

FILED
U.S. DISTRICT COURT
DISTRICT OF UTAH
SALT LAKE CITY
MAY 29 2009
BY: _____

MANNING, CURTIS, BRADSHAW & BEDNAR LLC

Alan C. Bradshaw (Utah Bar No. 4801)
Tyson Snow (Utah Bar No. 10747)
170 South Main Street, Suite 900
Salt Lake City, Utah 84101-1655
Telephone: (801) 363-5678
Facsimile: (801) 364-5678
abradshaw@mc2b.com
tsnow@mc2b.com

GAUNTLETT & ASSOCIATES

David A. Gauntlett
Joseph S. McMillen
18400 Von Karman, Suite 300
Irvine, California 92612
Telephone: (949) 553-1010
Facsimile: (949) 553-2050
info@gauntlettlaw.com
[Pro Hac Vice Admission Pending]

Attorneys for Plaintiff
Novell, Inc.

**UNITED STATES DISTRICT COURT
DISTRICT OF UTAH – CENTRAL DIVISION**

NOVELL, INC., a Delaware corporation,

Plaintiff,

vs.

VIGILANT INSURANCE COMPANY, a
New York corporation,

Defendant.

) Case No.

) **COMPLAINT FOR DECLARATORY
JUDGMENT**

) **Case: 2:09cv00496**
) **Assigned To : Stewart, Ted**
) **Assign. Date : 5/29/2009**
) **Description: Novell v Vigilant**
) **Insurance**

This is an insurance coverage suit seeking to establish that Defendant Vigilant Insurance Company (“Vigilant”) had a duty to defend Plaintiff Novell, Inc. (“Novell”) in the underlying litigation styled as *The SCO Group, Inc. v. Novell, Inc.*, Third Judicial District Court of Salt Lake County, State of Utah, Case No. 040900936, removed to the U.S.D.C., District of Utah, Case No. 2:04CV00139 (“the SCO Action”), and that Vigilant reimburse Novell for all defense expenses incurred therein.

THE PARTIES

1. Plaintiff Novell, Inc. is a corporation organized under the laws of the State of Delaware. Its principal executive offices and headquarters are located in Waltham, Massachusetts.

2. Defendant Vigilant is, and at all times mentioned herein was, an insurance company organized and existing under the laws of the State of New York with its principal place of business located at 55 Water Street, New York, NY 10041-0004. It transacts insurance business in the State of Utah.

JURISDICTION

3. This is an action for declaratory relief pursuant to 28 U.S.C. § 2201. This court has jurisdiction over this action pursuant to 28 U.S.C. § 1332 in that complete diversity exists between the parties. Plaintiff is a citizen of Delaware and Massachusetts. Defendant Vigilant is a citizen of New York.

4. The amount in controversy exceeds the sum of \$75,000 exclusive of interest and costs, and in addition to other and further relief, declaratory relief is sought.

VENUE AND APPLICABLE LAW

5. Venue is proper in the United States District Court for the District of Utah pursuant to 28 U.S.C. § 1391(a) and (c).

6. Vigilant is an insurance company actively selling insurance policies in Utah and,

on information and belief, is licensed to sell insurance by the Utah Department of Insurance. Vigilant would have sufficient contacts with the District of Utah to be subject to personal jurisdiction in this District.

7. Venue is proper in this District because a substantial part of the events or omissions giving rise to the claims alleged herein occurred in this District. This Complaint centers on the liability insurance contracts between Vigilant and Novell (the "Vigilant Policies") that were formed in the District of Utah, where Vigilant actively sells insurance policies and where Novell, which maintains a place of business in Provo, Utah, negotiated and received the pertinent Policies. Additionally, the underlying *SCO* Action is pending and being defended in this District. This dispute concerns Vigilant's failure to defend Novell in Utah under insurance Policies issued to Novell in Utah.

