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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

THE SCO GROUP, INC., by and through the
Chapter 11 Trustee in Bankruptcy, Edward N.
Cahn,

Plaintiff/Counterclaim-Defendant,

vs.

NOVELL, INC., a Delaware corporation,

Defendant/Counterclaim-Plaintiff.

**SCO'S OPPOSITION TO NOVELL'S
MOTION FOR JUDICIAL NOTICE OF
PRIOR FACTUAL FINDINGS**

Civil No. 2:04 CV-00139

Judge Ted Stewart

Plaintiff/counterclaim-defendant, The SCO Group, Inc. (“SCO”), by and through the Chapter 11 Trustee in Bankruptcy, Edward N. Cahn, respectfully submits this brief in opposition to Novell’s Request for Judicial Notice of Prior Factual Findings dated February 24, 2010 (the “Request for Judicial Notice”).

INTRODUCTION

Novell’s Request for Judicial Notice is the latest effort by Novell to transform this into a trial about the language Judge Kimball used in making certain rulings in 2007 rather than a trial about the underlying facts concerning Novell’s actions and intentions. Juries determine facts, including the issues of malice and intent that underlie SCO’s claim for slander of title.

In ruling on motions in limine, the Court made clear that this trial should be about facts – not judicial statements about facts, especially where Novell seeks to cherry-pick such statements from a judicial opinion and attempt to deliver them to the jury as axiomatic truths that preclude consideration of the evidence. The Court thus already concluded that such “findings” are irrelevant, pose a danger of unfair prejudice, could mislead and confuse the jury, and therefore should not be admitted under Federal Rules of Evidence 402 and 403. (See, e.g., Order Granting SCO’s Motion in Limine No. 2 at 2 (“While Defendant argues that the Court’s prior rulings are relevant to support its defense, the real evidence on these issues is that which was presented to the court on summary judgment not the summary judgment ruling itself.”).)

ARGUMENT

I. JUDICIAL NOTICE OF “FACTS” WITHIN PRIOR JUDICIAL RULINGS IS INAPPROPRIATE.

Courts considering requests to take judicial notice of prior findings have recognized that the mere fact that a court made certain findings does not render them “not subject to reasonable dispute” or appropriate for judicial notice. As such, courts have limited judicial notice to the fact

of a judicial record's existence, rather than to any facts found or alleged within a court decision. Novell's own cases support the point. In Randy's Studebaker Sales, Inc. v. Nissan Motor Corp. in U.S.A., 533 F.2d 510, 521 (10th Cir. 1976), the Tenth Circuit noted that the trial court should have made clear to the jury that taking judicial notice of a prior judicial finding (a preliminary injunction) did not mean that the prior finding was properly decreed. The Tenth Circuit confirmed that the jury was to decide the claims presented to it on the evidence in the record and not on the basis of prior findings. Id. That is precisely what this Court has held in denying Novell's motions in limine.

The Tenth Circuit's holding in Studebaker Sales is consistent with the holdings of courts in other jurisdictions that judicial notice of prior judicial records should be limited to a record's existence, rather than to facts found or set forth within a decision. See Holloway v. Lockhart, 813 F.2d 874, 878-79 (8th Cir. 1987); Sosinky v. Grant, 6 Cal. App. 4th 1548 (Cal. Ct. App. 1992). Like Novell, the plaintiffs in Sosinky asked the court to take judicial notice of findings it had made in a related case. Denying plaintiffs' request, the court held that "we do not see why 'facts' which were in actuality the subject of a reasonable dispute would become, after the dispute has been decided, 'facts' which could not reasonably be subject to dispute." Id. at 1566 (emphasis in original).

Novell also relies extensively on Ag Services of America, Inc. v. Nielsen, 231 F.3d 726 (10th Cir. 2000), but that case does not even mention judicial notice, let alone hold that a court can take judicial notice of a court's statements in a prior summary judgment ruling. Instead that case concerns the claim that the Seventh Amendment "protects a party's right to a jury trial by ensuring that factual determinations made by a jury are not thereafter set aside by the court, except as permitted under common law." Id. at 730. The court held that "under the Seventh

Amendment, the court may not substitute its judgment of the facts for that of the jury; it may only grant a new trial if it concludes that the jury's verdict was so against the weight of the evidence as to be unsupportable." Id. Novell actually seeks to do the exact opposite: Deny SCO the right to have a jury decide the factual issues underlying the remanded claims by judicially noticing comments and collateral findings made on other claims as axiomatic, dispositive conclusions on factual issues that should be for the jury.

II. THE REQUESTED "FINDINGS" ARE NOT APPROPRIATE FACTS FOR JUDICIAL NOTICE.

Judicial notice provides a mechanism for consideration of facts that are "not subject to reasonable dispute" and that are relevant. Fed. R. Evid. 201(b), 402. Because the effect of judicial notice is to deprive a party of the opportunity to use rebuttal evidence, cross-examination, and argument to attack contrary evidence, caution must be used in noticing facts as beyond controversy under Rule 201(b). See Fed. R. Evid. 201(b) advisory committee notes; Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc., 146 F.3d 66, 70 (2d Cir. 1998). None of Novell's proposed series of facts meets this test.

