Appeal No. 10-4122

IN THE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

THE SCO GROUP, INC.,

*Plaintiff-Appellant,*

vs.

NOVELL, INC.,

*Defendant-Appellee.*

On Appeal from the United States District Court
for the District of Utah
The Honorable Ted Stewart, Judge Presiding
(Case No. 2:04-CV-00139-TS)

APPELLEE NOVELL, INC.'S BRIEF
ORAL ARGUMENT REQUESTED

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## CORPORATE DISCLOSURE STATEMENT

Appellee Novell, Inc. has no parent corporation.  No publicly held

corporation owns 10% or more of Novell's stock.

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## OTHER AUTHORITIES

## STATEMENT OF RELATED CASES

*SCO Group v. Novell, Inc.*, Case No. 08-4154, filed August 1, 2008, by

Movant-Appellant Jonathan Lee Riches, dismissed by this Court on October 6,

2008, for failure to prosecute.

*SCO Group v. Novell, Inc.*, Case No. 08-4217, filed December 1, 2008 by

The SCO Group, Inc.

## STATEMENT OF CASE

### A.      Nature of Case

Two years after acquiring the UNIX operating system business for more than $300 million, Novell sold specified portions of that business to Santa Cruz Operation, Inc. ("Santa Cruz").  The Asset Purchase Agreement ("APA"), as amended, outlined that Novell would transfer rights and assets to allow Santa Cruz to develop and market a flavor of UNIX known as UnixWare.  Novell, however, would retain all existing copyrights.  The APA also provided that Santa Cruz would become Novell's agent with respect to the UNIX licensing business.

Santa Cruz subsequently sold the UnixWare-related assets to The SCO Group, Inc. ("SCO").  SCO embarked on a campaign to collect license fees from Linux users based on SCO's claims that Linux infringed UNIX copyrights.  SCO requested that Novell transfer the UNIX copyrights to SCO, a request Novell rejected.  Nevertheless, SCO contacted roughly 1,500 companies, alleging infringement of the UNIX copyrights.  Novell responded that SCO did not own the copyrights, and SCO filed this action.

After losing on summary judgment in 2007, SCO argued to this Court that it should be given the chance to present its claims to a jury.  The Court gave SCO that opportunity.  The finders of fact (both jury and judge) were presented at trial and in post-trial briefing with two competing interpretations of the amended APA.

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SCO argued the deal was an acquisition of the entire UNIX and UnixWare

business.  Novell presented evidence that the final deal was more limited, because

Santa Cruz could not afford to purchase the entire business.  Instead, Novell

transferred the UnixWare business to Santa Cruz, but retained substantial rights in

the UNIX licensing business, including the right to receive most ongoing UNIX

royalties.  To safeguard that royalty stream, Novell deliberately retained ownership

of the existing UNIX and UnixWare copyrights.  The amendments to the APA did

not alter that fundamental feature of the APA.  The finders of fact agreed with

Novell's interpretation of the transaction.

SCO now seeks to undo the factual findings of the jury and judge.

Throughout its brief, SCO makes arguments based on its version of events—a

version that would require that factual findings below be ignored or reversed.  But

SCO is not entitled to re-try its case in this Court.  Instead, SCO must demonstrate

the jury's verdict and the district court's factual findings were unreasonable and

unsupported by the evidence.  That SCO utterly fails to do.  To the contrary, the

findings below were consistent with the evidence, and thus should not be disturbed

on appeal.

## B.    Procedural History

SCO filed a complaint for slander of title in state court, which Novell

removed to federal court.  On cross-motions for summary judgment, the district

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court entered judgment for Novell and determined damages in a bench trial.  This

Court affirmed-in-part, reversed-in-part, and remanded for trial.

After a three-week trial, the jury found for Novell.  The judge also found for

Novell on the issues the parties agreed the court would decide after the trial.  The

district court denied SCO's motions for judgment as a matter of law or a new trial.

<div align="center">STATEMENT OF FACTS</div>

A.      Factual Background

1.       The UNIX and UnixWare Businesses

About fifty years ago, AT&T developed the UNIX operating system.

(A2947 ¶3.)  By the 1980s, AT&T developed UNIX System V (known as SVRX)

which it licensed to major computer manufacturers, including IBM, Sun

Microsystems, and Hewlett-Packard.  These manufacturers were authorized to use

the SVRX source code to develop their own "flavors" of UNIX—i.e., their own

unique UNIX-based operating systems.  (A2948 ¶4.)

In 1993, Novell paid over $300 million to purchase the entirety of UNIX

System Laboratories, an AT&T spin-off that owned all of the UNIX business,

including copyrights and licenses.  (A2948 ¶5.)  Novell subsequently developed a

new flavor, "UnixWare."  UnixWare combined the latest release of SVRX with

some components of Novell's NetWare source code.  (A2948 ¶6.)

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Two years after it purchased AT&T's UNIX business, Novell decided to sell some of it.  (A2949-50 ¶¶10-11.)  Novell initially intended to divest itself of its entire $300 million investment.  But the buyer Novell identified, Santa Cruz, lacked the resources to purchase the entire business.  (A2950 ¶11.)  Instead, Novell sold Santa Cruz the right to develop UnixWare.  Novell retained, however, rights to most of the UNIX licensing business, including the ongoing royalty stream and the UNIX and UnixWare copyrights needed to safeguard those royalties.  (A2950 ¶11.) The ultimate transaction was a limited asset purchase agreement, rather than a full acquisition.  (A2950 ¶11.)

### 2.    The Asset Purchase Agreement

Tor Braham, outside counsel for Novell, was tasked with protecting Novell's interests in the negotiation and drafting of the agreement.  (A2773:2343.)  The lead drafter of the APA, he testified the deal was structured such that Santa Cruz would acquire the assets and rights it needed to exploit and develop UnixWare going forward.  (A2964-65 ¶48.)  Novell retained substantial rights in its already-existing UNIX licensing business, including the right to receive SVRX royalties.  Santa Cruz became Novell's agent in the collection of those royalties and acquired assets, such as contracts and employees, to effectuate that role.  (A2951 ¶11.)  Santa Cruz did not enter into the SVRX licensing business for itself, and in general could not even enter into new SVRX licenses.  (A2956 ¶28.)  Instead, it operated solely as

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Novell's agent, with Novell retaining control over all components of the SVRX licensing business.  (A2951;A2981-82;A2998 ¶¶11,91,130.)

To "bulletproof" Novell's ongoing interest in the UNIX royalties, Novell retained ownership of the existing UNIX and UnixWare copyrights. (A2966;A2992-93;A2995-96 ¶¶51,117,123.)  In particular, Novell retained copyright ownership because of concerns regarding Santa Cruz's long-term viability; Novell desired to protect its ongoing royalties in case Santa Cruz or a successor went bankrupt.  (A2965 ¶50.)

Under the APA, Novell transferred to Santa Cruz certain assets (listed on the Included Assets schedule), while Novell expressly retained other assets (listed on the Excluded Assets schedule).  Section 1.1 of the APA provides that Santa Cruz acquired the "right, title and interest in and to the assets and properties of [Novell] relating to the Businesses (collectively the 'Assets') identified on Schedule 1.1(a)." (A3110.)  But the APA also provides, "the Assets to be so purchased shall not include those assets (the 'Excluded Assets') set forth on Schedule 1.1(b)." (A3110;A3164-65.)

The schedules for Included Assets (Schedule 1.1(a)) and Excluded Assets (Schedule 1.1(b)) each have an "Intellectual Property" subheading, specifying which intellectual property is included and which is excluded.  The only intellectual property listed as Included Assets on Schedule 1.1(a) are the UNIX and

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UnixWare trademarks.  Copyrights are not listed on that schedule.  Schedule 1.1(b) explicitly excludes from the transaction "[a]ll Patents" and "[a]ll copyrights and trademarks, except for the trademarks UNIX and UnixWare."  (A3165 ¶21.)

Those most closely involved with negotiating and drafting the APA (including Braham, the primary drafter of the agreement) testified Novell's retention of copyright ownership and its broad waiver rights with respect to SVRX licenses were critical components of the deal and protected Novell's ongoing interests.  (*See, e.g.*, A2964 ¶48 (Braham testimony), A2965 ¶49 (testimony of David Bradford, Novell's General Counsel from 1985-2000), A2965 ¶50 (testimony of James Tolonen, Novell's Chief Financial Officer at time of APA), A2966 ¶51 (testimony of Michael Defazio, Executive Vice President of Novell at time of APA), A2966 ¶52 (testimony of Jack Messman, member of Novell's Board of Directors at time of APA and later CEO).)  When the Novell Board of Directors approved the deal, it did so with an explicit statement in its approved Board minutes that Novell would "retain all of its patents, copyrights and trademarks (except for the trademarks UNIX and UnixWare)."  (A2957 ¶31.)[1]

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[1] A few former Novell employees testified that they believed copyright ownership was intended to transfer.  (A2959-60;A2962-63 ¶¶38-40,44-45.)  Those individuals may not have understood that Santa Cruz could not afford the entire business.  (A2967 ¶53.)  And the jury and judge were entitled to credit the contrary

(Footnote continues on next page.)

The APA also provided in Section 4.16 that Santa Cruz would administer the

collection of all royalties and other fees under SVRX licenses.  (A2954 ¶25.)

Santa Cruz was not permitted to amend, modify, or waive any right under any

SVRX license without Novell's prior consent, but Novell could direct Santa Cruz

to amend, supplement, modify, or waive any rights under any SVRX license.

