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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 RESPONSE TO SCO'S
OBJECTION TO CERTAIN
TESTIMONY OF TOR BRAHAM**

Judge Ted Stewart

I. INTRODUCTION

In its submission of March 21, 2010 (Dkt. 819) and during trial on March 23, 2010, SCO stated its intention to object to certain testimony of Tor Braham regarding his communications with Novell concerning the APA and his understanding of Novell's intent pertaining to the APA. SCO argues that this testimony should be excluded because (1) questions on these subjects were purportedly blocked by privilege objections during the Rule 30(b)(6) deposition of Aaron Alter, who was testifying on behalf of Wilson Sonsini, Mr. Braham's former law firm; and (2) Novell withheld from production on grounds of privilege certain drafts of Amendment No. 1, the Operating Agreement, and other mostly post-APA documents.

SCO's objection is without merit and should be overruled for at least three reasons:

First, the general substance of Mr. Braham's expected testimony regarding the APA was long ago disclosed in a declaration submitted in this case on April 19, 2007. SCO had the opportunity to take Mr. Braham's deposition on these subjects, but it never did so. Novell has never asserted privilege to block Mr. Braham's deposition.

Second, Mr. Alter in his deposition of April 27, 2007, provided extensive testimony on the topics covered in Mr. Braham's declaration (the declaration was available to SCO's counsel at the time of the deposition). Only a handful of privilege objections were interposed in nearly 150-pages worth of testimony. Mr. Alter was not prevented from testifying as to his understanding of Novell's intent pertaining to the APA.

Third, the documents that Novell previously withheld as privileged are not relevant to the issues of copyright ownership or rights under Section 4.16 of the APA, the subjects of Mr. Braham's expected testimony. Most of these documents are drafts of Amendment No. 1, the Operating Agreement, or other post-APA documents, and they contain no edits pertaining to

copyright ownership or Section 4.16. To quiet any concern, Novell has produced copies of these documents to SCO for inspection (copies of the documents were e-mailed to SCO on the evening of March 23).

SCO has not been prevented in any way from pursuing discovery on the topics of Mr. Braham's expected testimony. Accordingly, SCO's objection to Mr. Braham's testimony should be overruled.

II. THE TOPICS OF MR. BRAHAM'S EXPECTED TESTIMONY WERE DISCLOSED IN HIS APRIL 20, 2007 DECLARATION

The substance of Mr. Braham's expected testimony was disclosed in his 11-page declaration of April 20, 2007. (Ex. A.) The topics covered in the declaration include:

- Wilson Sonsini's retention by Novell to negotiate and draft the APA. (*Id.* ¶ 4.)
- Mr. Braham's central role in negotiating and drafting the APA. (*Id.* ¶¶ 5-6.)
- Mr. Braham's communications with David Bradford of Novell concerning the APA. (*Id.* ¶¶ 6, 14.)
- Mr. Braham's understanding of the structure, purpose, and intent of the APA, from his own and Novell's perspective. (*Id.* ¶¶ 7-13, 15, 18-21.)

SCO never sought to depose Mr. Braham, either before or after his declaration was submitted. Novell disclosed Mr. Braham in its initial disclosures of February 28, 2006, and SCO was no doubt aware of his involvement in the APA transaction well before that. SCO had the opportunity to pursue discovery of Mr. Braham and failed to do so. At no point did Novell prevent further discovery from Mr. Braham based on privilege objections.

III. MR. ALTER WAS PERMITTED TO TESTIFY EXTENSIVELY ON THE TOPICS OF MR. BRAHAM'S EXPECTED TESTIMONY

Mr. Alter's deposition on behalf of Wilson Sonsini occurred on April 27, 2007, a week after Mr. Braham's declaration was submitted in this case. (Ex. B.) Mr. Alter gave nearly 150-pages worth of testimony covering all the topics in Mr. Braham's declaration. This included extensive testimony regarding Novell's intent in connection with the APA. The questions asked and answered during Mr. Alter's deposition included:

“Q. In the APA, did Novell intend to transfer to Santa Cruz any intellectual property rights in the UNIX source code?” (Ex. B at 21:19-21.)

“Q. In the APA, did Novell intend to retain the UNIX and UnixWare copyrights?” (*Id.* at 30:20-21.)

“Q. Was it Novell's view that owning the copyrights in the UNIX and UnixWare source code would permit Novell to continue to have rights in the revenue stream if Santa Cruz were to go bankrupt?” (*Id.* at 37:17-20.)

“Q. In the APA, did Novell intend to give Santa Cruz a license to use the UNIX and UnixWare copyrighted works in Santa Cruz's business?” (*Id.* at 51:18-20.)

Mr. Alter was not prevented from testifying on these and other subjects covered in Mr. Braham's declaration – the same subjects that are expected to arise in Mr. Braham's trial testimony.

The handful of privilege objections that were made during Mr. Alter's deposition break down into two categories: (1) objections to questions concerning Mr. Alter's communications with Novell in time periods *after* the negotiation and drafting of the APA (Ex. B at 6:12-7:3; 15:10-17; 127:4-15), and (2) objections to questions as to which

Mr. Alter was nonetheless allowed to answer to the extent of his recollection (*Id.*

at 12:17-13:19; 45:9-23; 48:6-10 (compare to 14:5-15:1); 107:9-22).

In SCO's submission of March 21, 2010 (Dkt. 819), SCO cites to the following question on page 48 of Mr. Alter's testimony, as to which a privilege objection was interposed: "Q. Did Wilson Sonsini ever tell, other than Mr. Bradford, anyone from Novell that the copyrights in UNIX and UnixWare would not transfer?" By phrasing the question to ask if Wilson Sonsini "ever" told Novell that the copyrights in UNIX and UnixWare would not transfer, the question was not limited to the APA negotiation period that will be the subject of Mr. Braham's expected testimony. When Mr. Alter was asked more targeted questions earlier in his deposition as to Wilson Sonsini's communications with Mr. Bradford and others at Novell in the APA negotiation period, he answered each of those questions. (Ex. B at 14:13-15:1; 18:23-19:7.) Accordingly, Mr. Alter was not prevented from testifying as to Wilson Sonsini's communications with Novell in the APA negotiation period, or any other topic that was raised in Mr. Braham's declaration.

III. DOCUMENTS PREVIOUSLY WITHHELD BY NOVELL ON PRIVILEGE GROUNDS ARE IRRELEVANT TO THE SUBJECTS OF MR. BRAHAM'S EXPECTED TESTIMONY

SCO complains that Novell has withheld a number of documents "concerning negotiations of the APA and related materials." (Dkt. 819 at 4.) But these documents are in no way relevant to the issues of copyright ownership or rights under Section 4.16 of the APA, the subjects of Mr. Braham's expected testimony. Most of the documents are drafts of Amendment No. 1, the Technology License Agreement, the Operating Agreement, the Bill of Sale, and other ancillary documents post-dating the APA. They contain no edits pertaining to copyright ownership or Section 4.16, and no information pertinent to Mr. Braham's expected testimony.

To alleviate any concerns, Novell has produced copies of these documents to SCO for inspection. Novell will have a copy of these documents available for the Court's review on Wednesday morning.

IV. CONCLUSION

At no point in this litigation has SCO been prevented from seeking discovery regarding the expected testimony of Mr. Braham by virtue of any privilege objections. SCO's objection to certain testimony of Mr. Braham should be denied.

DATED: March 23, 2010

Respectfully submitted,

By: /s/ Sterling A. Brennan
WORKMAN NYDEGGER

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Counterclaim-Plaintiff Novell, Inc.