- Request No. 1. "[A]greements that postdate the APA may constitute SVRX Licenses."

This Court has already ruled that "the determination that agreements that postdate the APA may constitute SVRX Licenses is the law of the case and Plaintiff will be precluded from presenting evidence or arguing otherwise." (Order on Novell Motion in Limine No. 9 at 2.) That, of course, does not mean that the statement is relevant to any issue in the case. SCO submits that the proposed statement for judicial notice is not relevant because just as it has been determined that agreements that postdate the APA may constitute SVRX licenses, it also has been determined that SCOsouce licenses are not SVRX royalty-bearing licenses. (Docket No. 542 at 28-35.) Indeed, this is precisely the point which Novell unsuccessfully sought to reopen

in its recent Rule 60(b) motion.¹ Because the only purported purpose of telling the jury that SVRX Licenses may postdate the APA would be to facilitate and even advance Novell's argument that SCOsouce licenses are such agreements, and that argument is foreclosed, Novell's request for judicial notice should be denied.

- Request No. 2. "Although Novell may have initially intended to sell the complete UNIX business, both parties agree that Santa Cruz was either unwilling or unable to commit sufficient financial resources to purchase the entire UNIX business outright."

This passing comment is not a "factual finding." Not every statement in the Court's 50-plus page opinion should be viewed as a finding. While some testimony suggests that the parties structured the deal to allow for the purchase price to be paid in part through royalties because Santa Cruz could not pay the entire purchase price in cash, other witnesses, including Santa Cruz Chief Technology Officer Douglas Michels, testified that the deal was structured as such because of the parties' uncertainty regarding the amount of the revenue stream the royalties would generate. (Deposition of Douglas Michels dated 3/28/07 at 14-15.) The jury should be permitted to decide the facts and consequences of such testimony. The reference in the Court of Appeals opinion was not necessary to any judgment by the Court and thus does not preclude litigation of any identical issue in this case. Moss v. Kopp, 559 F.3d 1155, 1161 (10th Cir. 2009).

- Request No. 3. "If [one] were to interpret the contract based initially only on the APA itself – without regard to Amendment No. 2 – . . . its language unambiguously excludes the transfer of copyrights."

This Request is flatly in the face of the Tenth Circuit's decision in the case that "Amendment No. 2 must be considered together with the APA as a unified document" and

¹ In deciding Motion in Limine No. 9, the Court observed that it would have been appropriate for SCO to file its own motion in limine to preclude Novell from arguing that it is entitled to any SCOsouce revenues. Although SCO did not file a motion in limine on the issue, it may now object to the relevancy of any evidence on this point – whether through requests for judicial notice or otherwise. McCormick on Evidence § 52 (6th ed. 2009).

“California law . . . dictates that we construe them together, following Amendment No. 2 wherever the language contradicts the APA.” The SCO Group, Inc. v. Novell, Inc., 578 F.3d 1201, 1211 (10th Cir. 2009). It is hard to envision a statement to the jury in the context of this case that would be more misleading than Novell’s proposed request number 3.

- Requests No. 4 & 5. “[T]here is no evidence that Novell’s public statements [regarding copyright ownership] were based on anything but its good faith interpretation of the contracts”; and “there is no evidence to demonstrate that Novell’s position [regarding copyright ownership] was contrary to its own understanding of the contractual language or objectively unreasonable given the history of the dispute between the parties.”

Judge Kimball did not make either of these statements in the context of SCO’s slander of title claim. Indeed, Novell elected not to move for summary judgment on SCO’s slander of title claim on these grounds. These statements concern only the unfair competition and breach of contract claims, which will not be tried, and are not relevant to the claims that are going to trial.

Moreover, these statements do not relate to the question of Novell’s subjective malice for purposes of slander of title. “A publisher’s knowledge of the falsity of a statement is inherently subjective.” Ferguson v. Williams & Hunt, Inc., 221 P.3d 205, 215 (Utah 2009).² There is an abundance of admissible evidence from which the jury may find that Novell intentionally or recklessly made false claim to the copyrights, and that Novell acted maliciously to harm SCO. That evidence includes (i) testimony that Novell intentionally and maliciously timed its announcement on the day of SCO’s earnings report to “confound SCO’s stock position” and “upset the stock price” and that Novell’s Vice Chairman leaked this information “with laughter” and “chortling”; (ii) evidence that Novell made its ownership announcement without considering Amendment No. 2 and without consulting the people who negotiated the amended APA; (iii)

² “Likewise, acting with reckless disregard as to the statement’s falsity involves a showing of subjective intent or state of mind. The Restatement explains that reckless disregard as to falsity ‘exists when there is a high degree of awareness of probable falsity or serious doubt as to the truth of the statement.’” Ferguson, 221 P.3d at 215 (citing Restatement (Second) of Torts § 600 cmt. b (1977)).

evidence that Novell’s claim that Amendment No. 2 was “not present in Novell’s files” proved to be false, as Novell CEO Jack Messman later admitted that a signed copy of Amendment No. 2 had been present in Novell’s files all along, and that Novell had recklessly published its initial ownership claims knowing that it had, at least, an unsigned copy of the Amendment; and (iv) evidence that Novell’s repeated statements that SCO contacted Novell in 2002 or 2003 “seeking a transfer of copyrights” were false, as Novell’s own in-house counsel admitted that SCO never sought such a transfer, and the testimony of three SCO witnesses showed that SCO did not ever make such request.