(A2956 ¶28.)  Santa Cruz was to act as Novell's agent.  (A2977 ¶82.)  Section 4.16

was the key provision embodying the deal that the UNIX licensing business would

remain owned by Novell, but be *administered* by Santa Cruz.  (A2977 ¶83.)  This

section was intended to "bulletproof" Novell's ongoing financial interest in SVRX

royalties.  (*Id.*)

SVRX licenses consist of three types of agreements—an umbrella software

agreement, a product supplement agreement, and a sublicensing agreement.

(A2979-80 ¶88.)  An umbrella software agreement provides the general terms and

conditions that will govern the relationship between the licensee and the licensor.

(A2979;A2323:625.)  A product supplement agreement licenses a specific software

product and enables the licensor to develop code on top of it.  (A2979;A2323:625.)

A sublicensing agreement allows the licensor to distribute a binary product.

(A2979-80.)  These agreements work together.  (A2980.)  If a company does not

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(Footnote continued from previous page.)

testimony.  *Pioneer Drilling Co. v. N.L.R.B.*, 391 F.2d 961, 964 n.3 (10th Cir.
1968).

have an umbrella software agreement, it cannot have a product supplement
agreement.  (A2980.)

### 3.      Amendments No. 1 and No. 2

The APA was amended twice.  Amendment No. 1 was executed several
months after the original APA.  Although that amendment was a carefully crafted
clean-up amendment, it did not alter the copyright-exclusion provision.  (A2958
¶33.)

Amendment No. 2, executed on October 16, 1996, was negotiated by Santa
Cruz's General Counsel Steve Sabbath and Novell's in-house counsel
Allison Amadia.  (A2714:2120.)  Sabbath initially took the position that copyrights
had been intended to transfer under the APA and the exclusion was an error.
(A2973-74 ¶74.)  He sent a draft amendment to Amadia with language to transfer
the copyrights.  (A2974 ¶76.)  In speaking with Braham and Tolonen, Amadia
learned the exclusion of copyrights was intentional.  (A2973-74 ¶¶74-76.)
Accordingly, she rejected Sabbath's proposal, explaining that Novell would not
transfer copyright ownership.  She agreed, however, to add language to the list of
Excluded Assets—Schedule 1.1(b)—to confirm Santa Cruz had the rights it needed
under the copyrights to exercise the development rights it acquired under the APA.
(A2974 ¶76.)  The final language in Amendment No. 2 amended the copyright
exclusion to read:  "All copyrights and trademarks, except for the copyrights and

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trademarks owned by Novell as of the date of the Agreement required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies.  However, in no event shall Novell be liable to SCO for any claim brought by any third party pertaining to said copyrights and trademarks."  (A2958 ¶34.)  No modification was made to Schedule 1.1(a), the schedule of assets *included* in the transaction.

### 4.    SCO's Actions Against IBM

In the 1980s, AT&T built a substantial business licensing SVRX source code to major computer manufacturers, including IBM.  (A2948 ¶4.)  When Novell purchased UNIX System Laboratories from AT&T, it acquired the SVRX licenses and resulting royalties.  (*Id.*)  Under the APA, Novell retained rights to the SVRX licensing business, but Santa Cruz was charged with collecting the royalties.

In October 1996, IBM, Santa Cruz, and Novell amended IBM's SVRX license, granting IBM an irrevocable and fully paid perpetual right to exercise all rights under its license in exchange for approximately $10 million. (A2981;A2985-86 ¶¶90,103.)  Both Novell and Santa Cruz signed this amendment, and Santa Cruz received part of the payment.  (A2981 ¶90.)

In 2001, SCO purchased Santa Cruz's UNIX and UnixWare-related assets and rights.  (A2228:264;A4471-75.)  Santa Cruz warned SCO at the time that it "may not be able to establish a chain of title from Novell" for any copyrights.

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(A4473.)  Nevertheless, SCO created a new licensing division known as

SCOsource, in an effort to obtain licensing fees from Linux users based on SCO's

claims that Linux infringed UNIX copyrights.  (A2983-84 ¶98.)

As part of this effort, SCO repeatedly contacted Novell requesting a transfer

of UNIX copyrights to SCO, which Novell rejected.  (A2741-42:2220,

A2742:2222;A2742:2224;A4375.)  SCO nevertheless launched SCOsource.

(A2983-84 ¶98.)  SCO sent letters to roughly 1,500 companies, including Novell,

alleging infringement.  (A2652-53:1890-1891;A4212-13.)  Novell viewed SCO's

actions as a campaign against Linux end users and was concerned due to its own

involvement in the Linux business.  (A2984 ¶99.)  Novell responded that Novell,

not SCO, owned the UNIX copyrights.  (A4379.)

In 2003, SCO sued IBM, alleging that IBM had donated UNIX source code

and other confidential information to Linux.  (A2984 ¶100.)  As part of that

litigation, SCO threatened to terminate IBM's SVRX license.  (*Id.*)  IBM contacted

Novell and requested that Novell waive all claims SCO had made or might make

against IBM with respect to IBM's SVRX license.  (A2985 ¶102.)  After analyzing

IBM's request, Novell sent SCO a letter stating that SCO's claims threatened

Novell, its customers, and the industry in general.  Under Section 4.16(b) of the

APA, Novell directed SCO to waive its claims to terminate IBM's SVRX license.

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(A2986 ¶103.)  When SCO refused, Novell sent a second letter waiving such

claims on behalf of SCO, pursuant to Section 4.16(b).  (*Id.*)

Novell wrote a third letter to SCO directing SCO to waive its claim that code

supplied to IBM by AT&T and incorporated into IBM's flavor of UNIX, AIX,

must be maintained as confidential and not contributed to Linux, even though such

code did not contain proprietary UNIX code.  (A2986-87 ¶104.)  After SCO failed

to waive its claim, Novell waived the claim on SCO's behalf.  (*Id.*)

### B.     Proceedings Below

### 1.     First District Court Judgment

On cross-motions for summary judgment, the district court ruled for Novell

on key issues.  (A355-56.)  The court held that Novell owned the UNIX and

UnixWare copyrights.  (A315.)  The court concluded that the plain language of the

APA did not transfer the copyrights to SCO.  (A311.)  The court further held that

the APA, particularly Amendment No. 2, lacked the necessary specificity to satisfy

the written-transfer requirement of 17 U.S.C. § 204(a).  (A313-16.)

The district court also held that under the APA, Novell could waive "any

rights" under "any SVRX License," including claims based on IBM's alleged

breach of software and sublicensing agreements that were part of the "combination

of agreements" licensing SVRX.  (A331,342.)  The court also concluded that the

APA required SCO, as Novell's agent and fiduciary, to provide Novell with

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royalties paid under "all SVRX Licenses."  This included payments SCO collected

from Sun and Microsoft.  (A350.)  To determine the amount of royalties SCO

owed Novell, the court held a bench trial and awarded Novell $2,547,817 of Sun's

$9.1 million payment.  (A398.)

### 2. First Appeal

SCO appealed, and this Court affirmed-in-part, reversed-in-part, and

remanded for trial.

With respect to whether the APA and Amendment No. 2 transferred the

UNIX and UnixWare copyrights to SCO, this Court held that there were triable

factual issues.  First, the Court held that Section 204(a) of the Copyright Act does

not preclude ambiguous writings from transferring copyright ownership.  Second,

the Court held that interpretation of a written agreement is a question of fact.  *SCO*

*Grp., Inc. v. Novell, Inc.,* 578 F.3d 1201, 1214 (10th Cir. 2009).  It observed that a

case "involving a complicated, multi-million dollar business transaction involving

ambiguous language about which the parties offer dramatically different

explanations, is particularly ill-suited to summary judgment."  (*Id.* at 1215).  The

Court recognized "that Novell has powerful arguments to support its version of the

transaction" and "there may be reasons to discount the credibility, relevance, or

persuasiveness of the extrinsic evidence that SCO presents."  (*Id.*)  Nonetheless,

viewing the conflicting evidence in the light most favorable to SCO, this Court

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held that "[a] rational trier of fact could surely find that Amendment No. 2 clarified the APA so as to indicate that at least some copyrights transferred to SCO." (*Id.* at 1216.) But the Court also made clear that it merely viewed the evidence as creating "ambiguity over whether the transfer of copyrights was required to support SCO's rights under the APA," and that it was *not* taking a "position on which party ultimately owns the UNIX copyrights or which copyrights were 'required' for Santa Cruz to exercise its rights under the agreement." (*Id.* at 1218-1219.) Because the evidence was "subject to conflicting, reasonable interpretations," such determinations were "for the finder of fact on remand." (*Id.*)

This Court also held that there was ambiguity with respect to the meaning of "SVRX License" and Novell's waiver rights under Section 4.16. (*Id.* at 1220.) The Court held that the language was not so clear as to preclude SCO's interpretation, although the Court observed that it was reasonable that the parties would have agreed to protect Novell's "substantial pecuniary interest." (*Id.* at 1224.)

The Court thus remanded for a trial on four enumerated issues: "(1) the ownership of the UNIX and UnixWare copyrights; (2) SCO's claim seeking specific performance; (3) the scope of Novell's rights under Section 4.16 of the APA; [and] (4) the application of the covenant of good faith and fair dealing to Novell's rights under Section 4.16 of the APA." (*Id.* at 1227.)

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### 3.     On Remand

a.     The district court held a three-week jury trial, and the jury returned a verdict for Novell.  In response to the question, "Did the amended Asset Purchase Agreement transfer the UNIX and UnixWare copyrights from Novell to SCO," the jury answered "no."  (A1914-15.)  This mooted the remaining jury questions, which included questions on slander and special damages.  (*Id.*)

b.     Because the parties agreed that the judge would decide whether SCO was entitled to specific performance requiring Novell to transfer the copyrights, the judge made express findings of fact and conclusions of law regarding copyright ownership.

