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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. 2:04CV00139

**NOVELL, INC.'S OPPOSITION TO
SCO'S MOTION IN LIMINE NO. 1
TO PRECLUDE MISLEADING
STATEMENTS OR EVIDENCE
CONCERNING LANGUAGE IN APA
REMOVED BY AMENDMENT NO. 2**

Judge Ted Stewart

AND RELATED COUNTERCLAIMS.

SCO's request for an order in limine precluding "misleading statements" concerning the copyright exclusion language in the APA should be denied. Although the copyright exclusion language of the APA was subsequently amended, SCO cannot dispute the obvious relevance of the original language to understanding the intent behind the amendment. Novell's percipient witnesses will testify that the APA excluded UNIX copyrights from the assets sold to SCO and that Amendment No. 2 was not intended to reverse that exclusion. This story cannot be told without reference to the language of the APA itself—this includes both the original language of the APA and Amendment No. 2.

I. ARGUMENT

"Amendment No. 2 must be considered together with the APA. . . ." *SCO Group, Inc. v. Novell, Inc.*, 578 F.3d 1201, 1211 (10th Cir. 2009). The Tenth Circuit acknowledged that the copyright exclusion language of the original APA was perfectly clear, but found that the language of Amendment No. 2 was ambiguous. *Id.* at 1210. Based on this, the court held that "extrinsic evidence regarding the parties' intent is relevant to [the] interpretation of the combined instrument." *Id.* at 1211. Because, as the Tenth Circuit stated, Amendment No. 2 "merely clarified or affirmed the original intent of the transaction" (*id.* at 1214, n.2), the presentation of evidence will by necessity refer to the original language of the APA.

SCO does not contest that it "may be necessary" for Novell to refer to the copyright exclusion language in the APA in the course of presenting its evidence. (Mot. at 1.) Novell's witnesses will necessarily reference the APA in explaining their understanding of the original deal and the intent behind Amendment No. 2. For example, Novell plans to present the testimony of Allison Amadia to explain the negotiation and drafting of Amendment No. 2. Ms. Amadia was Novell's legal representative in the negotiations with Santa Cruz that led to Amendment No. 2. (Decl. of Allison Amadia ¶ 4, Dkt. No. 278.) She will testify that when she was approached by Santa Cruz with a proposal to amend the APA to give Santa Cruz rights to

copyrights in UNIX and UnixWare, she first read the language of the APA to confirm that it contained a copyright exclusion. (*Id.* at ¶ 7.) She will further testify that “Amendment No. 2 was not intended to alter the Original APA’s copyright ownership exclusion,” but rather “affirmed that Santa Cruz had a license under the Original APA to use Novell’s UNIX and UnixWare copyrighted works in its business.” (*Id.* at ¶ 14.) The copyright exclusion language in the APA therefore is central to Ms. Amadia’s testimony. Similar testimony will be offered by other Novell witnesses. There is no basis for excluding or limiting any of this highly relevant testimony.

The original language of the APA is also relevant to Novell’s defense against SCO’s slander of title claim, specifically to show that Novell had a reasonable basis for its May 28, 2003 statement challenging SCO’s claim of ownership. (Ex. 1A (Novell Trial Ex. J15) at 2.) Novell’s interpretation at that time was based on its reading of the copyright exclusion language in the original APA. (Ex. 1B (Novell Trial Ex. Y15) at 2.) Novell’s subsequent press releases must also be understood by reference to the original language of the APA. For example, Novell’s letter of August 4, 2003, first sets forth the general exclusion of copyright from the transferred assets, and then discusses the exception in Amendment No. 2. (Ex. 1C (Novell Trial Ex. D18.) Argument and testimony about the original language in the APA should be admitted for this purpose.

SCO contends the jury would be misled by statements that suggest that the APA still contains its original copyright exclusion language. (Mot. at 1.) But SCO fails to identify precisely what statements it would like the Court to preclude. If by its motion SCO seeks to prohibit arguments or testimony that Amendment No. 2 never occurred, Novell and its witnesses will acknowledge at trial that the APA has been amended. However, given the undisputed relevance of the original language of the APA, SCO’s request for an order precluding some undefined category of “misleading statements” should be denied.

II. CONCLUSION

SCO's request to preclude "misleading statements" concerning the copyright exclusion language of the original APA should therefore be denied.

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Respectfully submitted,

By: /s/ Sterling A. Brennan
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