 10, 2003

NOVELL, Inc.

Re: Asset Purchase Agreement by and Between
the Santa Cruz Operation, Inc. and Novell, Inc.
dated as of September 19, 1995

Dear: _____

This letter clarifies the intent of the parties with respect to the above-captioned transaction.

It is our understanding that the Asset Purchase Agreement by and Between the Santa Cruz Operation, Inc. and Novell, Inc. dated as of September 19, 1995 (the "Asset Purchase Agreement") transferred all of the rights and obligations under the various AT&T SVRX Software Agreements and Sublicensing Agreements (the "AT&T SVRX Agreements") from Novell to SCO, excepting only the ongoing right to receive royalty payment streams according to the terms specified in the Asset Purchase Agreement.

We wish to clarify the following:

1. That all right, title and interest in and to copyrights associated with the AT&T SVRX Agreements held by Novell at the time of the Asset Purchase Agreement were intended to be part of the Included Assets identified in Schedule 1.1 (a);
2. That no right title or interest in and to copyrights associated with the AT&T SVRX Agreements otherwise held by Novell at the time of the Asset Purchase Agreement were intended to be part of Excluded Assets identified in Schedule 1.1 (b); and
3. That no right title or interest whatsoever in and to the trademark "UNIX" was intended to be part of the Included Assets identified in Schedule 1.1 (a).

Please confirm your concurrence with the above by countersigning this side letter of understanding in the space provided below.

Sincerely yours,

Agreed and accepted:

The SCO Group

Novell, Inc.

Christopher S. Sontag
Senior Vice President
Operating Systems Division

Name: _____
Title: _____
Date: _____

Message

Page 1 of 1

REDACTED

-----Original Message-----

From: Chris Sontag [mailto:csontag@sco.com]
Sent: Thursday, February 20, 2003 10:36 AM
To: Greg Jones (gsjones@novell.com)
Subject:

Greg,

Attached is a first cut at a side letter to clarify the issues that we discussed yesterday. I will give you a call later, or feel free to call me on my cell at 801-918-8549.

Regards,

Chris Sontag

2/16/2006

SCOR10729

AMICUS 00856