Although the court noted that SCO's witnesses expressed the view that the UNIX and UnixWare copyrights were intended to transfer to SCO (testimony SCO highlights before this Court), the district court expressly found that testimony less credible and less persuasive than Novell's evidence.  (A2967 ¶53.)  Specifically, the court found that SCO's witnesses, while having a business-level understanding of negotiations between Novell and Santa Cruz, were not themselves involved in the negotiation or drafting of the agreement.  (A2967;A2975 ¶¶53,79.)  Moreover, the court found that SCO's witnesses had a substantial financial interest in the outcome of this case, which undermined their credibility.  (A2967 ¶53.)

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In contrast, the district court found that Novell's witnesses had actual and direct knowledge of the topics on which they testified.  None had any financial interest in the outcome of this lawsuit.  The court thus found Novell's witnesses more credible.  (A2967 ¶53.)  For example, Braham was the lead drafter of the APA and was able to explain the intent behind both the copyright exclusion and the broad waiver and approval language of Section 4.16.  Amadia was the lead negotiator and drafter of Amendment No. 2 and was able to explain the drafting history and the intent behind that provision.  As Novell's Chief Financial Officer at the time of the original APA and Amendment No. 2, Tolonen signed Amendment No. 2.  Tolonen was the only witness from either side with involvement in both the original agreement and the amendment.  (A2964;A2965;A2973-74 ¶¶48,50,74-76.)

Based on these express factual findings, the court concluded that SCO was not entitled to specific performance, because such an equitable remedy would conflict with the jury verdict and the weight of the evidence.  (A2990-92 ¶¶110-15.)

The court also held that Novell was entitled to a declaratory judgment that Novell possessed broad waiver rights under Section 4.16 of the APA.  The court explained that if SCO's limited interpretation of "SVRX License" were accurate, SCO would have the unfettered ability to terminate umbrella software agreements, which would destroy Novell's ability to protect its SVRX royalty stream.  Product

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supplement agreements could exist only between parties who also had entered

software agreements.  (A2999 ¶132.)

Finally, the court held that Novell did not breach the covenant of good faith

and fair dealing by exercising its waiver rights under Section 4.16.  The court

found that (1) neither of the exceptional circumstances set out by this Court's prior

decision existed, (2) Novell's actions were in good faith, and (3) SCO's argument

rested on the faulty premise that Novell transferred the entire UNIX business to

Santa Cruz, a premise that the jury rejected.  (A3002-04 ¶¶142-46.)

c.      The district court denied SCO's renewed motion for judgment as a

matter of law or, in the alternative, a new trial.  With respect to the motion for

judgment as a matter of law, the court noted that it "must draw all reasonable

inferences in favor of the nonmoving party."  (A3007 (citation omitted).)  The

court rejected SCO's motion because there was "substantial evidence" in Novell's

favor, and the jury found Novell's version of the facts persuasive.  (A3008.)

The court noted that a new trial can be granted only where the verdict is

"clearly, decidedly, or overwhelmingly against the weight of the evidence."

(A3012 (citation omitted).)  The court observed that "the mere fact that SCO

presented more witnesses" did not satisfy that standard.  (A3013.)  The court

concluded that the jury found SCO's witnesses less credible or less persuasive for a

number of reasons, "including their lack of involvement in drafting the APA, the

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fact that there was little testimony on any actual discussions concerning the

transfer of copyrights, or that many of the witnesses had a financial interest in the

litigation." (A3013.)  The court also noted that the drafter of Amendment No. 2,

Amadia, "specifically testified that she informed Mr. Sabbath [Santa Cruz's

negotiator and signer of Amendment No. 2] that Novell would not transfer the

copyrights." (A3013.)

## SUMMARY OF ARGUMENT

I.      Over the course of a three-week trial, SCO argued the APA was

designed to transfer the entire UNIX and UnixWare business, including copyrights.

But Novell presented substantial testimony and evidence that, because of Santa

Cruz's lack of resources, the final deal was more limited.  Specifically, the deal

transferred much of the UnixWare business to Santa Cruz, but left the UNIX

licensing business and copyrights with Novell.  Amendment No. 2 confirmed Santa

Cruz had the rights it needed to operate its business accordingly.  Novell's

evidence included testimony from the lead drafters of the APA (Braham) and

Amendment No. 2 (Amadia), plus minutes from the Novell Board of Directors

meeting approving the APA and stating copyrights were not intended to transfer.

By contrast, SCO presented witnesses with no involvement in the actual

negotiation and drafting of the APA or no involvement in its final stages.  SCO

presented no witnesses who could contradict Novell's position on Amendment

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No. 2. SCO's primary witness with respect to that amendment did not recall the relevant paragraph, did not recall negotiating it, and conceded he would not be able to contradict Novell's witness regarding whether he stated copyrights were specifically excluded from the APA. Furthermore, SCO's own witnesses admitted SCO did not require ownership of the UNIX copyrights to operate its software business or to protect the intellectual property SCO created, contradicting SCO's core arguments with respect to Amendment No. 2.

After weighing the evidence, both judge and jury determined that Novell's position was more persuasive. In light of the voluminous evidence in Novell's favor, the district court correctly rejected SCO's motion for judgment as a matter of law.

II.     A new trial is not warranted because the verdict is not clearly, decidedly, or overwhelmingly against the weight of the evidence. The jury had ample reasons to discount SCO's evidence, including SCO's witnesses' lack of knowledge of the negotiation and drafting of the amended APA, lack of competency with respect to Amendment No. 2, and in some cases financial interest in the trial's outcome.

III.    The court correctly denied SCO's request for specific performance. The evidence supported Novell's position that copyrights were not intended to transfer and were not required for SCO to exercise its rights with respect to the

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UNIX and UnixWare technologies.  Also, specific performance cannot be granted

if it would contradict a factual predicate of a jury's verdict.  Contrary to SCO's

assertion, the jury verdict necessarily decided that copyrights were not required for

SCO's business, as this was a central issue on which both parties presented

extensive evidence.

  IV. The district court correctly held that Novell had the right to waive

SCO's rights under IBM's SVRX license.

  The APA established that SCO was Novell's agent with respect to the UNIX

business and SVRX licenses.  That agency relationship is consistent with Novell

having broad control over SCO regarding that portion of the business.

Furthermore, it was undisputed at trial that the waiver provision was intended to

"bulletproof" Novell's interest in the royalty stream from SVRX licenses, and that

a party could not have a royalty-producing product supplement agreement if it did

not also have a software agreement.

  The court was also correct to hold that Novell did not breach the implied

covenant of good faith and fair dealing by exercising its right to waive SCO's

claims in connection with IBM's SVRX license.  Novell acted in accord with the

APA's terms, and its actions did not render the contract contradictory or illusory.

  V. The three evidentiary rulings SCO attacks were well within the district

court's broad discretion.

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*First*, the court did not abuse its discretion in permitting limited evidence of prior judicial decisions.  SCO invited the introduction of this evidence by disregarding the court's repeated warnings.  This evidence was necessary for Novell to cross-examine SCO's damages expert, who ignored the highly publicized decisions as possible causes of damage to SCO's reputation and business that were independent of Novell's allegedly wrongful acts.

*Second*, the court did not abuse its discretion in permitting Novell to reference the original APA.  It would have been nonsensical for Novell and SCO to ask witnesses who had no involvement in or knowledge of Amendment No. 2 questions about that amendment.

*Third*, the court did not abuse its discretion in permitting Novell to show a document relied on by Novell's expert.  The document was not used for a hearsay purpose, but to show that independent of Novell, negative statements about SCO were being published, whether true or not.

## ARGUMENT

## I.    THE DISTRICT COURT CORRECTLY DENIED SCO'S MOTION FOR JUDGMENT AS A MATTER OF LAW

### A.    Standard Of Review

A jury's verdict is entitled to great deference.  This Court reviews "the denial of a motion for JMOL de novo, using the same legal standard as the district court."  *Kelly v. Metallics West, Inc.*, 410 F.3d 670, 674 (10th Cir. 2005).  "JMOL

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is only proper when the evidence and all inferences to be drawn therefrom are so

clear that reasonable minds could not differ on the conclusion." (*Id.*) This Court

draws "all reasonable inferences in favor of the nonmoving party" and does not

"weigh the evidence, pass on the credibility of witnesses, or substitute [its]

conclusions for that of the jury." *Id.*; *see also Weese v. Schukman,* 98 F.3d 542,

547 (10th Cir. 1996).[2]

A district court's findings of fact are reviewed only for clear error.

*Raytheon Aircraft Co. v. United States*, 590 F.3d 1112, 1120 (10th Cir. 2009).

This Court does not reweigh evidence or reconsider witnesses' credibility. *See*

*United States v. Valenzuela*, 365 F.3d 892, 901 (10th Cir. 2004); *United States v.*

*McIntyre*, 997 F.2d 687, 707-778 (10th Cir. 1993), cert. denied, 510 U.S. 1063

(1994).

### B.   The Jury's Verdict That The Amended Asset Purchase Agreement Did Not Transfer Copyrights Is Well Supported

In arguing that the court erred in denying its motion for JMOL, SCO

carefully selects and strategically cites testimony to contend that the findings by

the jury and the district court that no copyrights transferred cannot be reconciled

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[2] SCO asserts that this Court has "repeatedly seen fit to reverse the erroneous denials of motions under Rule 50(b)." (SCO Br. 24.) But two of the eight decisions SCO cites for that proposition did not even reverse. In all but one of the six remaining decisions, the Court reversed based on an error of *law*, not the absence of sufficient evidence.

