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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP, INC., a Delaware corporation, Plaintiff, vs. NOVELL, INC., a Delaware corporation, Defendant.	Case No. 2:04 CV00139 **NOVELL'S MOTION TO PRECLUDE SCO FROM CALLING TROY KELLER AS A WITNESS** Judge Ted Stewart

I. INTRODUCTION

SCO has indicated it intends to call Troy Keller as a witness. Novell respectfully moves the Court to preclude SCO from presenting Mr. Keller's testimony, as Mr. Keller was not disclosed before the close of fact discovery by SCO. In addition, SCO used attorney-client privilege as a shield to withhold relevant documents and prevent Novell from inquiring in depositions about the details of activities to which Mr. Keller will testify.

II. BACKGROUND

On September 27, 2006, Novell served interrogatories on SCO seeking the identification of all witnesses whom SCO believed had knowledge of facts and bases in support of its allegations. SCO responded to these interrogatories on December 28, 2006, with several names of witnesses, but did not list Troy Keller. SCO did not supplement these interrogatories or serve anything on Novell in writing that would have notified Novell of Mr. Keller's status as a potential witness before fact discovery closed on April 30, 2007.

The month after fact discovery closed, on May 18, 2007, SCO submitted the declaration of Troy Keller in support of its summary judgment opposition briefing. Novell objected at the time to SCO's use of this declaration as improper use of withheld discovery. (*See* Novell's Evidentiary Objections to SCO's Exhibits Submitted in Support of its Summary Judgment Oppositions Filed May 18, 2007, Dkt. No. 350.) SCO provided no excuse as to why it had not disclosed Mr. Keller's identity before the close of fact discovery. In addition, throughout the course of fact discovery, SCO had withheld documents and obstructed testimony on the grounds of privilege and work product regarding the precise topics of Mr. Keller's later-submitted declaration.

SCO supplemented its interrogatory responses to name Mr. Keller on July 12, 2007, nearly three months after the close of fact discovery. It disclosed Mr. Keller as a potential witness shortly thereafter in its first pretrial disclosures on August 2, 2007. (*See* SCO's Rule 26(a)(3) Pretrial Disclosures, Dkt. No. 370, 8/2/2007.) Several weeks later, however, SCO deleted Mr. Keller from its second amended pretrial disclosures of August 22, 2007. (*See* SCO 2d Amended Rule 26(a)(3) Pretrial Disclosures, Dkt. No. 381.) This removal ensured that over the next two years, as the case proceeded through the appeals process, Novell had no reason to press its objection regarding Mr. Keller.

Two and a half years later in February 2010, SCO added Mr. Keller to its extensive lineup once again one month before the current trial – far too late for Novell to seek to reopen discovery. On the eve of trial, SCO then filed witness lists containing *thirty-two* witnesses but excluding Mr. Keller. (*See* SCO's "Will Call" and "May Call" Witness Lists, Dkt. Nos. 778-79.) It was only several days after trial had begun that SCO informed Novell that it intended to call Mr. Keller after all.

On March 11, 2010, Novell again raised with SCO its objections to Mr. Keller testifying at trial. Novell anticipated that its objections to Mr. Keller's testimony might be resolved if document issues were resolved and a pre-testimonial deposition were permitted, but made it clear that it was still reviewing this issue, reserved its rights, and in particular had concerns about the issues raised in this motion. After further review, for the reasons set out in this motion, Novell determined that the prejudice is simply too great to be resolved at this late stage.

III. ARGUMENT

A. SCO Should Not be Permitted to Present Testimony from a Witness it Did Not Timely Disclose

A party has a continuing duty to supplement its interrogatory responses if it has not otherwise made the information known to the other party during the discovery process in writing. Fed. R. Civ. P. 26(e)(1). If a party fails to supplement its interrogatory responses to identify a witness without substantial justification or a showing that the failure is harmless, a court must exclude the witness's testimony at trial. Fed. R. Civ. P. 37(c)(1). Rule 37 is a "self-executing," "automatic" sanction that prevents a party from using witnesses that have not been disclosed as required by Rule 26(e)(1), providing a "strong inducement for disclosure." (Fed. R. Civ. P. 37(c) 1993 advisory committee's notes.)

SCO must have known of Mr. Keller prior to May 18, 2007, as it filed a signed declaration from him on that date. Novell, on the other hand, had no reason to know of Mr. Keller, and as set out above, SCO did not reveal the identity of Mr. Keller until it filed his declaration after the close of fact discovery.

SCO recently agreed to a deposition of Mr. Keller to take place two days before he is set to testify, provided Novell agree that such deposition resolves all objections to Mr. Keller testifying. However, this proposed solution cannot rectify the late disclosure of Mr. Keller – even a deposition conducted in May 2007, after the declaration of Mr. Keller was filed, would have been too late, much less a deposition conducted midtrial. Mr. Keller's deposition will likely reveal parties from whom Novell would have had the opportunity to seek discovery had Mr. Keller been disclosed during the discovery period. SCO now wants to prevent Novell from objecting to this prejudice before it will even consent to a pre-testimonial deposition.

