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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'S OPPOSITION TO  
SCO'S MOTION IN LIMINE NO. 2  
RE REVERSED RULINGS**

Judge Ted Stewart

AND RELATED COUNTERCLAIMS.

SCO's motion in limine no. 2 ("Motion," Dkt. No. 645) seeks to preclude Novell from referencing certain summary judgment rulings. According to SCO, those determinations are moot in light of the Tenth Circuit's reversal, and therefore irrelevant and potentially misleading to the jury. However, the fact that those rulings were made at all is directly relevant to Novell's defenses to SCO's claims, and SCO has not identified any potential prejudice substantially outweighing that relevance. Thus SCO's Motion should be denied.

**I. JUDGE KIMBALL'S PREVIOUS RULINGS ARE RELEVANT TO NOVELL'S GOOD FAITH**

The specific rulings targeted by SCO's Motion are that Novell (1) owns the copyrights and (2) has the right to waive (or direct SCO to waive) certain claims against IBM. (Motion at 1.) The Motion does not identify any other rulings sought to be excluded. According to SCO, "that the District Court previously made such rulings" is irrelevant "because they were reversed by the Court of Appeals." (*Id.*)

But the fact that Judge Kimball made those rulings *is* relevant, notwithstanding the Tenth Circuit's reversal. SCO still is asserting that Novell (1) slandered its supposed title to the copyrights, by asserting ownership; and (2) breached the covenant of good faith and fair dealing, by "purporting to waive and revoke SCO's rights and claims against IBM." (Second Am. Compl., Dkt. No. 96, at ¶ 99(c).) One of Novell's primary defenses to both claims is that it acted in good faith and had probable cause for engaging in the conduct on which those claims are based.<sup>1</sup> And the fact that Judge Kimball once granted summary judgment on SCO's claims, even though those rulings were reversed, is probative of Novell's good faith and probable cause.<sup>2</sup>

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<sup>1</sup> *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 373, 826 P.2d 710 (1992) ("the covenant of good faith can be breached for objectively unreasonable conduct"); *Weaver v. Stafford*, 134 Idaho 691, 701, 8 P.3d 1234 (2000) ("An action will not lie where a statement in slander of title ... was *made in good faith with probable cause*" [emphasis added]).

<sup>2</sup> *See, e.g., Harris Custom Builders Inc. v. Hoffmeyer*, 834 F. Supp. 256, 261-62 (N.D. Ill. 1993) ("An action that is well enough grounded, factually and legally, to survive a motion for summary

## **II. SCO HAS NOT DEMONSTRATED PREJUDICE**

SCO alleges that introduction of Judge Kimball’s rulings “could only serve to mislead the jury.” (Motion at 1.) But if the summary judgment rulings to which SCO’s motion is directed come in, then so too—in all probability—will the Tenth Circuit’s reversal (to explain why the issues are still live). There is thus no risk of the jury being misled.

If there were such a risk, it would be more properly addressed by measures other than exclusion. *Cf.* Fed. R. Evid. 403 advisory comm. note (“In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness ... of a limiting instruction”). For example, “a court may ... take judicial notice, whether requested or not of its own records and files,” *St. Louis Baptist Temple v. F.D.I.C.*, 605 F.2d 1169, 1172 (10th Cir. 1979) (citation omitted); and having taken notice, can then “instruct the jury to accept as conclusive any fact judicially noticed,” Fed. R. Evid. 201(g). If the Court discerns a risk of the jury being misled then the Court can use the tools of judicial notice and jury instruction to clarify matters and thus avoid confusion.

“The exclusion of relevant evidence under Rule 403 is ‘an extraordinary remedy to be used sparingly.’” *K-B Trucking Co. v. Riss Int’l Corp.*, 763 F.2d 1148, 1155 (10th Cir. 1985) (citation omitted). Here, the circumstances do not justify the extraordinary remedy SCO seeks.

## **III. CONCLUSION**

SCO’s Motion should be denied because Judge Kimball’s summary judgment rulings are relevant to Novell’s good faith and probable cause, and there is no real risk of the jury being misled.

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judgment is sufficiently meritorious to lead a reasonable litigant to conclude that they had some chance of success on the merits”).

DATED: February 19, 2010

Respectfully submitted,

By:     /s/ Sterling A. Brennan      
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