Brent O. Hatch (5715)
bhatch@hjdlaw.com
Mark F. James (5295)
mjames@hjdlaw.com
HATCH, JAMES & DODGE, PC
10 West Broadway, Suite 400
Salt Lake City, Utah 84101
Telephone: (801) 363-6363
Facsimile: (801) 363-6666

David Boies (admitted pro hac vice)
dboies@bsfllp.com
Robert Silver (admitted pro hac vice)
rsilver@bsfllp.com
Edward Normand (admitted pro hac vice)
enormand@bsfllp.com
BOIES SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504
Telephone: (914) 749-8200
Facsimile: (914) 749-8300

Stuart Singer (admitted pro hac vice)
ssinger@bsfllp.com
Sashi Bach Boruchow (admitted pro hac vice)
sboruchow@bsfllp.com
BOIES SCHILLER & FLEXNER LLP
401 East Las Olas Blvd.
Suite 1200
Fort Lauderdale, Florida 33301
Telephone: (954) 356-0011
Facsimile: (954) 356-0022

Attorneys for Plaintiff, The SCO Group, Inc.

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 TO STRIKE TESTIMONY OF DAMAGES AFTER JUNE 9, 2004** Civil No. 2:04 CV-00139 Judge Ted Stewart

Plaintiff, The SCO Group, Inc. ("SCO"), respectfully submits this Opposition to Novell's Motion to Strike Testimony of Damages After June 9, 2004.

Having failed in a half dozen motions to persuade the Court that the probative value of selective snippets of subsequently reversed court rulings warrant their unlimited use at trial,[1] Novell now seeks the even more extreme and unwarranted act of striking most of SCO's damages because such irrelevant testimony is not being admitted. The result Novell seeks is hardly the implied outcome of this Court's prior rulings, for a number of reasons.

First, Novell confuses the issue of intent with the issue of damages. The purported rationale for admission of the "judicial rulings" is that Novell may have relied upon such rulings in continuing to publish the slander of title on its website. In response to Novell's March 21 motion, SCO pointed out that – except for the continued availability of a slander on the website – Novell's slanderous statements were published between May 28, 2003, and March 31, 2004, and that is the relevant time frame for consideration of Novell's intent. Of course, damages resulting from the slander are not limited to the dates that the slanders were made. SCO has presented competent evidence that the slanders led to the end of the SCOsource licensing program in 2004, a program that but-for the slanders would have generated significant sales in the period through 2007.

Second, even with respect to Novell's intent, the Court correctly has limited use of these reversed court rulings for lack of probative value and extreme prejudice. Trial Tr. 1793:21-1794:3. As SCO has previously pointed out, it is specious to suggest that a discussion in a June 2004 district court order denying a motion to remand and denying a motion by Novell to dismiss had any effect on Novell's intent. Indeed, even after Judge Kimball's summary judgment ruling

[1] The Court has given Novell the ability to use these rulings in the cross-examination of SCO's damages expert Christine Botosan, as well as a single additional witness in connection with SCO's claim for punitive damages.

was reversed by the Tenth Circuit, that reversal – which rejected the rationale of the June 9, 2004 opinion – did not cause Novell to withdraw or change its publication of the slander on its website.

Third, as Professor Botosan's testimony made clear, the events in the litigation, including the June 9, 2004 decision, have no effect on SCO's damages. The damages are predicated on the demand for the SCOsource product in a "but-for" world in which there is no slander, and thus no litigation and no rulings. [2] The demand for that product was appropriately addressed by Professor Pisano, who testified that other reasons for purchasers' decisions not to buy the product (such as lack of sufficient concern over infringement) are accounted for by the methodology he used, leaving the slander by Novell as the causative factor[3] for the losses suffered. Trial Tr. 1265:25-1266:14; see also 1286:1-20. Moreover, defendant has not offered (or proferred) any actual probative evidence that any prospective purchaser of a SCOsource license after June 9, 2004 made a decision not to purchase such a license in whole or in part because of statements made in the course of the district court's denying a motion to remand and denying Novell's motion to dismiss.

Novell's position implies that there can never be proof of damages in a slander of title action after any rulings are made because those rulings themselves (if not consistently favorable

---

[2] As SCO also has pointed out before, a "but-for" analysis is an established and appropriate approach. See Callahan v. A.E.V., Inc., 182 F.3d 237, 254-258 (3d Cir. 1999).

[3] Referencing its proposed "Instruction No. 36 distributed on March 22, 2010," Novell argues (at 2, n.1) that "SCO must 'eliminate other causes'" in order "to 'recover for the loss of the market'." As SCO explains in its response to the Court's Jury Instructions, SCO objected to this language by Novell, noting that the proposed language was taken out of context and does not remotely reflect the controlling standard. The Court's Instruction, in contrast, properly identifies the controlling standard, which is that a plaintiff on a slander of title claim must show that the slanderous statement was a "substantial factor" in causing damages. The plaintiff is not required to "eliminate other causes."

for plaintiff) become a causative factor in the effects in the real world. There is absolutely no legal support for this position.

DATED this 24th day of March, 2010.

By: /s/ Brent O. Hatch
HATCH, JAMES & DODGE, P.C.
Brent O. Hatch
Mark F. James

BOIES, SCHILLER & FLEXNER LLP
David Boies
Robert Silver
Stuart H. Singer
Edward Normand
Sashi Bach Boruchow

Counsel for The SCO Group, Inc.

CERTIFICATE OF SERVICE

I, Brent O. Hatch, hereby certify that on this 24th day of March, 2010, a true and correct copy of the foregoing SCO's OPPOSITION TO NOVELL'S MOTION TO STRIKE TESTIMONY OF DAMAGES AFTER JUNE 9, 2004, was filed with the Court and served via electronic mail to the following recipients:

Sterling A. Brennan
David R. Wright
Kirk R. Harris
Cara J. Baldwin
WORKMAN | NYDEGGER
1000 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111

Thomas R. Karrenberg
Heather M. Sneddon
ANDERSON & KARRENBERG
700 Bank One Tower
50 West Broadway
Salt Lake City, UT 84101

Michael A. Jacobs
Eric M. Aker
Grant L. Kim
MORRISON & FOERSTER
425 Market Street
San Francisco, CA 94105-2482

Counsel for Defendant and Counterclaim-Plaintiff Novell, Inc.

By: /s/ Brent O. Hatch
Brent O. Hatch
HATCH, JAMES & DODGE, P.C.
10 West Broadway, Suite 400
Salt Lake City, Utah 84101
Telephone: (801) 363-6363
Facsimile: (801) 363-6666