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with the evidence.  (SCO Br. 25-39.)  But that argument would require this Court

to re-weigh the evidence.  That this Court should not do.

The fact-finders weighed the contractual language, documentary evidence,

and testimony presented at the three-week trial and chose between two conflicting

interpretations of the agreement, which this Court previously deemed ambiguous.

SCO argued the deal always was designed to transfer the entire UNIX and

UnixWare business, including copyrights.  SCO contended that Amendment No. 2,

although ambiguously phrased, confirmed that those copyrights did transfer.

But Novell presented evidence that Santa Cruz lacked the resources to buy

the entire UNIX and UnixWare business, which Novell had purchased for more

than $300 million.  Novell's evidence showed that the final deal intentionally

transferred only certain assets to Santa Cruz.  Novell retained the uncontested right

to ongoing UNIX licensing royalties, with Santa Cruz acting as Novell's agent to

collect those royalties.  To protect that significant royalty stream, Novell retained

the existing UNIX and UnixWare copyrights and the power to direct Santa Cruz to

amend, supplement, modify, or waive rights under any SVRX license.  Santa Cruz

acquired the valuable right to develop, sell, and license UnixWare, and

Amendment No. 2 confirmed that right.

After considering the extensive evidence, both jury and judge found

Novell's view of the APA transaction more credible.  Given the substantial

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evidence supporting Novell's interpretation, SCO is wrong to now assert that the factual findings below were unreasonable or lacked an evidentiary basis.

Nor is the judgment inconsistent with this Court's mandate. As this Court held (at SCO's urging) in the previous appeal, the amended APA was sufficiently ambiguous to justify looking to extrinsic evidence and negotiators' testimony on original intent. *SCO Grp., Inc. v. Novell, Inc.*, 578 F.3d 1201, 1210-1211 (10th Cir. 2009). That the evidence did not support SCO's version of the transaction provides no basis for the new fact-finding SCO seeks from this Court. Indeed, this Court previously "recognize[d] that Novell has powerful arguments to support its version of the transaction, and that … there may be reasons to discount the credibility, relevance, or persuasiveness of the extrinsic evidence that SCO presents." (*Id*. at 1215.) These reasons proved true, and SCO's reliance on the discounted testimony supporting its rejected view of the amended APA cannot support reversal.[3]

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[3] SCO suggests throughout its brief that the fact-finders' determinations are wrong where they allegedly conflict with isolated statements from this Court's prior opinion. But those arguments ignore the context in which the prior appeal arose. Because this Court was reviewing summary judgment in favor of Novell, the Court drew all reasonable inferences in the light most favorable to SCO. By contrast, on this appeal, Rule 50(b) requires the Court to consider only whether the verdict is supported by the evidence presented at trial, all of which must be viewed in the light most favorable to Novell. *See Kelly*, 410 F.3d at 674. Moreover, this

(Footnote continues on next page.)

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### 1.     Testimony Of Those Involved In Drafting And Negotiating Amendment No. 2 Confirms It Did Not Transfer Copyrights

As the district court expressly found, significant testimony from those involved in the drafting and negotiation of Amendment No. 2 confirms that the amended APA did not transfer the UNIX or UnixWare copyrights to SCO.

Before this Court, however, SCO has combed through the record to selectively cite extrinsic evidence that it contends supports its claim.  (SCO Br. 27-30.)  SCO's argument is fatally flawed for two reasons.  First, it ignores Novell's substantial evidence to the contrary supporting the findings of the jury and district court, to which this Court should defer.  Second, it overlooks that the fact-finders were entitled to find SCO's testimony unpersuasive and/or lacking in credibility.[4]

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(Footnote continued from previous page.)

Court was careful not to prejudge the issues to be decided at trial.  *SCO*, 578 F.3d at 1219.

[4] SCO suggests (without citation to any authority) that Amendment No. 2 is susceptible to a "straightforward interpretation" that Novell must upset by "compelling . . . evidence."  (SCO Br. 27.)  There is no basis, legal or otherwise, to create a new contract-law standard that shifts the burden to Novell rather than SCO (the party who must satisfy Rule 50(b)) when the plain language of the amended APA contains no express transfer of copyrights.  Indeed, SCO's argument is contrary to the law of the case.  This Court held, at SCO's urging, that Amendment No. 2 is ambiguous.  The Court thus *required* consideration of extrinsic evidence as to the parties' intent to determine *whether* any copyrights transferred.  *SCO*, 578 F.3d at 1210-1211.

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### a. The jury's verdict is well supported

Ample testimony supports the finding that Amendment No. 2 did not transfer copyrights to SCO.

Novell's witnesses testified that Amendment No. 2 was never intended to transfer ownership of the UNIX copyrights. Both Tolonen (Novell's CFO at the time of both the APA and Amendment No. 2 and signer of the latter) and Amadia (former Novell in-house attorney and lead negotiator and drafter of Amendment No. 2) so testified. (A2692:2036;A2692:2038;A2713-14:2119-2120;A2714:2123.)

In fact, Amadia initially received a draft of Amendment No. 2 from SCO's Sabbath that would have revised Schedule 1.1(b) to transfer copyright ownership. But she rejected the proposed language because Novell did not want to transfer the copyrights to Santa Cruz. (A2714:2120.) Sabbath's proposed revision of Schedule 1.1(b), if it had been accepted, would have identified as Excluded Assets "[a]ll copyrights and trademarks, except for the copyrights and trademarks owned by Novell as of the date of this Amendment No. 2, which pertain to the UNIX and UnixWare technologies *and which SCO has acquired hereunder*." (A4753.) (emphasis added). Amadia told Sabbath that Novell would not alter the original APA to transfer copyright ownership, and she could only modify the language to "affirm the rights that [SCO] ha[d] acquired in terms of license grants and rights to use the technology." (A2714:2120.) Amadia prepared such a revision, which

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became the final language of Amendment No. 2.  (A2714:2121-2123.)  This

evidence alone is sufficient for a reasonable jury to find for Novell.

Moreover, SCO's construction of Amendment No. 2 defies basic logic and

ignores this Court's requirement that the agreement be construed as a single

document.  *SCO*, 578 F.3d at 1211.  Amendment No. 2 made no change to the

schedule of assets *included* in the transaction (Schedule 1.1(a), which itself had an

Intellectual Property subsection).  That schedule did not transfer any copyrights to

Santa Cruz.  Amendment No. 2 merely changed the language of the *Excluded*

Assets in Schedule 1.1(b).  No SCO witness proffered any explanation as to why, if

copyrights were intended to transfer, Amendment No. 2 did not amend

Schedule 1.1(a) to affirmatively include copyrights.

Indeed, Tolonen and Amadia both testified that if Amendment No. 2 had

been intended to confirm the transfer of copyrights, Schedule 1.1(a)'s list of

Included Assets would also have been amended. Amadia testified that if copyrights

were to transfer, she "would have definitely amended Schedule 1.1(a), which listed

the [I]ncluded [A]ssets." (A2724:2160.)  Likewise, Tolonen agreed that the way to

transfer the copyrights would have been to include them on the schedule of

Included Assets.  (A2692:2037.)

Nor is there any merit to SCO's claim that some of Amadia's testimony

supports its position.  SCO quotes Amadia's testimony that "if there are copyrights

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that are required for SCO to exercise its rights, like the UNIX and UnixWare

trademarks, they were transferred." (SCO Br. 27.) But Amadia stated that

Amendment No. 2 was not referring to the transfer of copyright ownership, but

instead the transfer of certain copyright rights. (*See, e.g.*, A2724:2160 ("the way

that I wrote and intended Amendment Number 2 to be read is that this language

was saying that whatever *copyright rights* Santa Cruz needed in order to exercise

the rights it was given . . . they would have *those rights*.") (emphases

added);A2713:2122 ("Q: Did anyone at Novell ever suggest to you that in

connection with amendment number two that Novell ought to transfer *ownership*

of UNIX copyrights to Santa Cruz Operation? A: No, no one did.") (emphasis

added).) [5]

SCO also misrepresents Amadia's testimony, claiming that she believed

Sabbath understood the purpose of Amendment No. 2 to be "to clarify that the

UNIX and UnixWare copyrights had transferred." (SCO Br. 15). But SCO omits

the first part of the question, which makes clear that this was only "initially in the

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[5] SCO's argument that Amendment No. 2 must have included *copyright*
ownership because it included *trademarks* is misguided. The UNIX and UnixWare
trademarks were explicitly listed as Included Assets in the APA. Furthermore,
unlike copyrights, trademarks have no value aside from business goodwill.
J. McCarthy on Trademarks & Unfair Competition § 18.2 (4th ed. 2010). If Santa
Cruz was to be the face of the business going forward, trademark ownership would
necessarily need to transfer. The same is not true of copyright ownership.

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beginning of discussions." (*Compare* SCO Br. 15 *with* A2726:2169.)  As Amadia

explained, "after he executed Amendment Number 2," Sabbath "thought he got

what he needed, which would clear license rights to go forward, to use the code, to

develop it to, you know, own modifications to it, to do all of the things they

intended to do to acquire the assets." (A2726:2169.)

In any event, even if portions of Amadia's testimony were construed to

support SCO's claim that copyright ownership transferred (SCO Br. 4), the fact-

finders were free to rely on and credit her ample testimony that supported Novell's

position. (A2973-75 ¶¶74-79.)

### b.    SCO's witnesses were less credible and less persuasive

The foregoing evidence is more than sufficient to sustain the jury's verdict

and district court's findings, and this Court should refrain from re-weighing the

evidence.  In any event, the fact-finders had good reason to discount SCO's

evidence.

