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**UNITED STATES DISTRICT COURT
DISTRICT OF UTAH**

NOVELL, INC., a Delaware corporation,
Plaintiff,

vs.

VIGILANT INSURANCE COMPANY, a
New York corporation,
Defendant.

) Case No. 2:09-cv-00496-TS

)
) **PLAINTIFF NOVELL, INC.'S**
) **OBJECTIONS TO VIGILANT**
) **INSURANCE COMPANY'S**
) **REQUEST FOR JUDICIAL**
) **NOTICE**
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Plaintiff Novell, Inc. objects to Defendant Vigilant Insurance Company's Request for Judicial Notice (Docket No. 30) as follows:

1. Vigilant's Exhibit D, the Second Amended Complaint in the underlying *SCO* suit.
Objection: irrelevant.

SCO's allegations in its Second Amended Complaint are irrelevant to the current summary judgment motions. They concern whether Vigilant breached its duty to defend Novell in the *SCO* suit. In determining whether its duty to defend has been triggered, an insurer may only consider the facts available to it at the time of tender, including the allegations in the tendered complaint. *Deseret Federal Sav. & Loan Ass'n v. U.S. Fidelity & Guar. Co.*, 714 P.2d 1143, 1146-1147 (Utah 1986) (In ascertaining its duty to defend, "The insurer must make a good faith determination based on all the facts known to it, or which by reasonable efforts could be discovered by it, that there is no potential liability under the policy."); *Benjamin v. Amica Mut. Ins. Co.*, 2006 UT 37, ¶ 16, 140 P.3d 1210 (Utah 2006) ("When we engage in a duty-to-defend analysis, we focus on two documents: the insurance policy and the complaint. 'An insurer's duty to defend is determined by comparing the language of the insurance policy with the allegations of the complaint.'").

SCO's Second Amended Complaint was not available to Vigilant at the time of Novell's tender of that suit. Novell tendered the claim to Vigilant on or about January 27, 2004. [Declaration of Michael J. Rettig, Docket No. 29 ("Rettig Decl."), ¶ 3] SCO filed its Second Amended Complaint on February 3, 2006,¹ two years later. This was also two years after Vigilant denied any duty to defend on February 11, 2004. [Rettig Decl., ¶ 3] The Second Amended Complaint allegations are therefore irrelevant to whether Vigilant breached its duty since they were not available to it at the time of tender or denial.

¹Vigilant's Memorandum in Support of Its Motion for Summary Judgment and In Opposition to Novell's Motion for Partial Summary Judgment, Docket No. 28, p. 6 ¶ 19.

2. Vigilant's Exhibit E, the dictionary definition of the word "assert" and "assertion."

To the extent Vigilant contends the dictionary definitions it submits are the only pertinent definitions to consider, Novell objects. Novell has submitted a reasonable meaning of the ambiguous intellectual property exclusion based on Black's Law Dictionary's legal definition of "assertion" and "assert." [Novell's Request for Judicial Notice, ¶ 2 and **Exhibit "8"** thereto ("to invoke or enforce (a legal right)")] Since Vigilant's alternative interpretation based on different dictionary definitions is not the only reasonable interpretation, the Court must also consider Novell's definitions and adopt its reasonable interpretation of the exclusion. *Farmers Ins. Exchange v. Versaw*, 2004 UT 73, ¶ 25, 99 P.3d 796 (Utah 2004) ("[A]mbiguous or uncertain language in an insurance contract that is fairly susceptible to different interpretations should be construed in favor of coverage.").

Indeed, the Court's role in interpreting the word "assertion" in the exclusion is not to adopt and apply *any* dictionary definition as Vigilant does, "which by their nature define words in the abstract," but determine the meaning from the context in which the word is used. *Cyprus Plateau Mining Corp. v. Commonwealth Ins. Co.*, 972 F. Supp. 1379, 1384-85 and n.4 and 5 (D. Utah 1997). In analyzing an exclusion which must be strictly interpreted against the insurer, adopting a broad definition for "assertion" like Vigilant's is to engage impermissibly in "abstract philology." *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1265, 833 P.2d 545, 10 Cal. Rptr. 2d 538 (Cal. 1992) (While using a standard layperson's dictionary definition of policy term "is probably correct as a matter of abstract philology, it is defective as a matter of policy interpretation because it disregards the context.").

Noscitur a sociis is "a canon of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it." BLACK'S LAW DICTIONARY 1087 (8th ed. 2004). Utah follows this principle. *Andrew v. Ideal Nat'l Ins. Co.*, 29

Utah 2d 343, 347, 509 P.2d 367, 370 (Utah 1973) (“[T]he rule of noscitur a sociis well may be applicable . . .”). “Assertion” is part of a triptych of words (“assertion or infringement or violation”);² the latter are legal terms of art. It is therefore appropriate to use the legal definition Novell submits.

Since Novell’s definition is reasonable, and here it is the most contextually appropriate one, it must be adopted. *Versaw*, 2004 UT 73, ¶ 25.

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²Declaration of Jim F. Lundberg, ¶¶ 3, 4, 9 and Exhibits “1” and “2” thereto (“Policies”), p. 17 of 32.

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 2009, I electronically filed the foregoing **PLAINTIFF NOVELL, INC.'S OBJECTIONS TO VIGILANT INSURANCE COMPANY'S REQUEST FOR JUDICIAL NOTICE** with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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