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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. 5
TO EXCLUDE STATEMENTS MADE
BY MICHAEL ANDERER AS AN
INDEPENDENT CONTRACTOR FOR
SCO**

Judge Ted Stewart

AND RELATED COUNTERCLAIMS.

SCO's motion to exclude statements made by Michael Anderer as purportedly inadmissible hearsay should be denied because Mr. Anderer's statements are not being offered for the truth of the matter asserted. At SCO's request, Mr. Anderer examined the APA and reported to SCO's CEO, Darl McBride, that SCO had not obtained all of the UNIX intellectual property under the APA. Contrary to SCO's assumption, Novell does not intend to offer Mr. Anderer's statements to establish that the UNIX copyrights did not transfer under the APA, but rather to establish Mr. McBride's state of mind when he was communicating with Novell in 2002 and 2003 regarding the UNIX copyrights. This evidence is highly relevant to Novell's defenses.

I. ARGUMENT

SCO mistakenly assumes that any reference at trial to Mr. Anderer's statements concerning the APA would be hearsay, admissible only if Rule 801(d)(2)(D) applies. However, Novell does not plan to offer Mr. Anderer's statements to prove the truth of the matter asserted, so they are not hearsay. *See* Fed. R. Evid. 801(c) (defining hearsay as an out-of-court statement "offered in evidence to prove the truth of the matter asserted"); *United States v. McIntyre*, 997 F.2d 687, 704 (10th Cir. 1993) (documents not hearsay where not offered for the truth of the assertions contained therein). SCO's motion should therefore be denied.

Mr. Anderer's statements, including statements concerning the APA made in a January 4, 2003 email to Darl McBride, will be offered to show Mr. McBride's state of mind when he contacted Novell requesting transfer of its UNIX copyrights. Mr. Anderer was retained by SCO in 2003 as an outside contractor, in which capacity he reviewed and offered remarks regarding the APA. For example, after reviewing the APA, Mr. Anderer advised Mr. McBride that the agreement "indicates Novell transferred substantially less" of the UNIX intellectual property than it owned. (Ex. 5A (Novell Trial Ex. C12).) Mr. Anderer noted that the APA excluded "all patents, copyrights and just about everything else," and concluded with the following warning to

Mr. McBride: “We really need to be clear on what we can license. It may be a lot less than we think.” (*Id.*)

Subsequently, on February 4, 2003, Mr. McBride contacted Christopher Stone, Vice Chairman of Novell, and stated that he wanted Novell to “amend” the APA to give SCO the “copyrights to UNIX.” (Ex. 5B (Novell Trial Ex. E32) at 1.) On February 25, 2003, Mr. McBride contacted Novell again, asserting that SCO “needs the copyrights.” (Ex. 5C (Novell Trial Ex. W12).) Because Novell plans to offer Mr. Anderer’s statements to show their effect on Mr. McBride’s state of mind when he contacted Novell in early 2003, not for the truth of Mr. Anderer’s interpretation of the APA, they are not hearsay. *Howard Den Hartog v. Wasatch Academy*, 909 F. Supp. 1393, 1396 n.1 (D. Utah 1995) (denying motion in limine in part because the evidence objected to as hearsay was “not hearsay because it is offered to show its affect on or state of mind of Defendants and not for the truth of the matter asserted.”); *United States v. Hanson*, 994 F.2d 403, 406 (7th Cir. 1993) (“An out of court statement that is offered to show its effect on the hearer’s state of mind is not hearsay.”)(citation omitted). The statements, therefore, are admissible.

Even if the statements were hearsay, Novell may still offer Mr. Anderer’s statements to impeach Mr. McBride at trial. *See United States v. Crouch*, 731 F.2d 621, 623 (9th Cir. 1984) (hearsay statements may be admissible to impeach a declarant who subsequently testifies at trial).

II. CONCLUSION

For the foregoing reasons, SCO’s motion to exclude Mr. Anderer’s statements should be denied.

DATED: February 19, 2010

Respectfully submitted,

By: /s/ Sterling A. Brennan
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