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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

THE SCO GROUP, INC., by and through the Chapter 11 Trustee in Bankruptcy, Edward N. Cahn, Plaintiff/Counterclaim-Defendant, vs. NOVELL, INC., a Delaware corporation, Defendant/Counterclaim-Plaintiff.	**SCO'S OPPOSITION TO "NOVELL'S MOTION IN LIMINE NO. 2 TO DETERMINE THAT FIRST AMENDMENT DEFENSES APPLY TO SLANDER OF TITLE"** Civil No. 2:04 CV-00139 Judge Ted Stewart

Novell argues that the First Amendment defenses that may apply to claims for defamation should apply to SCO's claim for slander of title, because that claim is essentially the same as a claim for defamation.[1] As an initial matter, this motion is properly a request for a jury instruction, not a motion in limine, and may be denied for that reason. Novell's argument also should be rejected on its merits. In addition, as also discussed in response to Novell's Motion in Limine No. 3, the Court, in an abundance of caution, could address Novell's concerns with a special question on the verdict form.

1. A claim for slander of title is different from a claim for defamation. Novell admits that it has found no case applying the First Amendment in a slander of title case, yet it asks this Court in the context of an evidentiary motion with limited briefing to break new ground. The reality is that federal courts have never applied First Amendment defenses to a claim for slander of title. In Mueller v. Abdnor, 972 F.2d 931 (8th Cir. 1992), the court expressly declined to apply the First Amendment to a claim for slander of title, reasoning that the case involved "defamation of the ownership of land, not defamation of an individual's reputation." Id. at 937.

In an analogous line of cases, the Supreme Court declined to apply a First Amendment defense to a claim for misappropriation of property, with respect to the broadcast of a videotape of the plaintiff's public entertainment act. Zacchani v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977). The "interest protected" in a defamation claim is "permitting recovery for placing the plaintiff in a false light," whereas the interest in permitting a right to the fruits of one's property "is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment." Id. at 572-73. The interest is thus "closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation." Id. at 573 (emphasis

[1] This is the "first half" to Novell's Motion in Limine concerning the First Amendment.

added); see also Hustler Magazine v. Falwell, 485 U.S. 46, 53 (1988) (reaffirming the ruling in Zaccahani "that the 'actual malice' standard does not apply to the tort of appropriation of a right of publicity"). This analysis compels the same result here.

2. The nature of Novell's speech does not warrant a First Amendment instruction.[2] In any event, it is well established that commercial speech occupies a "subordinate position in the scale of First Amendment values." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). Accordingly, where a defendant's defamatory statements constitute "commercial speech," the statements are not entitled to the First Amendment protection necessary to require proof that the defendant acted with "actual malice." New York Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964) (making threshold determination that speech at issue was "editorial" rather than "commercial"); Procter & Gamble Co. v. Amway Corp., 242 F.3d 539, 547-59 (5th Cir. 2001) (declining to apply "actual malice" standard concerning commercial speech); U.S. Healthcare, Inc. v. Blue Cross, 898 F.2d 914, 928-39 (3d Cir. 1990) (same).

The main factors are whether the speech was contained in an advertisement, referred to a product, and was made with an economic motive. Bolger, 463 U.S. at 66; accord Proctor & Gamble Co. v. Haugen, 222 F.3d 1262, 1274 (10th Cir. 2000). A statement containing those elements, even if it also contains "discussions of important public issues," is commercial speech. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67-68 (1983); accord Haugen, 222 F.3d at 1275. A press release may constitute an "advertisement." Neuralstem, Inc. v. StemCells, Inc., 2009 WL 2412126, at *5 (D. Md. Aug. 4, 2009).

[2] The Supreme Court has declined to determine whether First Amendment defenses apply to a claim other than defamation where resolution of that issue was not necessary. See Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 513 (1984) (taking no position on whether such an analysis "should be applied to a claim of product disparagement").

The Novell press releases of May 28 and June 6, 2006, which Novell acknowledges should be considered together, were advertisements and commercial speech. Novell admits that it issued the press releases to "gain credibility with the OpenSource community." (Ex. 1 at 67.) It begins the first press release by explaining that it is "[d]efending its interests in developing services to operate on the Linux platform," and as a "leading proponent of open source" states that Novell had made "recent announcements to support Linux with NetWare services," a Novell product. Both press releases state that Novell "is a leading provider of information services" and specifically identify Novell's "Nsure™", "exteNd™", "Nterprise™", and "Ngage™" products. They address other subjects as well - indeed, the first press release contains a factual assertion of copyright ownership - but they were made with an economic motive, they refer to multiple products, and they seek to advertise their value and relevance to the subject matter otherwise addressed.

3. The verdict form can be appropriately structured. Novell's motion is really a request for a jury instruction, and question on the verdict form, and not a request for a pretrial evidentiary ruling. Even while denying Novell's motion for the above reasons, the Court could propound a jury question on the verdict form to separately ask whether Novell has acted with "actual malice" and/or "common law malice." One advantage of this approach is that even if an appellate court were later to find that the First Amendment applied, there would not be a need for a new trial. Similarly, by denying Novell's motion and having the jury consider damages even if they did not find "actual malice," the Court also avoids the prospect of a retrial in the event an appellate court holds that the First Amendment does not require heightened intent on this slander of title case.

CONCLUSION

SCO respectfully submits, for the reasons set forth above, that the Court should deny Novell's "Motion in Limine No. 2," but without prejudice to consideration of the issue with respect to jury instructions and the verdict form.

DATED this 19th day of February, 2010.

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CERTIFICATE OF SERVICE

I, Brent O. Hatch, hereby certify that on this 19th day of February, 2010, a true and correct copy of the foregoing **SCO'S OPPOSITION TO "NOVELL'S MOTION IN LIMINE NO. 2"** was filed with the court and served via electronic mail to the following recipients:

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