The only SCO witnesses with any involvement in Amendment No. 2—

Sabbath and Kim Madsen—had nothing to say regarding the negotiation and

interpretation of Amendment No. 2.  Sabbath did not recall the relevant paragraph

in Amendment No. 2, did not recall negotiating it, did not know who would have

negotiated it, and could not recall focusing on that provision before signing the

amendment. (A2401-02:924-925.)  Indeed, Sabbath conceded he would not be

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able to contradict Amadia regarding whether he stated the copyrights were specifically excluded from the APA.  (A2401-02:924-925;A2403:933.)

Despite this lack of memory, Sabbath executed a self-serving declaration in 2004 stating his belief that Amendment No. 2 was intended to confirm that SCO would obtain ownership of the UNIX copyrights under the APA.  (A2397:910.) But Sabbath was forced to admit that he had also executed, under penalty of perjury, an earlier declaration that conflicted with his trial testimony and that conceded Novell retained much of the UNIX intellectual property, quoting the schedule of Excluded Assets.  (A2402:927-928.)

Madsen testified that she "reviewed and commented" on the language of Amendment No. 2, but had only a general memory of the amendment's execution and did not have any specific recollection of discussions with Sabbath. (A2369:802.)  When asked what copyrights she believed were "required" for Santa Cruz to operate its UNIX and UnixWare business in 1996, Madsen responded only:  "We would have acquired all the copyrights."  (A2369-70:802-803.)

In short, ample reasons existed for the jury and the district court to reject the testimony of SCO's witnesses.  This Court, with only the cold trial transcript, should not re-weigh that evidence.  (*See* A2963-64 ¶¶46-47, noting inconsistencies in testimony of Sabbath and Madsen.)

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### c.     The findings do not render Amendment No. 2 meaningless

There is no merit to SCO's claim that Amendment No. 2 is rendered meaningless if no copyrights transferred.  (SCO Br. 25.)  As Amadia explained, Amendment No. 2 affirmed that Santa Cruz had the right to use the UNIX technology to manufacture and modify UnixWare.  (A2716:2128.)  As discussed above, she explained that Sabbath believed he obtained what he wanted out of Amendment No. 2:  the ability to "use the code, … develop it[, and] own modifications to it, … all of the things they intended to do [when Santa Cruz] acquire[d] the assets."  (A2726:2169.)

SCO is wrong to suggest that, because "the term 'license' is not mentioned in the APA with respect to SCO's rights," Amendment No. 2 cannot be referring to usage rights.  (SCO Br. 20.)  The word "license" is not necessary to grant usage rights.  In fact, courts have found licenses where the word "license" was not used or there was no written agreement.  *See, e.g.*, *Eickmeyer v. Commissioner of Internal Revenue.*, 580 F.2d 395, 399-400 (10th Cir. 1978) (holding that failed patent assignment constituted mere license even where license terminology was not used).

Nor did this Court hold that Amendment No. 2 referred only to ownership, not usage rights.  (SCO Br. 7.)  This Court's previous ruling made clear that

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copyrights did not necessarily transfer under Amendment No. 2; rather, it held that there were triable issues of fact as to copyright ownership.  And this Court expressly took "no position on which party ultimately owns the UNIX copyrights." *SCO*, 578 F.3d at 1219.  It thus was entirely consistent with this Court's mandate for the jury and district court to conclude that Amendment No. 2 did something other than transfer UNIX and UnixWare copyrights.

> **2.    Testimony As To The Original Intent Of The APA Confirms That Novell Intentionally Retained The UNIX And UnixWare Copyrights**

a.     Testimony of the primary APA draftsman further confirms that Novell intentionally retained the copyrights.  The original APA unequivocally excluded "all copyrights," including the UNIX and UnixWare copyrights, from the transaction between Novell and Santa Cruz.  (A2954 ¶23.)  Notwithstanding SCO's claims that this was a drafting error, both the jury and judge found that this was no mistake.  Ample evidence supports those findings.

Braham, Novell's outside counsel who was the primary draftsman of the APA, testified that the copyright exclusion was negotiated and agreed upon at Novell's direction.  (A2778:2363.)  Braham and Mike DeFazio, former head of the UNIX and UnixWare business at Novell who later joined Santa Cruz, agreed that the copyright exclusion was designed to protect Novell's interests in future SVRX royalties.  The copyrights thus were not listed on the schedule of the assets

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included in the sale (Schedule 1.1(a)).  (A2778:2363-64.)  Because Santa Cruz was

unable to pay for the entire UNIX and UnixWare business, it purchased the

UnixWare business, with Novell retaining rights and royalties from the UNIX

licensing business.  (A2950-51 ¶11.)  DeFazio confirmed that the retention of

copyrights was crafted to "bulletproof" Novell's royalty stream.  (A2966 ¶51.)

Similarly, Tolonen, Novell's CFO during the time of both the original APA

and Amendment No. 2 and a signer of Amendment No. 2, testified that copyrights

were purposefully excluded because (1) Santa Cruz was small and could not afford

to pay the entire value for all UNIX and UnixWare-related rights and assets, and

(2) Novell was concerned about Santa Cruz's long-term viability and wanted to

ensure Novell's rights would not be jeopardized if a competitor acquired Santa

Cruz.  (A2688-89:2021-23.)

This testimony went unrefuted by SCO and unmistakably undermines

SCO's contention that the parties originally intended the APA to transfer

copyrights and that Amendment No. 2 confirmed that intent.  None of SCO's

witnesses were directly involved in drafting the original APA, as Braham was, and

SCO did not call any outside lawyers from the Santa Cruz side of the transaction.

The jury weighed Novell's testimony against that of SCO's witnesses and found

Novell's more persuasive.  That conclusion is bolstered by the district court's

explicit factual findings that this testimony was credible.  (A2975 ¶79.)

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b.       Moreover, Novell demonstrated that Novell's Board of Directors

approved the APA with specific reference to its exclusion of all copyrights.

(A2957 ¶31.)

David Bradford, Secretary to the Board of Directors and General Counsel

for Novell for nearly 15 years, including at the time of the APA and Amendment

No. 2, prepared the Board minutes.  (A2797:2434.)  He testified that Novell's

Board approved the APA transaction with the proviso that Novell would retain all

copyrights.  (A2799:2442.)  If Amendment No. 2 had been intended to change this

exclusion and transfer copyrights, that would have been a material change

requiring separate Board approval.  Such approval was never sought or obtained.

(A2692:2037.)[6]

Indeed, this Court recognized that Amendment No. 2 could not be easily

read to change the scope of the APA.  The Court noted that "SCO paid no

additional consideration for Novell's agreement to Amendment No. 2," and

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[6] SCO incorrectly asserts that Bradford's testimony was "highly equivocal."
Bradford admitted needing to review documents that *he prepared and was involved
with* to remember what happened in this specific deal 15 years ago.  (A2797:2435).
While SCO highlights one "memo" that did not report on the exclusion of
copyrights (SCO Br. 27 n.4), SCO omits Bradford's explanation that this was
simply a term sheet showing, for purposes of negotiation, what one party might
want; it was only one part of a package sent to the Board; and that the resolution of
the Board was more important than an isolated term sheet.  (A2801:2450-
51;A2805:2466-A2806:2468.)  In any event, the jury and the judge were entitled to
rely on Bradford's testimony.

acknowledged that "[i]f Amendment No. 2 were a change in the agreement (and a

commercially significant one, at that), it is hard to see why Novell would have

agreed to it without compensation." *SCO*, 578 F.3d at 1211.

The existence of Amendment No. 1 also supports the jury's determination

that the retention of copyright ownership was intended and authorized by Novell.

(A4707-24.)  Amendment No. 1 was a carefully reviewed and crafted clean-up

amendment, yet it did not add copyrights to the Included Assets (Schedule 1.1(a)),

nor did it remove copyrights from the Excluded Assets (Schedule 1.1(b)).  (*Id.*)

SCO's witness Robert Frankenberg agreed that

> even after the Board meeting that was held at which the
> [APA] was approved, after [he] and other members of the
> Board had a chance to thoroughly review the [APA], and
> even after Mr. Sonsini [senior partner of the Wilson
> Sonsini law firm and member of Novell's Board] and
> Mr. Bradford, the legal advisors, apprised the Board
> about what was contained in the agreement and even
> after a nearly three-month period to review it, neither
> Novell nor Santa Cruz Operation chose to include UNIX
> copyrights in the [APA] when Amendment Number 1
> was executed.

(A2199:153-54.)

    c.    Nor is there any merit to SCO's argument that extrinsic evidence

relating to the original intent of the APA cannot sustain the judgment.  (SCO

Br. 25 (asserting that Novell's reliance on original intent testimony "cannot be

reconciled with the fact that Amendment No. 2 replaced the original exclusionary

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language").)  That argument is contrary to this Court's mandate in SCO's first

appeal, and directly contradicts the arguments that SCO advanced (and this Court

accepted) in that appeal.

In its previous appeal, SCO argued "Amendment No. 2 was designed to

bring the language of the transaction in line with the parties' *original intent* to

transfer the copyrights."  *SCO*, 578 F.3d at 1210 (emphasis added).  This Court

explained that if Amendment No. 2 was understood "to clarify the parties' *original*

*intent* as to the transfer of copyrights, SCO's extrinsic evidence concerning the

business negotiations may be relevant to resolving ambiguity concerning the

content of the original intent." (*Id.* (emphasis added).)  This Court thus rejected

Novell's argument that the Court "ought not consider any of SCO's extrinsic

evidence bearing on the development of the APA itself, and limit any inquiry

beyond the text of the agreement to the course of the parties' negotiations over

Amendment No. 2." (*Id.* at 1210.)  The Court expressly held that, "to the extent

that it is proper … to read Amendment No. 2 as clarifying the APA, SCO's

extrinsic evidence of the business negotiators' intent concerning the transaction

ought to be admissible." (*Id.* at 1210-11.)  That holding now is the law of the case.

