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*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. 13 TO EXCLUDE CERTAIN TESTIMONY FROM LAWRENCE BOUFFARD FOR LACK OF PERSONAL KNOWLEDGE AND VIOLATION OF PAROL EVIDENCE RULE</b></p> <p>Civil No. 2:04 CV-00139</p> <p>Judge Ted Stewart</p>
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Novell seeks to preclude SCO from offering certain testimony of Larry Bouffard on the grounds that Mr. Bouffard did not participate in negotiating the APA or Amendment No. 2. Novell's interpretation is contrary to the Tenth Circuit's determination that this is an ambiguous contract, as amended, and that extrinsic evidence is relevant for the purpose of determining the intent to transfer the copyrights.<sup>1</sup>

Mr. Bouffard worked in sales for Novell during the transition period in which Novell transferred the entire UNIX and UnixWare business to Santa Cruz. In the course of that process, he acquired an understanding of the parties' intent under the APA, including through company meetings and through his own effort to interpret and apply the APA during 1996. Mr. Bouffard explained to his co-workers in a contemporaneous e-mail, from early 1996, that Novell had sold the UNIX and UnixWare business "lock, stock and barrel." He confirmed at deposition that his understanding at that time was that "the intellectual property for UNIX had been transferred to SCO." (Ex. 1 at 141-42.) He acknowledged that as of today, as a legal matter, he does not know whether Novell sold all of its UNIX and UnixWare assets. (Id. at 84.)

Mr. Bouffard's e-mail and testimony are admissible. Mr. Bouffard has personal knowledge of the parties' course of performance. He need not have personally negotiated the terms of the APA or Amendment No. 2 to give admissible testimony of the parties' intent. His testimony constitutes relevant extrinsic evidence of the parties' course of performance under the APA, which the Tenth Circuit has specifically identified as a relevant – perhaps even the best – evidence of the parties' intent. Consistent with well-established California law, the Tenth Circuit has necessarily rejected the argument that only the testimony of the individuals who negotiated

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<sup>1</sup> This the second of Novell's eight similar motions (Motions in Limine Nos. 12-19) regarding witness testimony. SCO sets forth the controlling law governing the admissibility of such testimony in its Memorandum in Opposition to Novell's Motion in Limine No. 12, and hereby incorporates that discussion.

the language of the APA or Amendment No. 2 is relevant. SCO will not present any testimony from Mr. Bouffard in which he presently reads or interprets the language of the APA or Amendment No. 2. SCO intends to designate portions of Mr. Bouffard's deposition testimony to be played at trial, and Novell is entitled to offer counter-designations and/or to object to such designations as it deems appropriate. Novell's arguments go to the weight of Mr. Bouffard's testimony, not its relevance.

### **CONCLUSION**

SCO respectfully submits, for the reasons set forth above, that the Court should deny Novell's Motion in Limine No. 13.

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

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