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

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

Stuart Singer (admitted pro hac vice)
ssinger@bsfllp.com
Sashi Bach Boruchow (admitted pro hac vice)
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

Attorneys for Plaintiff, The SCO Group, Inc.

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 REPLY MEMORANDUM IN SUPPORT OF ITS RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, FOR A NEW TRIAL** Civil No. 2:04 CV-00139 Judge Ted Stewart

INTRODUCTION

SCO's Rule 50 motion is predicated on the plain language of the APA, as amended by Amendment No. 2, and as interpreted by the Tenth Circuit. The plain language of the APA, after Amendment No. 2, as well as the Court of Appeals's analysis of that language, makes clear that all copyrights that are required for SCO to exercise any of its purchased rights in the UNIX and UnixWare technologies acquired under the APA were transferred, and Ms. Amadia, Novell's drafter of the provision, after she admitted that she was assuming no copyrights were required, conceded as much on cross-examination. Because ownership of the UNIX and UnixWare copyrights is required, at least, for SCO to enforce its rights against third-party infringers and to pursue enforcement of claims transferred to it under the APA, the jury's verdict cannot stand.

Novell's defense of the verdict rests on a series of suppositions and non-issues. First, Novell contends that what SCO received in the APA was just a license to develop a new modified UnixWare product. This position cannot be squared with the facts that the APA is an asset purchase agreement, not a licensing agreement; the APA transfers "all rights and ownership" in the UNIX and UnixWare source code, which no license would do; and Novell offered UnixWare source code licenses to develop new modified UnixWare products for $375,000 – not the tens of millions of dollars Santa Cruz at minimum paid. (605:23-606:8 (Broderick); 598:4-8 (Broderick); 2018:6-8 (Tolonen); Ex. 133.) Second, Novell's position requires that SCO would have received a license to use UNIX and UnixWare copyrights, but there is no such license in the APA. Finally, Novell argues that it is sufficient that SCO could copyright its own modifications to the UNIX and UnixWare source code, ignoring that this would leave the underlying UNIX technology, on which such modifications are constructed, entirely unprotected. Because the amended APA transfers all copyrights that are required, and the UNIX and UnixWare copyrights are required, Rule 50 requires that judgment on copyright ownership be entered for SCO.

SCO's alternative motion for new trial under Rule 59 appropriately requires this Court to consider the jury's verdict against the extraordinary evidence that transfer of the UNIX and UnixWare copyrights was intended. This evidence includes testimony from Novell's own top executives and negotiators, not to mention indisputable evidence of how Novell remarked and relabeled UnixWare with SCO's copyright notice, informed customers that SCO now owned the technology, intentionally left its UNIX copyright registrations for SCO to keep, and never objected as SCO publicly claimed copyright ownership in subsequent press releases and other filings. Novell would have this Court believe that ten witnesses, five from Novell's side, most with no financial interest in the matter, have concocted the story that it was the intent of the transaction, as expressed in negotiations, that ownership of the whole UNIX and UnixWare business (excepting the existing royalty stream) be sold, and that this naturally included the UNIX and UnixWare copyrights.

It is true, as Novell says, that SCO fought for a jury trial. But doing so does not surrender the protections provided by law for a case where the jury is confused or misled into an untenable decision. We respectfully submit this is such a case.

ARGUMENT

I. SCO IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

SCO's Rule 50 motion is appropriately granted under the standard of Reeves v. Sanderson Plumbing Prods, Inc., where the Supreme Court stated that courts "should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." 530 U.S. 133, 150-51 (2000). The Court, of course, is also entitled – indeed required – to give controlling weight to the views of the Tenth Circuit expressed in the course of interpreting this very contract.