*Weston v. Harmatz*, 335 F.3d 1247, 1255 (10th Cir. 2003).

Having received the trial it requested based on the very extrinsic evidence it

sought to have considered, SCO should not now be permitted to flip-flop its

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position to exclude consideration of that evidence. The district court permitted

SCO and Novell to proffer conflicting extrinsic evidence regarding the original

intent of the APA. *SCO*, 578 F.3d at 1210. The extrinsic evidence presented by

Novell was accepted by the fact-finders and conflicts with SCO's entire theory of

the case—that Santa Cruz bought the entire UNIX business and Amendment No. 2

confirmed that understanding.

### 3.    Copyright Ownership Was Not Required For Santa Cruz To Exercise Its Acquired Rights

On appeal, SCO asserts that the UNIX and UnixWare copyrights were

"required"—and thus transferred under Amendment No. 2—because otherwise

SCO could not protect its intellectual property. (SCO Br. 31.)

That argument fails for two reasons. First, SCO presented no testimony to

support that its current interpretation of Amendment No. 2—that it was designed to

allow SCO to bring litigation—was part of the business that the parties understood

transferred to Santa Cruz at the time Amendment No. 2 was executed. Rather,

SCO's witnesses repeatedly testified that SCO could run its business without the

UNIX and UnixWare copyrights. That testimony is fatal to SCO's arguments on

appeal. Second, SCO ignores that ample evidence supports the conclusion that

SCO does not need to own the UNIX or UnixWare copyrights to protect the

intellectual property rights that it acquired under the amended APA.

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### a.  SCO's own witnesses testified that copyrights were not required

At trial, SCO repeatedly argued that copyright ownership is always required for a software business, with SCO even claiming in closing argument that a software business without the copyrights is "a car without an engine" or "a house without a roof." (A2850:2636.)  But such rhetoric does not come close to being evidence that is "so overwhelmingly preponderant in favor of [SCO] as to permit no other rational conclusion." *Crumpacker v. Kansas Dep't of Human Res.*, 474 F.3d 747, 751 (10th Cir. 2007) (citation omitted).  Moreover, admissions of SCO's own witnesses contradicted its hyperbole.

*SCO's CEO.*  Darl McBride, SCO's CEO from 2002 to 2009 and the architect of SCOsource, admitted that SCO could run its software business without owning the UNIX copyrights.  (A2479:1225-1226.)

McBride issued a statement to the SEC and the investing public expressly so stating.  (A4699.)  He confirmed at trial that the UNIX copyrights were not required for SCO to run its UnixWare and OpenServer software business:  SCO could "run [its] business . . . without the copyrights, just like HP, IBM, all of the other licensees of UNIX can run their businesses as well."  (A2479:1225-26.)  McBride characterized UnixWare and OpenServer as "branches off this tree," and agreed that before the APA, Santa Cruz had sold OpenServer without owning the

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UNIX copyrights.  (A2436:1057;A2436:1058;A2479:1225.)  He further admitted

that SCO could develop and sell its UnixWare products without ownership of the

UNIX copyrights.  (A2481:1231.)

McBride testified that SCO was only unable to "run [its] business for the

licensing side" without the copyrights.  (A2479:1226.)  He asserted that the

copyrights were needed for SCOsource, SCO's new business of licensing—and, if

necessary, suing—Linux users.  (A2437:1062;2479:1226.)  But SCO presented no

evidence that suing Linux users was part of the "rights" transferred under the APA.

Rather, even SCO's witnesses testified that the APA was intended to enable Santa

Cruz to develop a new version of UnixWare that could compete with Microsoft

Windows.  (A2183:91;A2183:92-93 (Frankenberg);A2218:224-225

(Duff Thompson); *see also* A2271:429 (Messman).)

**SCO's General Counsel.**  SCO's own witnesses also conceded that its

UNIX-related business could be sold without owning any copyrights.

Ryan Tibbitts, SCO's in-house corporate counsel from 2003 to the present,

acknowledged at trial that SCO was recently involved in a proposed transaction

whereby SCO would sell its UNIX-related business to a third party, yet retain the

copyrights for the new code that SCO had created.  (A2642:1850-51.)  Under the

proposed deal, the buyer would have acquired SCO's product business and SCO

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would have retained its new licensing business.  (A2644:1859 (SCOsource was

launched as new "licensing line" in 2003).)

On appeal, SCO attempts to retreat from this fatal admission.  (SCO Br. 37.)

But SCO's argument cannot ameliorate the fact that Tibbitts's testimony directly

contradicts SCO's core position—that a software business would *never* be sold

without the copyrights—because SCO tried to do just that.  The finders of fact

rightfully considered SCO's admission in crediting Novell's interpretation of the

transaction.

### b. SCO did not require the UNIX copyrights to protect its intellectual property

The trial testimony also supports the factual finding that the UNIX and

UnixWare copyrights were not required for SCO to protect its intellectual property.

Both SCO's witness Sabbath and Novell's witness Amadia testified that

SCO owned the copyrights to the new code it created and could use those

copyrights to protect that code against infringement.  (A2403:933;A2723:2157.)

Sabbath also acknowledged that SCO would not need anything more than a license

to create derivative works based on the UNIX source code.  (A2404:939.)  As the

owner of the copyrights in its own software, SCO was able to protect itself against

infringement of that code, and did not require ownership of the UNIX copyrights

to do so.  17 U.S.C. § 103(a) (subject matter of copyright includes derivative

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works); *Schrock v. Learning Curve Int'l, Inc.*, 586 F.3d 513, 518 (7th Cir. 2009)

(Copyright Act grants author of derivative work protection in original expression

he or she contributes).[7]

Consistent with McBride's testimony discussed above, SCO's witness

Madsen testified that, for over a decade before the APA, Santa Cruz successfully

distributed the OpenServer flavor of UNIX and developed a substantial business

around that flavor without owning the copyrights in the underlying UNIX code.

(A2373:816-17;A2373:817;A2387:869.)  Madsen agreed that Santa Cruz acquired

another flavor of UNIX under the APA:  UnixWare.  (A2387:869.)  This testimony

supports Novell's understanding of the transaction, with which the jury agreed:

under the APA, Santa Cruz had the right to develop UnixWare, another flavor of

UNIX; the right to manage Novell's UNIX licensing business, for a 5%

administrative fee; and acquired certain other enumerated rights and physical

assets, none of which required ownership of the existing UNIX and UnixWare

copyrights.

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[7] SCO's argument that most of UnixWare is older UNIX code is a red
herring.  (SCO Br. 33.)  SCO's witness Andrew Nagle acknowledged that he had
no estimate of the amount of code SCO contributed to the UnixWare product, and
would not be surprised if SCO had added seven million lines of code on top of the
seven million lines of code that existed in 1995.  (A2621:1773.)  Regardless of the
portion of code SCO created for the product, it is undisputed that SCO owns the
copyrights in the code *it creates* and can protect those rights without owning the
UNIX copyrights.

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In spite of the testimony recounted above, SCO argues that it requires the underlying UNIX copyrights to protect the preexisting intellectual property. (SCO Br. 35.) As the district court explained, however, SCO would need to protect the preexisting intellectual property only if it were the owner of the entire UNIX business. But the fact-finders determined SCO was not. (A2996 ¶124.) This finding accords with the district court's finding that SCO was an agent of Novell's with respect to the SVRX licensing business and an owner with respect to the prospective UnixWare business.

Finally, SCO's argument that it required copyrights to exercise source code licensing rights is without merit. (SCO Br. 35-37.) Once again, that argument presupposes that it owns the UNIX and UnixWare copyrights. As a matter of law, SCO could license any new software it created, because it would have copyright ownership in that content as its author. *Schrock*, 586 F.3d at 518. But SCO was not in the SVRX licensing business; it was merely an agent of Novell's and thus could enter into new licenses of old UNIX code only as Novell's agent. (A2950;A2978 ¶¶11,84.) SCO did not have independent authority to license old code or to enforce such licenses. (A2956 ¶28.) It thus did not "require" the rights to do so.

        c.        **The boilerplate term "all of seller's claims" did not
transfer copyrights**

SCO claims (SCO Br. 37-38) that it needs the copyrights to pursue the

claims it purportedly acquired through the amended APA's transfer to SCO "of all

of [Novell's] claims arising after the Closing Date against any parties relating to

any right, property or asset included in the Business." (A3879.)  That boilerplate

"all of seller's claims" provision did not transfer the copyrights to SCO.

As the district court correctly found, SCO "provided no evidence of any

such claims that it was entitled to pursue." (A2994 ¶120.)  The only evidence SCO

presented on this issue was testimony that the enumerated assets Novell actually

sold to Santa Cruz included "legal claims that it would have against parties that

were connected with the business." (A2224:248-49 (Thompson).)  Such testimony

that simply paraphrases the "all of seller's claims" provision was insufficient to

support SCO's argument that that provision transferred the copyrights to SCO.

(A2994 ¶120.)[8]

Moreover, reading the "all of seller's claims" provision to transfer the

copyrights would be inconsistent with the structure of the amended agreement.

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[8] SCO references claims that it pursued post-closing against Microsoft, and
its allegations of copyright infringement against Linux users.  (SCO Br. 38-39.)
but these claims presuppose that Santa Cruz acquired Novell's entire UNIX
business, which the fact-finders rejected.  Moreover, these are claims created by
SCO, not Novell, and thus are not "seller's claims."