This prejudice extends to Novell's inability to confirm or contradict Mr. Keller's statements with the use of documents. Seeking relevant documents from Mr. Keller's employer and superiors at the relevant time period is particularly difficult and time-consuming given that his employer during the relevant time – Brobeck, Phleger, & Harrison LLP – dissolved in 2003. Novell was able during discovery using the limited information that it then had to gain the production of one document from the Brobeck trustee – a Caldera prospectus discussing the Santa Cruz-Caldera transaction – but it is not a simple or quick task to track down more specific documents. Even SCO does not know whether it has any Brobeck diligence files and has acknowledged in correspondence that it is uncertain how such files would be found at this point given Brobeck's dissolution seven years ago. Discovery of documents resulting from Mr. Keller's proposed deposition testimony is certainly not something that can be performed between the pre-testimonial deposition and Mr. Keller's trial testimony two days later.

B. SCO Should Not be Permitted to Use Attorney-Client Privilege as a Sword and a Shield

It is well-settled that a litigant cannot use the attorney-client privilege or related doctrines "as both a sword and shield by selectively using the privileged documents to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 668 (10th Cir. 2006) (internal citation omitted); *see also Salzman v. Henderson*, 2009 U.S. Dist. LEXIS 119384, at *5 (D. Utah Dec. 22, 2009) (in context of litigation consultant privilege, "courts must be aware of any party attempting to use the privilege as a sword while at the same time invoking the doctrine as a shield") (internal citation omitted). District courts have discretion "to fashion a remedy to prevent a party from using information as a sword while invoking work-product privilege as a shield." *B.H. v. Gold Fields Mining Corp.*, 2006 U.S. Dist. LEXIS 91838, at *15 (N.D. Ok.

Dec. 19, 2006) (citing *United States v. Nobles*, 422 U.S. 225, 240 (1975), in which Supreme Court affirmed trial judge's decision to prevent investigator from testifying about report).

Novell anticipates that Mr. Keller will testify as to diligence performed by SCO with respect to the transaction between SCO and the Santa Cruz Operation in 2001. (*See* Keller Decl. ¶¶ 5, 6, 8, 9, 12 (discussing due diligence).) SCO repeatedly instructed its 30(b)(6) witness Christopher Sontag not to answer questions related to this precise topic.

> Q: Was one of the documents that SCO looked at in that period . . . the assignment from the Santa Cruz Operation to Caldera International?
> MR. NORMAND: Let me instruct the witness not to answer on the grounds of attorney/client privilege and attorney work product.
> Q: Are you going to follow your counsel's instruction?
> A: Yes.
> MR. JACOBS: So any testimony related to SCO's inquiry into this assignment is privileged?
> MR. NORMAND: Yes.
> Q: (By Mr. Jacobs) And you will follow that instruction?
> A: Yes.

(30(b)(6) Deposition of Chris Sontag 108:13-109:3, Apr. 30, 2007.) The same witness was instructed not to answer questions regarding whether SCO looked at the assignment from Santa Cruz to Caldera/SCO in its investigation of IP ownership; whether Santa Cruz diligently endeavored to establish chain of title from Novell; why Santa Cruz recorded the assignment document on February 2, 2004; how the "chain of title" clause in Paragraph 8(v) of the Santa Cruz-Caldera/SCO assignment came into being; and what Caldera/SCO representatives said to Santa Cruz representatives about Novell copyright ownership after the agreement between the two companies was closed. (*Id.* at 108-112, 202-204.) The witness was permitted to answer regarding but claimed no knowledge of the existence of any communications between Santa Cruz and Caldera/SCO, communications to which Novell believes Mr. Keller will now testify.

(*Id.* at 111-113, 119, 126, 191.) Similarly, SCO originally withheld documents involving Mr. Keller on the basis of privilege.

SCO has this past week cooperated to a limited extent by producing three e-mail messages that were originally listed on its privilege log, although it did not include the attached documents to which those e-mails referred. As with the proposed pre-testimonial deposition discussed above, the production of these previously withheld documents is too little, too late. It is far too late for Novell to follow any leads generated by the production of these previously withheld documents halfway through trial, whether in the form of seeking additional documents or testimony from particular parties named in those documents. Moreover, nothing can remedy SCO's shielding of its 30(b)(6) witness Chris Sontag on this topic, as Novell now has no opportunity to challenge Mr. Keller's assertions with the testimony of SCO's own representative.

IV. CONCLUSION

SCO failed to disclose Mr. Keller's identity until it filed his declaration after the close of fact discovery, too late for Novell to conduct follow-up discovery. SCO also used privilege and work product objections to withhold documents and prevent Novell from inquiring into the topics on which Mr. Keller will testify. SCO should not be permitted to prejudice Novell by now calling Mr. Keller as a witness at trial.

DATED: March 21, 2010

Respectfully submitted,

By: /s/ Sterling A. Brennan

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