A. The Amended APA Transferred "Required" Copyrights to SCO.

The amended APA plainly provides for transfer of copyrights required for SCO to exercise its rights with respect to the UNIX and UnixWare technologies it acquired through the APA. The transfer of "all rights and ownership" in the UNIX and UnixWare source code – if there is no exclusion of copyrights – is plainly sufficient to transfer the copyrights under settled case law. (See SCO Opening Br. at 5.) As the Tenth Circuit observed, "when a party acquires 'all rights and ownership' in a set of items, as was the case here, courts have generally found such language sufficient to satisfy Section 204(a) in the absence of language excepting copyrights or other special circumstances." SCO Group, Inc. v. Novell, Inc., 578 F.3d 1201, 1213 (10th Cir. 2008). Thus, "any change to the set of Excluded Assets in Schedule 1.1(b) necessarily implicated those copyrights actually transferred under Schedule 1.1(a)." Id. This clear statement, as well as others the Tenth Circuit made, resolves the issue here. Id. at 1213-16. Novell's competing interpretation is that Amendment No. 2 simply affirmed in SCO a right to use the UNIX and UnixWare technology, i.e., a "license," without using the word. But this is precisely the interpretation of which the Court of Appeals said it was "skeptical" because "[w]hatever the Amendment means, it refers to ownership of copyrights not to licenses." Id. at 1216. The language of Amendment No. 2, the Tenth Circuit's analysis, and the testimony of Novell's own chief witness on the point are all contrary to Novell's position.[1]

While the Tenth Circuit, as Novell argues, took "no position on which party ultimately owns the UNIX copyrights or which copyrights were required for Santa Cruz to exercise its rights under the agreement," that does not mean the Tenth Circuit's views of the proper interpretation of the contract are to be disregarded. They are law of the case. (See Novell Mot. in Limine No. 9

[1] Ms. Amadia makes it clear that her view of Amendment No. 2 is based on her erroneous reading that the APA was a mere grant of rights for SCO to do certain things (2152:10-17; 2153:5-13; 2156:6-9), rather than the outright ownership transfer of the UNIX and UnixWare businesses that it indisputably is.

(Docket No. 650) at 2.) Now that this Court has heard the evidence, the Court should consider the evidence in light of the Tenth Circuit's opinion and the views expressed therein.

Novell cites provisions that SCO would manage and remit to Novell older UNIX royalties, points to evidence that "the retention of copyrights was approved by the Novell Board,"[2] and argues that Amendment No. 2 could not have been intended to transfer copyright ownership because "that would have been a material change that would have required separate Board approval." But none of these arguments creates a plausible alternative reading of the amended APA. Moreover, there is no question that Amendment No. 2 is a binding contract to which Novell is legally bound, irrespective of the views of certain Novell witnesses regarding the need for further approval.[3] "Contract formation is governed by objective manifestations, not the subjective intent of any individual," and "subjective, undisclosed intent" is "immaterial to interpretation of contract." Coremetrics, Inc. v. Atomic Park.com, LLC, No. C-04-0222 EMC, 2005 WL 33100093, at *5 (N.D. Cal. Dec. 7, 2005); accord Navair, Inc. v. IFR Americas, Inc., 519 F.3d 1131, 1138 (10th Cir. 2008) (contracts formed "by what the parties communicate"); Williston on Contracts § 4:1 (2007) ("mutual assent is to be judged only by overt acts and words").

Novell also argues (at 9-10) that SCO "takes out of context" Ms. Amadia's concession that the amended APA transferred ownership of any required copyrights. A review of Ms. Amadia's testimony, however, shows that she clearly conceded the point under cross-examination that, if

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[2] Novell suggests (at 6) that Mr. Frankenberg "confirmed and verified the accuracy" of the Novell Board minutes at the time of the Board meeting. But Mr. Frankenberg merely authenticated the Board minutes. (147:10-17.) In addition, he made clear that he "misread" the exclusion of copyrights reflected in the Board minutes as an exclusion of Netware copyrights, and thus the mistake was not "caught at the time in 1995 when the transaction was being signed." (102:19-103:6.)

[3] Not only was Amendment No. 2 binding, as it was signed by a Novell officer, but the APA and related agreements were amended in material ways affecting Novell's rights, without evidence of Board approval, through Amendment No. 1 and the three-way amendment among Novell, SCO, and IBM known as Amendment X. (Ex. 1, Amendment No. 1; Ex. 165, Recitals.) Like those amendments, Amendment No. 2 was executed and became binding on Novell even without such Board approval.

copyrights were "required" by SCO contrary to what she was assuming in her direct testimony, the copyrights were transferred. First, she admitted that "whatever copyright rights Santa Cruz needed in order to exercise the rights it was given under the asset purchase agreement . . . they would have those rights." (2160:5-8). Then, in the context of testifying that both trademarks and copyrights[4] were transferred under the same language of Amendment No 2, Ms. Amadia testified:

> Q. So if there are copyrights that are required for SCO to exercise its rights, like the UNIX and UnixWare trademarks, they were transferred; correct?
>
> A. Yeah.