The "all of seller's claims" provision is part of the schedule of Included Assets, (A3878-79), which is expressly limited by the schedule of Excluded Assets, (A3828-29;A3882-83). As amended in Amendment No. 2, the schedule of Excluded Assets expressly excludes copyrights "except for the copyrights . . . . required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies." (A3882-83;A4443-45.) As discussed above, the fact-finders correctly found that SCO does not require the copyrights to exercise its rights with respect to the UNIX and UnixWare technologies that it acquired. Thus, even assuming that the "all of seller's claims" language could be read so broadly as to contemplate transfer of copyrights (and SCO proffered no credible extrinsic evidence of such an intent), the Excluded Assets provision expressly carves them out of the amended agreement. Under California law, that specific, deliberately negotiated contractual provision trumps the general "all of seller's claims" provision. Cal. Code Civ. P. § 1859; *Kashmiri v. Regents of Univ. of Cal.*, 67 Cal. Rptr. 3d 635, 653 (2007); *see* Model Asset Purchase Agreement with Commentary at 42 (ABA Section of Business Law, 2001) (term "all of seller's claims" is general boilerplate language).[9]

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[9] California law governs the APA. (A3875.)

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### 4.     The Technology License Agreement Does Not Change The Intent Of The APA Or Amendment No. 2

SCO's reference to the Technology License Agreement ("TLA") is of no moment. (SCO Br. 6, 29-30.) The TLA merely confirms that Novell has the right to license back rights conveyed to or developed by SCO under the APA; it does not affirmatively expand the rights transferred under the APA.

SCO's Sabbath testified that the TLA would grant Novell the right to license post-APA SCO-developed code in which SCO owned copyrights. (A2403:933.) Joe LaSala, Novell's General Counsel from 2001 to 2008, similarly testified that the TLA gave Novell a license-back to all assets *conveyed* to SCO, as well as additional code to be developed by SCO. (A2672:1964;A2677:1984-85.) In short, all that was licensed back to Novell under the TLA were the assets transferred under the APA.

### 5.     SCO's "Course of Performance" Evidence Does Not Trump The Terms Of The Amended APA

The jury's verdict is not undermined by SCO's so-called "course of performance" testimony. SCO contends that letters Novell sent to customers after the APA, changes in copyright notices, and SCO's physical possession of the copyright registrations demonstrate that copyrights transferred. But testimony from SCO's own witnesses revealed that (1) the letters at issue merely informed customers that they needed to deal with Santa Cruz going forward, which was true

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in light of Santa Cruz's role as Novell's agent to collect royalties, (2) neither

copyright notices nor copyright registrations demonstrate who owns the copyrights

if they conflict with the underlying agreements, and (3) when the APA was

finalized, UNIX staff and property simply remained in the same physical location

in New Jersey.  (A2604:1706;A2623:1778-79;A2327:641-42.)  Based on this

clarifying testimony, the jury and district court rightly discounted SCO's "course

of performance" evidence and arguments.[10]

Moreover, copyright notices were changed only on the then-current releases

of UnixWare that Santa Cruz was taking over; they were not changed on older

UNIX or UnixWare releases, the copyrights that SCO now claims transferred

under the APA.  Andrew Nagle, SCO's Senior Director of Product Development,

confirmed that SCO did not change copyright notices on older UnixWare or

System V Release 4.2MP because it was SCO's understanding that ownership of

copyrights in older code was established by the legal agreements, not the notices.

(A2622:1775-76.)

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[10] SCO selectively quotes general statements from a Novell Hart-Scott-
Rodino filing but, as it did at trial, omits that the APA, including its express
copyright exclusion, was attached to that filing and incorporated by reference.
(A2792:2415.)

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## II.   THE DISTRICT COURT CORRECTLY DENIED SCO'S MOTION FOR A NEW TRIAL

### A.   Standard Of Review

This Court reviews a district court's denial of a motion for new trial for abuse of discretion. *M.D. Mark, Inc. v. Kerr-McGee Corp.*, 565 F.3d 753, 762 (10th Cir. 2009). Where a new trial motion asserts that the jury verdict is not supported by the evidence, the verdict must stand unless it is clearly, decidedly, or overwhelmingly against the weight of the evidence. (*Id*.) "When the basis of the motion for a new trial is that the jury's verdict is against the weight of the evidence, the district court's denial of the motion is virtually unassailable on appeal." *Children's Broadcasting Corp. v. Walt Disney Co.*, 357 F.3d 860, 867 (8th Cir. 2004) (citation omitted).

### B.   The Verdict Is Not "Clearly, Decidedly, Or Overwhelmingly" Against The Weight Of The Evidence

In this Court, SCO advances the same single argument on which it based its motion for a new trial. Namely, it contends that "the verdict clearly was against the weight of the evidence," allegedly because the "overwhelming weight of the evidence" suggested that the parties intended to transfer the UNIX and UnixWare copyrights. (SCO Br. 39.) But this argument is refuted by the substantial evidence that supports the jury's verdict. As discussed above, numerous key witnesses with knowledge of the amended APA and involvement in its final negotiation testified

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in support of Novell's understanding of the transaction.  The district court found

that Novell's witnesses were more credible than SCO's.  (A2967;A2975 ¶¶53,79.)

This testimony plainly supports the jury's verdict.  And any conflicting testimony

that SCO proffered (even putting aside the adverse credibility determinations made

against those witnesses) is nowhere near overwhelming so as to provide a basis for

this Court to conclude that the district court abused its discretion.

SCO instead touts that it presented "ten witnesses" on whether copyrights

were intended to transfer.  (SCO Br. 16.)  But SCO mistakes quantity of witnesses

with quality of testimony.  As the jury was instructed, numerosity of witnesses is

not determinative.  (*See* A1929 ("To prove by a preponderance of the evidence

means to prove something is more likely so than not so. It does not mean the

greater number of witnesses or exhibits.").)  SCO did not challenge this instruction,

which accurately states the law.  (A1841-52.)

Moreover, the jury had ample reasons to discount what SCO's witnesses had

to say.  As discussed above, SCO's witnesses had little or no knowledge of the

negotiation and drafting of the amended APA.  SCO advanced no competent

witnesses to explain the meaning behind Amendment No. 2.  None of SCO's

witnesses could articulate what copyrights they believed were required for SCO to

exercise its rights.  (A2967;A2970-73 ¶¶53,64-70.)  Rather, SCO's witnesses made

only broad statements that all copyrights would be required to run a software

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business—generalizations that were undermined by SCO's own testimony from McBride and Tibbitts. (*Id.*;A2973 ¶71.) And the district court expressly found SCO's witnesses to be less credible, as many had a direct financial stake in SCO prevailing. (A2967 ¶53.)

## III. THE DISTRICT COURT CORRECTLY DENIED SCO'S CLAIM FOR SPECIFIC PERFORMANCE

Notwithstanding the jury's verdict that the amended APA did not transfer the UNIX and UnixWare copyrights, SCO claimed that the agreement required Novell to execute documentation transferring those copyrights. The district court correctly rejected SCO's request for specific performance because: (1) the jury already had determined that the amended APA was not intended to transfer the disputed copyrights; (2) the evidence supported the finding that copyrights were not intended to transfer; and (3) the evidence demonstrated that the disputed copyrights were not required for SCO to exercise its rights with respect to the UNIX and UnixWare technologies. (A2990-2997 ¶¶109-26.)

SCO asserts that the jury's verdict did not preclude SCO's specific performance claim, contending that the jury did not necessarily decide whether copyrights were "required" for SCO's business. (SCO Br. 40 n.8.) But, as the district court explained, the jury verdict resolved this question due to the extensive evidence directed to (1) whether the parties intended to transfer copyrights, and

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(2) whether the copyrights were "required" for SCO's business. (A2991 ¶113.)

The verdict "necessarily means that the jury found that it was not the intent of the

parties to transfer ownership of the copyrights from Novell to SCO and that the

copyrights were not required for SCO to exercise its rights." (A2991 ¶114.) As

such, there was no basis for granting SCO's request for specific performance. *Ag*

*Servs. of Am., Inc. v. Nielsen*, 231 F.3d 726, 733 (10th Cir. 2000) (necessary to

infer that certain views of evidence were not taken by jury if jury could not have

rationally supported result based on those views), cert. denied, 865 U.S. 1021

(2001).

In any event, ample evidence supports the district court's findings and

conclusions. SCO's appellate argument is based on SCO's one-sided recitation of

the facts that ignores any evidence to the contrary. (SCO Br. 40.) But, as

discussed above, the evidence demonstrated that the parties never intended the

UNIX or UnixWare copyrights to transfer under the amended APA, and that such a

result is entirely consistent with the overall structure of the transaction (*see* pp. 22-

46 *supra*). The district court expressly found "particularly persuasive the

testimony of Novell's outside counsel Tor Braham, who was the lead drafter of the

APA" and whose "testimony showed that Novell purposefully retained ownership

of the copyrights." (A2992 ¶¶115-16.) Similarly, the district court expressly relied

on Amadia's testimony that Amendment No. 2 did not transfer any copyrights to

Santa Cruz.  (A2993-94 ¶¶118-20.)  This Court is "bound to accept the resolution

of conflicting evidence and the assessment of the credibility of witnesses as they

are found by the trial judge as the trier of fact."  *McIntyre*, 997 F.2d at 707-08.