None of this evidence was the subject of Novell’s motion for summary judgment on the claims for breach of the implied duty of good faith and fair dealing and unfair competition. As reflected in the briefing on that motion (Docket No. 272 at 9; Docket No. 332 at 12-16), Novell made a legal argument with respect to what California law required for violation of the implied duty. While the Court’s ruling that there is no claim for breach of the implied duty disposes of that claim, there is no basis for expanding its reach to other claims, an expansion not found in either Novell’s motion to the Court nor the Court’s ruling.

In addition, Novell’s position on why it should not be found to have acted with malice regarding the May 28, 2003, slander is directly tied to what the Tenth Circuit did reverse – Novell’s asserted belief in the effect of the unamended APA. “Novell’s interpretation at that time was based on its reading of the copyright exclusion language in the original APA . . . Novell’s subsequent press releases must also be understood by reference to the original language of the APA.” (Novell Response to SCO’s Motion in Limine No. 1 at 2.) Novell is permitted to advance this explanation, but it would be improper to admit a district court’s statement regarding Novell’s intent, made at the time when the district court was under the erroneous belief that it

was proper to interpret the APA independently from Amendment No. 2 – a position subsequently rejected by the Tenth Circuit.

- Requests No. 6 & 7. “SCO breached its fiduciary duties to Novell by failing to account for and remit the appropriate SVRX Royalty payments to Novell for the SVRX portions of the 2003 Sun . . . Agreement[].”; and “SCO was not authorized under the APA to amend, in the 2003 Sun Agreement, Sun’s 1994 SVRX buyout agreement with Novell, and SCO needed to obtain Novell’s approval before entering into the amendment.”

These statements are not relevant to the trial. They relate only to Novell’s prior argument regarding “substantial performance,” which the Court rejected in denying Novell’s Motion in Limine No. 11 and granting SCO’s Motion in Limine No. 3 on multiple bases:

“[E]vidence of Defendant’s monetary judgment is irrelevant to the issues before the jury. Further, any relevance is substantially outweighed by the danger of unfair prejudice and confusion of the issues. The Court finds that Plaintiff would be prejudiced if the jury was informed that a substantial judgment has been entered against it and would likely be confused by such evidence.”

(Order on SCO’s Motion in Limine No. 3 and Novell’s Motion in Limine No. 11 at 3.) The Court further held that to the extent Novell argued that the 2008 trial findings were relevant to Novell’s “substantial performance” defense, that issue was never addressed by the prior courts and “[t]herefore, the law of the case doctrine is not applicable here.” Similarly, the breach of fiduciary duty finding constituted the basis for the award on Novell’s claim, and is no more relevant to the issues in this trial than the existence of that money judgment. Finally, the issue of whether part of the Sun Agreement exceeded the scope of the APA was litigated in the prior trial and is not relevant to any issues in this trial.

III. ANY RELEVANCE OF THE PROPOSED MATTERS FOR JUDICIAL NOTICE IS OUTWEIGHED BY THEIR PREJUDICIAL EFFECT

Rule 403 allows this Court to exclude even relevant evidence if “any relevance is substantially outweighed by the danger of unfair prejudice and confusion of the issues.” (Order Granting SCO’s Motion in Limine No. 2 at 2.) Pulling sentences out of a lengthy judicial

opinion without the surrounding context elevates those snippets above other evidence the jury will hear, guarantees confusion, and creates prejudice. As this Court stated at the pretrial conference: “As a general matter, I want both of you to avoid reference to the prior decision by Judge Kimball or the Tenth Circuit. . . . I’m going to be very hesitant to allow reference to those things because I believe that it would be confusing to the jury and also very prejudicial.” (Transcript of 2/25/10 Pretrial Conference at 53.) For this same additional reason, the proposed requests for judicial notice should be denied, and this trial should proceed as a trial of the evidence, not a trial about what previously has been said about the evidence.

CONCLUSION

SCO respectfully submits, for the reasons set forth above, that the Court should deny Novell’s Request for Judicial Notice of Prior Factual Findings.

DATED this 4th day of March, 2010.

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CERTIFICATE OF SERVICE

I, Brent O. Hatch, hereby certify that on this 4th day of March, 2010, a true and correct copy of the foregoing **SCO'S OPPOSITION TO NOVELL'S REQUEST FOR JUDICIAL NOTICE OF PRIOR FACTUAL FINDINGS** was filed with the court and served via electronic mail to the following recipients:

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