(2177:25-2178:18) There is simply no contextual confusion – which is the only possible response Novell has to this clear, dispositive admission from its chief witness on the issue.

B. <u>SCO Required UNIX and UnixWare Copyrights.</u>

SCO showed that it plainly requires the copyrights to enforce its rights against third-party infringers and to pursue enforcement of claims transferred to it under the APA.

Novell does not and cannot dispute that SCO cannot enforce copyrights against infringers of the UNIX source code and related information, which Novell concedes SCO owns, without owning the copyrights (or holding an express exclusive license, a position even Novell does not espouse). SCO's ability to copyright subsequent modifications and enhancements does not provide a means to protect the underlying UNIX source code – code that Andrew Nagle (a long-time USL, Novell, and Santa Cruz employee) testified to, without contradiction, "is still there" in UnixWare today.[5] (1784:1-22; <u>see</u> SCO Opening Br. at 11). Indeed, with no copyrights, SCO

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[4] While trademarks are expressly listed in Schedule 1.1(a), they are excluded by the excluded asset language unless that language – which applies equally to copyrights – allows for conveyance of ownership.

[5] Mr. Nagle's testimony alone answers Novell's assertion that SCO presented no testimony as to what copyrights were required. UNIX and UnixWare are a continuous development process building new code on top of the original UNIX code. (1722:5-11; 1729:11-1730:1.) "The engine to UNIX is the kernel, it is the core of the operating system . . . . All of that technology, the basis for that technology, reaches back

would not even be able to protect the UnixWare product it received and commenced selling at the time of the closing. (1784:1-22.)

With respect to the transfer of legal claims – which would include copyright claims – in the APA, Novell protests (at 13-14) that SCO "made no showing" that "legal claims" were among the rights SCO acquired under the APA. But Item II of Schedule 1.1(a) clearly transfers "All of Seller's claims arising after the closing date against any parties relating to any right, property or asset included in the business." (Emphasis added.) Without contradiction, Mr. Thompson testified "that the enumerated assets Novell actually sold to Santa Cruz included legal claims that it would have against parties that were connected to the business." Under the case law, a copyright owner cannot transfer its copyright claims without also transferring the copyrights. Silvers v Sony Pictures Entm't., Inc., 402 F.3d 881, 885 (9th Cir. 2005).

Novell next argues (at 8-9) that Ms. Amadia and Mr. Tolonen "testified that the 'required for' language in Amendment No. 2 was not intended to transfer the UNIX copyrights." But even if (contrary to fact) that testimony could be squared with the plain language of the amended APA, Mr. Tolonen and Ms. Amadia were not testifying regarding the relevant question – whether the copyrights at issue are required – but rather declaring categorically that Amendment No. 2 accomplished nothing – even though Ms. Amadia admitted that the reason Amendment No. 2 was drafted in the first place was to, in Mr. Sabbath's words, "correct" a "clerical error" "regarding the ownership of the copyrights under the asset purchase agreement." (2107:2-18.)

Novell next argues (at 10-11) that Mr. McBride's statement that the copyrights were not required to run the UnixWare business proves that the copyrights are not required for SCO to exercise the rights it acquired under the APA. But Mr. McBride was clearly referring to only one part of SCO's business – its ability to sell UnixWare binary products directly to customers – as is

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to the development of 4.2 MP that was done at UNIX System Laboratories. It was brought forward into UnixWare 2, it was brought forward into UnixWare 2.1, and it is still there." (1784:12-19.)

evident from (1) his comparison of UnixWare to OpenServer and the products of "HP, IBM and all other UNIX licensees," and (2) the distinction he draws between the UnixWare business and "the licensing side" of SCO's overall business. That SCO, like UNIX licensees, could continue to sell its UnixWare binary products without the copyrights does not mean that the copyrights were not required to exercise critical rights "on the licensing side" that SCO also acquired under the APA. Indeed, even selling binary products would be more tenuous if infringers could copy protected UNIX and UnixWare code with impunity.[6]

Mr. Tibbitts squarely testified that without the UNIX and UnixWare copyrights SCO "could not protect" its business and that "this venerable UNIX business that has been around for many years that many customers around the world are using would simply die off." (1844:25-1846:1; 1850:11-14.) SCO's consideration of selling the UnixWare binary business while retaining the copyrights to pursue its intellectual property business is consistent with the legal and practical reality that copyrights are required to license and enforce the intellectual property. Moreover, Mr. Tibbitts testified that "the copyrights were potentially going to go with that business [through the proposed sale] when the [litigation] issues get cleared up." (1850:15-19.)

