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Attorneys for Plaintiff, The SCO Group, Inc.

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

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| <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>SCO'S OPPOSITION TO NOVELL'S MOTION IN LIMINE NO. 15 TO EXCLUDE CERTAIN TESTIMONY FROM ROBERT FRANKENBERG FOR LACK OF PERSONAL KNOWLEDGE AND VIOLATION OF PAROL EVIDENCE RULE</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 Robert Frankenberg on the grounds that Mr. Frankenberg did not participate in negotiating the APA or Amendment No. 2. Novell adopts an unduly restrictive interpretation of the law and of the nature of Mr. Frankenberg's experience and testimony.¹

Mr. Frankenberg was the President and CEO of Novell at the time of the APA. (Ex. 1 at 7.) He decided in late 1994 or early 1995 to sell the UNIX and UnixWare business, in its entirety. (Id. at 9-11.) He testified that it was always his intent "that Novell would transfer copyrights to UNIX and UnixWare technology to Santa Cruz" (Id. at 135), and he never contradicted that testimony. Mr. Frankenberg specifically understood that the APA's sale of all rights and ownership included the copyrights. (Id. at 19.) He identified reasons for why he had and has that understanding. (Id. at 66, 105-06.) In recounting the extrinsic evidence relevant to the issue of the transfer of copyright ownership, the Tenth Circuit specifically cited Mr. Frankenberg's testimony. SCO Group, Inc. v. Novell, Inc., 578 F.3d 1201, 1206 (10th Cir. 2009).

Such testimony is admissible. Mr. Frankenberg has personal knowledge of the business negotiators' intent concerning the transaction, because he participated in the negotiations. His testimony constitutes relevant extrinsic evidence of the circumstances in which the APA was drafted; of the negotiations that occurred leading up to the execution of the APA; of the object, nature, and subject matter of the APA; and of circumstances helping to explain the execution and meaning of Amendment No. 2. His testimony is integral to helping the factfinder place itself in the same situation in which the parties found themselves in negotiating and executing the APA.

¹ This is the fourth 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.

His prospective testimony concerning his actions and statements in 1996 also goes to 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 the language of the APA or Amendment No. 2 is relevant. Novell's arguments go to the weight of Mr. Frankenberg'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. 15.

DATED this 19th day of February, 2010.

By: /s/ Brent O. Hatch
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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. 15** was filed with the court and served via electronic mail to the following recipients:

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