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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. 11 TO EXCLUDE EVIDENCE OF SUBSTANTIAL PERFORMANCE"** Civil No. 2:04 CV-00139 Judge Ted Stewart

Novell's "motion in limine" seeks effectively to dismiss SCO's claims for specific performance and breach of contract as a matter of law.[1] Novell argues that SCO must show that it substantially performed its obligations under the Asset Purchase Agreement ("APA") and that the law of this case is that SCO did not. Novell is wrong on both counts.

1. SCO's Alternative Claim for Specific Performance.

Novell misstates the law by citing an incomplete excerpt of the relevant statute. "Specific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions precedent on his part to the obligation of the other party." Cal. Civ. Code § 3392 (emphasis added). Omitting the key words "conditions precedent" from its citation, Novell misleadingly suggests that a party's failure to substantially perform any contractual obligation bars specific performance relief. That is not the law. The statute pertains only to a party's failure to substantially perform a "condition precedent," in the event that the parties had agreed to impose any such conditions precedent. The statute's limited scope makes sense, as a "condition precedent" is a condition "before some right dependent thereon accrues, or some act dependent thereon is performed." Id. § 1436 (emphasis added).

The APA does not identify any "conditions precedent" to Novell's obligation to sell the UNIX and UnixWare copyrights, and Novell does not argue otherwise. SCO's obligation to remit a portion of the payments it received under its 2003 agreement with Sun cannot be a "condition precedent" to Novell's obligation to transfer the UNIX and UnixWare copyrights to SCO. "Provisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring such construction." Wm. R. Clarke Corp. v. Safeco Ins. Co., 15 Cal. 4th 882,

[1] Novell's motion is thus not a proper motion in limine; it is an untimely dispositive motion. Novell also failed to assert SCO's prior alleged breach as an affirmative defense.

885 (1997) (citing Rubin v. Fuchs, 1 Cal. 3d 50, 53 (1969)); see also Frankel v. Board of Dental Examiners, 46 Cal. App. 4th 534, 550 (1996) (courts shall not construe a term of the contract so as to establish a condition precedent absent plain and unambiguous contract language to that effect").

2. SCO's Claim for Breach of Contract.

Novell's argument with respect to SCO's claim for breach of contract fares no better. First, SCO's breach of contract claim concerns Novell's breach of the covenant of good faith and fair dealing. Under California law, Novell is obligated to satisfy those obligations independent of SCO's performance. "A breach by one party to a contract does not absolve another party to the contract of the duty of good faith and fair dealing." Aguilar v. Millot, 2007 WL 1806860, at *7 (Cal. Ct. App. June 25, 2007) (citing Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 578 (1973)).

Second, Novell has continued to accept the benefits of SCO's continued performance under the APA, including its continued administration and remittance of SVRX Royalties for years after the 2003 Sun Agreement (and as recently as this year) totaling more than $200 million in royalty payments since the closing of the APA. On those facts, Novell cannot now disavow its duties of good faith and fair dealing under the APA. Roseleaf Corp. v. Radis, 122 Cal. App. 2d 196, 204-205 (Cal. Ct. App. 1953); 15 R. Lord, Williston on Contracts § 44:52 (4th ed. 2009).

Third, Novell's motion turns on the mistaken premise that the Court already addressed the issue of whether SCO "substantially performed" under the APA and decided that SCO did not. The Court did no such thing. Novell never moved for summary judgment on the basis of SCO's alleged failure to "substantially perform," and the Court never considered (and certainly did not reach any conclusions) with respect to that issue. "There is no simple test for determining whether substantial performance has been rendered and several factors must be considered, including the ratio of the performance already rendered to that unperformed, the quantitative character of the

default, the degree to which the purpose behind the contract has been frustrated, the willfulness of the default, and the extent to which the aggrieved party has already received the substantial benefit of the promised performance." Homebridge Mortg. Bankers Corp. v. Vantage Capital Corp., 2008 WL 5146957, at *5 (S.D.N.Y. Dec. 5, 2008) (citing Hadden v. Consolidated Edison Co. of New York, Inc., 34 N.Y.2d 88, 96 (1974)). The Court has never been asked to consider those issues.

If anything, Judge Kimball's findings with respect to Novell's counterclaims support the fact that SCO did "substantially perform" under the APA. Novell originally sought more than $30 million in damages based on its allegations that it was entitled to some of the payments SCO received for agreements it had entered into in 2003 and 2004 – including the Microsoft Agreement and dozens of SCOsource agreements.[2] At trial, Judge Kimball found against Novell with respect to all of those agreements, and awarded Novell less than 10% of its claimed damages (and less than 2% of the over $200 million in total royalties that SCO has remitted under the APA) on the basis of a single section of a single agreement. Those findings and evidence underscore SCO's substantial performance under the APA for more than a decade.

[2] Novell sought royalties from more than twenty SCOsource agreements; the Court found that SCO had properly retained all of the payments it received under all of those agreements.

CONCLUSION

SCO respectfully submits, for the reasons set forth above, that the Court should deny Novell's "Motion in Limine No. 11."

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

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