II. IN THE ALTERNATIVE, SCO IS ENTITLED TO A NEW TRIAL

Alternatively, the verdict was clearly, decidedly, and overwhelmingly against the weight of the evidence that the parties intended for SCO to receive the copyrights, as part of the "all rights and ownership" to the software business it acquired in the APA. Novell suggests (at 15, n.10) that Evans v. Fogarty, 241 Fed. Appx. 542, 550 (10th Cir. 2007), modifies the "abuse of discretion" standard of review where a district court grants, as opposed to denies, a motion for a new trial. But the Tenth Circuit makes no such distinction. Henning v. Union Pacific, 530 F.3d 1206, 1217 (10th Cir. 2008) ("Like a district court's decision to deny a motion for a new trial, we review the

[6] A party suffering infringement may sue to enjoin the infringing user, license the infringing use as SCO attempted with certain users through SCOSource licensing, or a combination of both.

district court's decision to grant a new trial for an abuse of discretion.") Fogarty thus speaks to the thoroughness of a panel's review of the record, not to any distinct, less-deferential standard.

A. SCO Acquired the UNIX and UnixWare Copyrights.

1. The Intent of the Negotiators and Principals Regarding the APA.

Novell first argues (at 15-17) that "SCO mistakes quantity of testimony with quality of testimony." SCO respectfully suggests that when a litigant is able to present favorable testimony from an array of its adversary's most senior executives, including its then-CEO, and the lead business negotiators, it has provided both "quality" and "quantity" of proof. But in any event the following facts about SCO's ten key witnesses are derived from the record:

- At the time of the APA, five worked for Novell and five for Santa Cruz.
- There was no evidence that seven – Mr. Frankenberg, Mr. Levine, Mr. Mohan,[7] Mr. Wilt, Mr. Michels, Ms. Madsen, and Mr. Sabbath – ever had any affiliation or interest in SCO. All seven offered testimony that was consistent within the entire group and also with the witnesses Novell challenged as having some potential interest in SCO.
- Mr. Levine, who Novell notes marked up Schedule 1.1(b), testified that it was intended that copyrights transfer and suggested it would have been unethical for Novell to sell the business and yet withhold the copyrights in that manner. (521:7-522:14.)

Novell argues (at 16) that "none of these ten witnesses offered reliable testimony as to the intent, negotiation, or drafting of the relevant portion of Amendment No. 2," ignoring that Ms. Madsen and Mr. Sabbath both offered fully competent testimony concerning the intent of Amendment No. 2. (802:14-803:1 (Madsen); 865:3-866:1 (Madsen); 900:23-901:9 (Sabbath)). Novell next

[7] Novell cites a memo from Mr. Mohan to argue that there were two businesses – the existing UNIX business and the UnixWare business – and that SCO acquired only the forward-looking UnixWare business. The APA, however, transferred all existing technology and versions of both UNIX and UnixWare without distinction, and Mr. Mohan drew no such distinction in his memo. (Ex. 1, Schedule 1.1(a), Item I; Ex. 163 at 1.) In fact, the memo states that SCO bought "the UNIX business from Novell" and attaches the Novell-SCO joint press release announcing that SCO was acquiring the "UNIX intellectual property." (110:22-112:13 (Frankenberg); Ex. 526; Ex. 163 at 1, 4.) Also, Mr. Mohan testified that when SCO bought the UNIX business from Novell, SCO got "the whole thing," including the copyrights. (459:2-6; 461:22-25; 462:1-9.)