8. The Vigilant Policies were intended to cover Novell's operations throughout the United States, including Utah.

9. The substantive rights of the parties are governed by the law of Utah because the contracts at issue in this case were executed in Utah, there is no evidence that the parties did not intend to contract pursuant to the laws of the State of Utah, and the policies and interest of Utah would be most seriously impaired if its laws were not applied.

THE VIGILANT POLICIES

10. Vigilant Insurance Company ("Vigilant") issued commercial general liability insurance policy no. 3525-51-31 to Novell, Inc., effective November 1, 2002 through November 1, 2003. A copy of relevant parts of the policy are attached as **Exhibit "1."**

11. Vigilant renewed the policy on the same terms and conditions under the same policy no. 3525-51-31, effective November 1, 2003 through November 1, 2004, again issuing the policy to named insured Novell, Inc. A copy of relevant parts of the 2003/2004 policy are attached as **Exhibit "2."**

12. These Vigilant insurance policies are collectively referred to as the “Policies.”

13. The Policies each have a limit of \$2 million for “advertising injury” and “personal injury” and a \$2 million general aggregate limit. (Exhibits “1,” “2”)

14. The Policies each provide in pertinent part the following “personal injury” coverage and definition:

Advertising Injury and Personal Injury Liability Coverage – Subject to all of the terms and conditions of this insurance, we will pay damages that the **insured** becomes legally obligated to pay by reason of liability:

- imposed by law; . . .

for **advertising injury** or **personal injury** to which this coverage applies.

This coverage applies only to such **advertising injury** or **personal injury** caused by an offense that is first committed during the policy period.

. . . .

Personal Injury [Definition] – **Personal injury** means injury . . . caused by an offense of:

D. electronic, oral, written or other publication of material that:

1. libels or slanders a person or organization (which does not include disparagement of goods, products, property or services); or

(Exhibits “1,” “2” (General Liability coverage part), pp. 3 and 30 of 32)

15. The Policies each provide in pertinent part the following defense provision and definition:

Investigation, Defense and Settlements – Subject to all of the terms and conditions of this insurance, we will have the right and duty to defend the **insured** against a **suit**, even if such **suit** is false, fraudulent or groundless.

If such a **suit** is brought, we will pay reasonable attorney fees and

necessary litigation expenses to defend:

- the insured;

....

Suit [Definition] – **Suit** means a civil proceeding in which damages, to which this insurance applies, are sought. . . .

(Exhibits “1,” “2” (General Liability coverage part), pp. 4 and 31 of 32)

16. The Policies each include the following exclusions and definition:

Expected or Intended Injury – This insurance does not apply to **advertising injury** or **personal injury** arising out of an offense, committed by or on behalf of the **insured**, that:

- is intended by such **insured**; or
- would be expected from the standpoint of a reasonable person in the circumstances of such **insured**;

to cause injury.

....

Intellectual Property Laws or Rights – This insurance does not apply to any actual or alleged **bodily injury, property damage, advertising injury** or **personal injury** arising out of, giving rise to or in any way related to any actual or alleged:

- assertion; or
- infringement or violation;

by any person or organization (including any **insured**) of any **intellectual property law or right**, regardless of whether this insurance would otherwise apply to all or part of any such actual or alleged injury or damage in the absence of any such actual or alleged assertion, infringement or violation.

This exclusion applies, unless such injury;

- is caused by an offense described in the definition of **advertising injury**; and
- does not arise out of, give rise to or in any way relate to any actual or alleged assertion, infringement or violation of any **intellectual property law or right**, other than one described in the definition of **advertising injury**.

....

Intellectual Property Law or Right [Definition] – **Intellectual property law or right** means any:

- certification mark, copyright, patent or trademark (including collective or service marks);
- right to, or judicial or statutory law recognizing an interest in, any trade secret or confidential or proprietary non-personal information;
- other right to, or judicial or statutory law recognizing an interest in, any expression, idea, likeness, name, slogan, style of doing business, symbol, title, trade dress or other intellectual property; or
- other judicial or statutory law concerning piracy, unfair competition or other similar practices.

