

Brent O. Hatch (5715)  
[bhatch@hjdllaw.com](mailto:bhatch@hjdllaw.com)  
Mark F. James (5295)  
[mjames@hjdllaw.com](mailto:mjames@hjdllaw.com)  
HATCH, JAMES & DODGE, PC  
10 West Broadway, Suite 400  
Salt Lake City, Utah 84101  
Telephone: (801) 363-6363  
Facsimile: (801) 363-6666

Stuart Singer (admitted pro hac vice)  
[ssinger@bsfllp.com](mailto:ssinger@bsfllp.com)  
Sashi Bach Boruchow (admitted pro hac vice)  
[sboruchow@bsfllp.com](mailto:sboruchow@bsfllp.com)  
BOIES SCHILLER & FLEXNER LLP  
401 East Las Olas Blvd.  
Suite 1200  
Fort Lauderdale, Florida 33301  
Telephone: (954) 356-0011  
Facsimile: (954) 356-0022

David Boies (admitted pro hac vice)  
[dboies@bsfllp.com](mailto:dboies@bsfllp.com)  
Robert Silver (admitted pro hac vice)  
[rsilver@bsfllp.com](mailto:rsilver@bsfllp.com)  
Edward Normand (admitted pro hac vice)  
[enormand@bsfllp.com](mailto:enormand@bsfllp.com)  
BOIES SCHILLER & FLEXNER LLP  
333 Main Street  
Armonk, New York 10504  
Telephone: (914) 749-8200  
Facsimile: (914) 749-8300

*Attorneys for Plaintiff, The SCO Group, Inc.*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH**

<p>THE SCO GROUP, INC., by and through the Chapter 11 Trustee in Bankruptcy, Edward N. Cahn,</p> <p style="text-align: center;">Plaintiff/Counterclaim-Defendant,</p> <p>vs.</p> <p>NOVELL, INC., a Delaware corporation,</p> <p style="text-align: center;">Defendant/Counterclaim-Plaintiff.</p>	<p><b>SCO'S OPPOSITION TO "NOVELL'S MOTION IN LIMINE NO. 4 TO PRECLUDE SCO FROM CONTESTING THAT NOVELL HAD AN OBJECTIVELY REASONABLE, GOOD FAITH BASIS FOR ITS STATEMENTS REGARDING COPYRIGHT OWNERSHIP"</b></p> <p>Civil No. 2:04 CV-00139</p> <p>Judge Ted Stewart</p>
--	--

Novell's Motion in Limine No. 4 argues that the law of the case doctrine precludes litigation of SCO's claims for unfair competition and for breach of the implied duty of good faith and fair dealing insofar as those claims relate to Novell's claims of copyright ownership. With respect to unfair competition, SCO has conceded that there are independent grounds in Judge Kimball's decision that Novell's assertion of copyright ownership cannot constitute unfair competition under Utah law, and accordingly, SCO will not seek to pursue that claim. (Docket No. 669 at 2 n.2.) On the other hand, for the reasons that follow, SCO's claim for breach of the implied covenant should proceed to trial.

Novell argues that despite the Tenth Circuit's reversal of Judge Kimball's conclusions regarding ownership of the copyrights and construction of the Amended Asset Purchase Agreement ("APA"), the Court should preclude SCO from proving its claim for breach of the covenant of good faith at trial because Judge Kimball has already determined that Novell's assertion of copyright ownership was not "objectively unreasonable." Novell's argument is that Judge Kimball based that conclusion on grounds that were "independent" of his construction of the amended APA and conclusions regarding copyright ownership. That is wrong.

An examination of Novell's motion for summary judgment on the implied covenant claim shows that Novell made two arguments: first, that a party's denial of ownership cannot constitute a breach of the implied covenant, which serves to fill gaps in contracts and "should not be extended to prohibit statements about rights conferred by a contract" (Docket No. 272 at 9; Docket No. 332 at 12-16); and second, that for the same reasons as set forth in Novell's motion for summary judgment on copyright ownership, SCO "cannot establish that Novell's statements were false" (Docket No. 272 at 10; Docket No. 332 at 16). The first of these arguments thus would constitute an independent ground for dismissal of SCO's implied covenant claim (as was

the case with Novell's independent argument regarding the scope of Utah unfair competition law); the second would not.