selectively quotes (at 16-18) from the testimony of these ten witnesses purportedly to show that "their knowledge and credibility were suspect." But Novell is unable to explain, and so does not try, how ten disparate witnesses, each allegedly suffering from distinct failures of knowledge or credibility, collectively offered identical testimony of their shared intent.[8]

The Technology Licensing Agreement ("TLA") simply cannot be squared with Novell's position. No one disputes that the TLA licensed to Novell post-APA UNIX derivatives. In another effort to focus the analysis on a non-issue, Novell claims that this is all the TLA does. But the TLA also licensed back to Novell the pre-APA UNIX technologies that Novell sold to SCO in the same transaction. Those are technologies for which Novell would not have needed a license, much less accepted a restricted license as stated in the TLA, had it owned the copyrights at issue. Novell incongruously emphasizes (at 20) that its General Counsel testified that "the TLA gave a license-back to Novell to all assets *conveyed* to SCO." Yes, by definition, those assets were the existing pre-APA technologies, including all UNIX source code, not the derivatives of those technologies that SCO would subsequently develop.

B. The Course of Performance Confirmed that Copyrights Were Transferred.

Knowing that the Tenth Circuit deemed such evidence "the best evidence" of the parties' contractual intent, SCO, 578 F.3d at 1217, Novell strains to downplay the probative value of the overwhelming, one-sided "course of performance" evidence SCO presented at trial.

Novell argues (at 21) that "copyright notices were changed only on the then-current release of UnixWare that Santa Cruz was taking over, and not older UNIX and UnixWare releases." But

[8] The forthright negotiator rule also requires interpreting Amendment No. 2 in SCO's favor. According to Novell, the rule does not apply because "SCO has presented no evidence that Santa Cruz attached a different meaning to the relevant portion of Amendment No. 2 at the time the agreement was made." But Mr. Sabbath believed that Amendment No. 2 fixed "a clerical error" and confirmed the transfer of the copyrights. (2107:2-18 (Amadia); 911:6-14 (Sabbath).) Knowing that that was his understanding from the start of the negotiations, Ms. Amadia drafted the final language to avoid "what his reaction was going to be to a whole modification of his proposed language" (2174: 6-24), which is the less-than-forthright negotiating approach that the law disfavors.

the fact that Novell changed the copyright notices on the "then-current release of UnixWare" is precisely the point. That release had been developed and was owned by Novell and was being transferred to SCO under the APA. (Ex. 1, Schedule 1.1(a), Item I (transferring UnixWare 2.1); 1722:19-1723-2 (Nagle).) No new code written by Santa Cruz was part of that product at that point. (1726:14-18 (Nagle); 1781:10-13 (Nagle).) Thus, it only made sense for Novell to change copyright notices on that release, which contained only Novell-developed code, if the pre-APA copyrights were also being transferred to SCO – which, of course, was the only testimony presented regarding the transition process.

Novell suggests (at 20) that it took no affirmative steps to turn its UNIX copyright registrations over to SCO but just left them behind in "the same physical location." That lack of effort to keep possession is instructive. Moreover, Mr. Broderick testified without rebuttal that Novell management affirmatively sorted its files to identify and turn over to SCO all the materials being transferred to SCO under the APA, while keeping materials that should not be transferred to SCO, which were related to Netware and other Novell technologies. (610:5-611:25.)

Novell claims (at 20) that the letters it sent to hundreds of UNIX licensees and partners "were not meant to give customers all details, but merely convey that customers needed to deal with Santa Cruz going forward." That may be true in part, but that does not detract from Novell's precise statements that it had transferred "its existing ownership interest in UNIX" and "the ownership of the UNIX operating system," including all existing and prior releases of UNIX and UnixWare. (Ex. 22; Ex. 751.) Not giving details is one thing; erroneously describing the transaction to partners is another. The letters speak for themselves about the intent of the APA.

CONCLUSION

SCO respectfully submits, for the reasons stated above, that the Court should grant SCO's motion for judgment as a matter of law or, in the alternative, grant SCO a new trial.

DATED this 28th day of May, 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

Counsel for The SCO Group, Inc.

CERTIFICATE OF SERVICE

I, Brent O. Hatch, hereby certify that on this 28th day of May, 2010, a true and correct copy of the foregoing **SCO'S REPLY MEMORANDUM IN SUPPORT OF ITS RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, FOR A NEW TRIAL** 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