(Exhibits “1,” “2” (General Liability coverage part), pp. 14, 17 and 27 of 32)

17. Vigilant does not define the terms “publication” or “unfair competition” in the Policies. (Exhibits “1,” “2” (General Liability coverage part Definitions), pp. 25-32 of 32)

THE UNDERLYING *SCO* ACTION

18. The SCO Group, Inc. (“SCO”) filed suit against Novell on January 20, 2004 in litigation styled as *The SCO Group, Inc. v. Novell, Inc.*, Third Judicial District Court of Salt Lake County, State of Utah, Case No. 040900936, removed to the U.S.D.C., District of Utah, Case No. 2:04CV00139 (“the *SCO* Action”). SCO alleged one cause of action for Slander of Title. A copy of the complaint in the *SCO* Action is attached as **Exhibit “3.”**

19. The SCO complaint includes the following allegations:

I. NATURE OF THIS ACTION

1. . . . SCO, through its predecessor in interest, acquired from Novell all right, title and interest in and to the UNIX and UnixWare business, operating system, source code, and all copyrights related thereto[.]

. . . .

5. Recently, Novell repeatedly claimed publicly in press releases and otherwise that it, and not SCO, owns the UNIX and UnixWare copyrights.

6. Novell has made such statements with the intent to cause customers and potential customers of SCO to not do business with SCO and to slander and impugn the ownership rights of SCO in UNIX and UnixWare

7. Novell's **false** and misleading representations that it owns the UNIX and UnixWare copyrights has caused and is continuing to cause **SCO to incur significant irreparable harm** to its valuable UNIX and UnixWare copyrights, to its business, **and its reputation**.

. . . .

III. FACTUAL BACKGROUND

. . . .

18. Novell, with full knowledge of SCO's exclusive ownership of the copyrights related to UNIX and UnixWare, has embarked on a malicious campaign . . . Novell . . . has made numerous **false** and misleading **public representations** disparaging SCO's ownership of the UNIX and UnixWare copyrights and **claiming that it, and not SCO, owns the Unix and UnixWare copyrights**.

19. Novell's false oaths and misleading public representations and wrongful assertion of ownership rights in UNIX and/or UnixWare include, but are not limited to, the following:

a) . . . [O]n May 28, 2003, Novell's Chairman, President, and CEO Jack Messman . . . **publicly claimed** that Novell did not transfer the UNIX and UnixWare copyrights to SCO and that **"SCO is not the owner of the UNIX copyrights."** Messman's statement **was published** in several newspapers, including the Salt Lake Tribune and Desert News, and was timed by Messman to be released on the eve of the release of SCO's quarterly statements.

. . . .

g) . . . Novell continued with its unfounded and malicious campaign to slander SCO's ownership of the copyrights.

h) Also on October 10, 2003 Novell **publicly filed** under oath with the United States Copyright Office four different iterations of a "Declaration Regarding Ownership" of UNIX copyrights . . . Novell declared "that it retains all or substantially all of the ownership of the copyrights in UNIX. . . .

i) In a **press release** dated December 22, 2003, Novell, despite its June 2003 statement that SCO owns the copyrights, Novell stated that "it owns the copyrights in UNIX. . . .

j) In a **press release** dated January 13, 2004, Novell again knowingly and wrongfully made the **false** claim that "it

retained ownership of [UNIX] copyrights.”

20. Novell’s **false** oaths and wrongful claims of copyrights and ownership in UNIX and UnixWare are in bad faith

21. Novell’s wrongful claims of copyrights and ownership in UNIX and UnixWare have caused, and continue to cause, irreparable harm to SCO, in the following particulars:

a) Customers and potential customers of SCO are unable to ascertain the truth of ownership in UNIX and UnixWare, and make decisions based thereon; and

b) SCO’s efforts to protect its ownership of UNIX and UnixWare, and copyrights therein, are subject to a false cloud of ownership created by Novell.

**IV. CLAIM FOR RELIEF
(Slander of Title)**

. . . .