Judge Kimball's decision on the implied covenant does not rest on the first ground above. The Court did not hold that California law does not recognize a claim for breach of the implied covenant that arises from even a bad-faith denial of ownership rights. Instead, the Court states that breach of the covenant requires "objectively unreasonable conduct" and then concludes that there is "no evidence to demonstrate that Novell's position was contrary to its own understanding of the contractual language or objectively unreasonable given the history of the dispute between the parties." (Docket No. 377 at 65).

Judge Kimball's opinion that Novell's reading of the APA was not "objectively unreasonable," however, was predicated on the now reversed conclusions (at 46-62) that (i) the APA can and should be read independent of Amendment No. 2, (ii) extrinsic evidence cannot be considered, and (iii) the APA merely gives SCO an "implied license." SCO appealed all three of those issues, and the Tenth Circuit rejected all three of Judge Kimball's conclusions. SCO Group, Inc. v. Novell, Inc., 578 F.3d 1201, 1210-11, 1214 n.2, 1216 (10th Cir. 2009). It follows that Judge Kimball's basis for saying there was no breach of the implied covenant of good faith and fair dealing was, in fact, dependent on his analysis of the APA. Novell cites Judge Kimball's statement that he would have reached his conclusion even if he had "ruled in SCO's favor on the copyright issue," but the Court did not say that Novell's reading was objectively reasonable even if (i) the APA had to be read together with Amendment No. 2, (ii) extrinsic evidence needed to be considered, or (iii) the APA could not be read as an implied license – the three conclusions that the Tenth Circuit has now established as law of the case on remand. Since the Tenth Circuit's mandate includes all of the "issues that were necessarily implied" by its

mandate, including claims that “part of the mandate might plausibly be read to have restored,” SCO’s claim for breach of the implied covenant of good faith should proceed to trial. Procter & Gamble Co. v. Haugen, 317 F.3d 1121, 1126 (10th Cir. 2003). In sum, because the prior decision did not rest on independent grounds, the claim for breach of the implied covenant based on Novell’s assertions of copyright ownership should be tried.

### **CONCLUSION**

SCO respectfully submits, for the reasons set forth above, that the Court should deny Novell’s “Motion in Limine No. 4.”

DATED this 19th day of February, 2010.

By: /s/ Brent O. Hatch  
HATCH, JAMES & DODGE, P.C.  
Brent O. Hatch  
Mark F. James

BOIES, SCHILLER & FLEXNER LLP  
David Boies  
Robert Silver  
Stuart H. Singer  
Edward Normand  
Sashi Bach Boruchow

*Counsel for The SCO Group, Inc.*

**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. 4"** was filed with the court and served via electronic mail to the following recipients:

Sterling A. Brennan  
David R. Wright  
Kirk R. Harris  
Cara J. Baldwin  
WORKMAN | NYDEGGER  
1000 Eagle Gate Tower  
60 East South Temple  
Salt Lake City, UT 84111

Thomas R. Karrenberg  
Heather M. Sneddon  
ANDERSON & KARRENBERG  
700 Bank One Tower  
50 West Broadway  
Salt Lake City, UT 84101

Michael A. Jacobs  
Eric M. Aker  
Grant L. Kim  
MORRISON & FOERSTER  
425 Market Street  
San Francisco, CA 94105-2482

*Counsel for Defendant and Counterclaim-Plaintiff Novell, Inc.*

By: /s/ Brent O. Hatch  
Brent O. Hatch  
HATCH, JAMES & DODGE, P.C.  
10 West Broadway, Suite 400  
Salt Lake City, Utah 84101  
Telephone: (801) 363-6363  
Facsimile: (801) 363-6666