24. **Novell has** slandered SCO’s title and rights to its UNIX and UnixWare copyrights **and damaged SCO’s business reputation** and relationship with potential customers by making **false** oaths of ownership to public officials, and by repeatedly representing both to the **public in general and directly to several of SCO’s customers** and potential customers **that Novell, and not SCO, owns the UNIX and UnixWare copyrights.**

25. Novell’s representations regarding its purported ownership of UNIX and UnixWare are patently **false**, and Novell made such representations intentionally, maliciously, and with the utter regard for the faithfulness thereof.

26. As a consequence of Novell’s conduct as alleged herein, SCO has incurred actual and special damages in an amount to be proven with at trial.

(**Exhibit “3” ¶¶** (emphasis added))

20. SCO filed an amended complaint on or about July 9, 2004. The amended allegations are almost the same as in SCO’s original complaint allegations. A copy of the amended complaint in the *SCO* Action is attached as **Exhibit “4.”**

NOVELL’S NOTICE TO VIGILANT AND VIGILANT’S DENIAL

21. Novell provided notice of the *SCO* Action to Vigilant in early 2004 after it had

been served in that Action. Novell requested that Vigilant defend Novell in the *SCO* Action, and it provided Vigilant a copy of SCO's January 20, 2004 complaint.

22. By letter dated February 11, 2004, Vigilant denied Novell a defense. A copy of the letter is attached as **Exhibit "5."** In the letter, Vigilant acknowledged receiving Novell's claim for the *SCO* Action and the SCO complaint. It then denied a defense claiming the allegations in the *SCO* Action do not fall within the insuring agreement of the Policies and are also excluded by the Intellectual Property Laws or Rights Exclusion. The letter stated in pertinent part, at pp. 2, 5:

Vigilant has reviewed the Commercial General Liability Policy in conjunction with the allegations and damages as set forth in the Complaint, and it is our position that we will be unable to provide defense nor indemnification in this litigation. It is Vigilant's position that the allegations and damages set forth by SCO Group, Inc. would not constitute bodily injury or property damage as defined by the Policies and for which must arise out of an occurrence, nor has there been an allegation set forth which would give rise to the offense of personal injury or advertising injury. Vigilant has also cited the policy exclusion entitled Intellectual Property Laws or Rights in furtherance of our declination of defense and indemnification.

It is Vigilant's position that SCO Group's contention of Slander of Title with respect to their interests in the UNIX and UnixWare copyrights would not constitute personal injury in as much as there has been no libel or slander to a person or organization.

In addition to this, Vigilant directs your attention to the policy exclusion entitled Intellectual Property Law or Rights. It is our position that this exclusion would be applicable with respect to this copyright issue and would further remove the claims from coverage pursuant to the Commercial General Liability Policy.

23. Vigilant also cited the language of the Expected or Intended Injury Exclusion in an Appendix to its February 11, 2004 letter [*see* **Exhibit "5"** (Appendix) pp. 3-4], but Vigilant did not explain why it felt the exclusion applied.

24. Vigilant has refused and continues to refuse to reimburse Novell for expenses despite its obligation to do so. Because of Vigilant's failure to defend, Novell has incurred

expenses defending itself in the *SCO* Action and in securing counsel to enforce its rights under the insurance Policies issued by Vigilant.

**SCO ALLEGES “PERSONAL INJURY” NOT EXCLUDED BY THE POLICIES
REQUIRING VIGILANT TO DEFEND THE *SCO* ACTION**

25. Vigilant’s Policies require it to defend suits alleging “personal injury.” The *SCO* Action complaint alleges facts constituting an “. . . oral, written or other publication of material that libels or slanders . . . ‘a[n] organization,’ ” a “personal injury” offense under the Vigilant Policies. Vigilant thus had and has an obligation under the Policies to defend Novell in the *SCO* Action.

26. Novell’s alleged conduct, referenced in the *SCO* complaint including at ¶¶ 1, 5, 18, 19, 24 and 26, defamed *SCO* because Novell allegedly paints *SCO* as a liar claiming ownership rights in the UNIX and UnixWare copyrights and operating system. According to *SCO*, Novell was claiming that it and not *SCO* had the ownership interests and rights to the copyrights and operating system to customers and the public, while *SCO* was simultaneously advising its customers that it was the owner. Novell’s alleged statements thus significantly impugned *SCO*’s corporate reputation. Novell’s alleged statements led customers to conclude that *SCO* was not being honest about its rights and ownership interests in the UNIX and UnixWare copyrights and operating system. Claims that *SCO* had no valid copyrights to assert slandered *SCO* by accusing it of being a liar.

27. Novell’s alleged conduct, referenced in the *SCO* complaint including at paragraphs 7 and 24, defamed *SCO* because Novell allegedly made false statements damaging *SCO*’s “reputation” and “business reputation.”

28. Other *SCO* fact allegations and information available to Vigilant besides those in the *SCO* complaint also show *SCO* alleged libel and slander within the meaning of Vigilant’s Policies.

29. No Policy exclusions bar a defense.

30. The Intellectual Property Laws or Rights Exclusion does not apply because, among other reasons, SCO's allegations of slander of an organization do not fall within the definition of Intellectual Property Law or Right. Additionally, Novell's potential liability for infringement, violation or assertion of intellectual property rights is independent of the defamatory conduct charged against Novell.

31. The Expected or Intended Injury Exclusion does not apply because, among other reasons, SCO states a claim for slander of an organization even if Novell acted innocently when making its allegedly false statements about the rights in the UNIX and UnixWare copyrights.

32. The exclusions relied upon by Vigilant also do not apply because, if they did, the coverage Vigilant provides is illusory.

FIRST CAUSE OF ACTION
Declaratory Relief – Duty to Defend

33. Novell, by this reference, incorporates each and every allegation set forth in the above paragraphs of this Complaint as though fully alleged herein.

34. By issuing and delivering the Policies, Vigilant agreed to provide a defense for suits seeking damages for "personal injury" offenses as defined in its Policies.

35. Vigilant is obligated under the Policies to pay attorneys' fees and costs incurred in the defense of the *SCO* Action. Vigilant breached its duty to Novell by failing to provide a defense in the *SCO* Action.

36. Novell has fully performed all of the obligations and conditions to be performed by it under the Vigilant Policies and/or has been excused from performing same as a result of Vigilant's breach of its duty to defend.

37. An actual bona fide controversy exists between Novell, on the one hand, and Vigilant, on the other hand, that requires judicial declaration by this Court of the parties' rights and duties. Namely, the parties disagree about whether Vigilant has a duty to defend Novell in the *SCO* Action and to pay all of the attorneys' fees and costs it has incurred and will incur to

defend that Action.


PRAYER FOR RELIEF

WHEREFORE, Plaintiff Novell prays for judgment against Defendant Vigilant as follows:

1. That the Court issue judgment declaring Vigilant had a duty to defend Novell under the Policies it issued to Novell against the claims asserted in the *SCO* Action;
2. That the Court issue judgment declaring Vigilant must promptly pay to Novell all attorneys' fees and costs incurred by Novell in defense of the claims asserted in the *SCO* Action, along with pre-judgment interest accruing thereon from the date of each invoice at the legal rate of 10% per annum;
3. For Novell's attorneys' fees incurred herein plus interest on said fees at the highest rate allowed by law from the date of entry of judgment until paid in full;
4. For total costs of the suit herein; and
5. For such other and further relief as the Court may deem just and proper.

Dated: May 29th, 2009

**MANNING, CURTIS, BRADSHAW &
BEDNAR LLC**

By: 
Alan C. Bradshaw
Tyson Snow

GAUNTLETT & ASSOCIATES
David A. Gauntlett
Joseph S. McMillen
18400 Von Karman, Suite 300
Irvine, California 92612
Telephone: (949) 553-1010
Facsimile: (949) 553-2050
info@gauntlettlaw.com
[Pro Hac Vice Admission Pending]

Attorneys for Plaintiff Novell, Inc.