## IV.   THE DISTRICT COURT CORRECTLY HELD THAT NOVELL HAD THE RIGHT TO WAIVE SCO'S RIGHTS UNDER IBM'S SVRX LICENSE

In the first appeal, this Court held that the language of Section 4.16 of the

APA was ambiguous enough to justify consideration of extrinsic evidence and

remanded for trial on the contract-interpretation issue.  *SCO*, 578 F.3d at 1221,

1227.  The Court also remanded for a determination as to whether the general rule

that an express grant of contractual authority cannot be constrained by the

covenant of good faith and fair dealing applied on the facts here.  (*Id.* at 1225.)  On

remand, the district court considered the extrinsic evidence and agreed with

Novell's interpretation of Section 4.16.  That finding of fact cannot be upset unless

SCO demonstrates clear error.  *Raytheon Aircraft Co.*, 590 F.3d at 1120.  The

district court also determined that the exceptions to the implied covenant of good

faith do not apply to these facts.  (3000-04 ¶¶137-46.)  This Court should affirm on

both issues.

### A.   The Asset Purchase Agreement Established That Santa Cruz Was Novell's Agent

The scope of Novell's waiver rights largely depends on whose interpretation

of the APA is correct.  As discussed above, SCO claimed that Santa Cruz acquired

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the entire UNIX and UnixWare business from Novell.  If that were true, a broad waiver right with respect to SVRX licenses would undermine Santa Cruz's benefit of the bargain.  But Novell showed that the transaction was actually far more limited:  when it came to the existing UNIX business, Santa Cruz was merely an agent of Novell, subject to Novell's extensive supervision and control.  The APA expressly provided that Santa Cruz was not in the SVRX licensing business and had no independent authority to license old code or to enforce such a license. (A2956 ¶28.)  Under this interpretation, a broad waiver right does not undermine Santa Cruz's benefit of the bargain; rather, it is consistent with Santa Cruz being Novell's agent.  The district court weighed the conflicting evidence and found Novell's interpretation to be correct.  Its findings are amply supported by the evidence.

As set out in the district court's findings of fact, Novell retained under the APA the complete rights to control what happened with the UNIX business, and Santa Cruz would act as Novell's agent to collect SVRX royalties.  (A2977 ¶¶81-83.)  SCO's McBride even conceded this point.  (A2440-41:1075-1078.) Likewise, Alok Mohan, CEO of Santa Cruz in 1995 when the APA was executed, wrote in an e-mail to all Santa Cruz employees on September 19, 1995, that Santa Cruz became "the owner of the UnixWare product line," but would merely "manage the licensing business for UNIX prior to UnixWare 1.0 (SVRx)."

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(A3385.)  Mohan's e-mail explains that there were two businesses—the forward-looking UnixWare product line and the existing UNIX business.  It further explained that, while Santa Cruz would own the forward-looking UnixWare product line, Santa Cruz would only *manage* the UNIX licensing business for Novell.  And the district court expressly found Novell's evidence on this point more credible than SCO's.  (A2999 ¶134.)

Nevertheless, before this Court, SCO continues to rely on its rejected version of the transaction.  For example, it argues that Novell's interpretation of Section 4.16 "would permit Novell to destroy SCO's UNIX-based business" and that Novell's proposed definition of "SVRX License" would render SCO's rights illusory.  (SCO Br. 46.)  But these claims are unsupported by the evidence.  Under the amended APA, Santa Cruz acquired the assets and rights it needed to exploit and develop UnixWare going forward.  (A2964-65 ¶48.)  Santa Cruz acquired assets such as contracts, employees, and other physical property to assist it in its role as Novell's agent.  (A2950-51 ¶11.)  Santa Cruz earned a 5% cut of any SVRX royalties that it collected for Novell, as Novell's agent.  (A2954 ¶24.)  None of these rights were upset, undermined, or rendered "illusory" based on Novell's retention of broad waiver rights over actions that Santa Cruz could take with respect to SVRX licenses.  Novell's broad waiver rights certainly *limit* SCO's

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rights in that respect, but such a limitation does not render the right illusory.

(A2978 ¶84.)

If anything, SCO's interpretation would render Section 4.16 illusory.  As

this Court accurately has expressed, the disagreement between the parties

essentially boils down to the following question:  "whether Novell's waiver rights

extend to all three types of agreements bearing upon the licensing of SVRX

technology—software agreements, sublicensing agreements, and product

supplement agreements…—or just to product supplement agreements."  *SCO*,

578 F.3d at 1219.  As the district court explained in its findings of fact, the

evidence at trial, including from SCO's own witnesses, demonstrated that these

three agreements work together:  if a company does not have an umbrella software

agreement, it *cannot* have a product supplement agreement.  (A2979-80 ¶88.)

SCO's interpretation would thus render Section 4.16 an illusory assurance to

Novell, as it would allow SCO unilaterally to terminate an umbrella software

agreement, rendering the product supplement agreement ineffective.  This

interpretation runs counter to the undisputed evidence that the intent of

Section 4.16 was to "bulletproof" Novell's ongoing financial interest.  (A2977-78

¶83.)

Several of SCO's witnesses did argue that Section 4.16 was limited to

product supplements.  But the trial revealed this testimony to be a post-contract

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invention of SCO and its witnesses, with no basis in fact.  Every SCO witness was

forced to admit that there was nothing in the language of Section 4.16 limiting

Novell's waiver rights to product supplements or binary royalties.  Ultimately,

even SCO's witnesses admitted that Section 4.16 was intended to allow Novell to

protect and manage its ongoing financial interests.  As explained above, that

function would be rendered entirely ineffective if Novell's control rights did not

extend to all subsets of SVRX licenses.  (A2977-78 ¶83.)[11]

### B. Novell Did Not Breach the Implied Covenant of Good Faith and Fair Dealing

SCO argues that the district court erred in finding that Novell did not breach

the implied covenant of good faith and fair dealing, contending that (1) the court's

interpretation of Section 4.16 makes the amended APA contradictory, ambiguous,

and illusory, and (2) the court's finding that Novell acted in its economic self-

interest does not mean it complied with the implied covenant.  SCO is mistaken.

First, as discussed above, the district court's interpretation does not make the

amended APA contradictory, ambiguous, or illusory.  Rather, SCO's interpretation

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[11] SCO asserts that because IBM's revenue stream was purchased, Novell no longer had an interest to protect, implying that the concerns of Section 4.16 thus do not apply to IBM.  (SCO Br. 48.)  If that were true, SCO's argument would lead to the absurd conclusion—completely unsupported by the contractual language—that the moment a licensee stops actively paying royalties (whether due to buyout, bankruptcy, or any other reason), all of Novell's rights under Section 4.16 cease to exist.

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would deprive Novell of the ability to protect its royalty stream in the SVRX

licenses, which was the entire purpose of Section 4.16.  Furthermore, SCO's

argument that Novell's right to "permit the free and unfettered use" of SVRX

source code destroys SCO's ability to operate a UnixWare business and protect the

technology therein is indistinguishable from its argument that it required the

copyrights.  The judge and jury rejected that argument.  It was undisputed at trial

that SCO would own the copyrights in the code that it created going forward with

the UnixWare business.  (A2973;A2996 ¶¶72,124.)  It would thus be able to

protect the technology that it created, while Novell retained the ability to control

the underlying SVRX licenses.

Second, contrary to SCO's claim, the district court did not hold that acting in

one's economic self-interest is independently sufficient to defeat a claim for breach

of the covenant of good faith and fair dealing.  The first sentence of the paragraph

cited by SCO reveals what the court actually held:  "[T]he Court finds that SCO's

claim for breach of the implied covenant of good faith and fair dealing fails

*because Novell acted in good faith according to a reasonable interpretation of the*

*contract language*."  (A3003 ¶146 (emphasis added).)  The district court further

explained that a breach of the implied covenant requires "objectively unreasonable

conduct, regardless of the actor's motive."  (*Id.* (quoting *Carma Developers (Cal.),*

*Inc. v. Marathon Dev. Cal., Inc.*, 826 P.2d 710, 727 (Cal. 1992)); *see also Chateau*

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*Chamberay Homeowners Ass'n v. Associated Int'l Ins. Co.*, 108 Cal. Rptr. 2d 776, 783 (2001) (breach of covenant of good faith and fair dealing requires showing that defendant committed conscious and deliberate act, not merely bad judgment or honest mistake).)  The court concluded that Novell's conduct was objectively reasonable in light of its actions and the language of the APA, and that Novell's actions were not taken because of influence by IBM or ill-will towards SCO. (A3003.)

The evidence at trial amply supported the district court's conclusion.  Novell took a careful, step-by-step approach in exercising its rights under Section 4.16(b). (A2657:1908;A2657:1909-1910;A2658:1911-1912.)  Novell consulted outside counsel and instructed IBM that Novell would waive SCO's claims only if such waiver right was a correct interpretation of the documents.  (A2657:1909-1910.) Novell's letters to SCO demonstrate Novell's careful approach, as they explained Novell's position and gave SCO the opportunity to waive particular claims. (A2663-64:1930-31;A4086;A3620-21;A4087-89;A3623-24;A4101-02.)  The evidence at trial demonstrates that Novell exercised its right to take action on behalf of SCO not in bad faith, but because Novell genuinely believed SCO's threats to terminate the agreement with IBM would be detrimental to Novell. (A2580:1613-14;A2586:1638;A2761:2298-99.)  The district court correctly held

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that this set of facts does not support a claim for breach of the implied covenant of

good faith and fair dealing.

## V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ITS EVIDENTIARY RULINGS

As a last resort, SCO contends that the district court abused its discretion in

making three evidentiary rulings.  These rulings are entitled to "deference" because

of the district court's "familiarity with the details of the case and its greater

experience in evidentiary matters."  *Sprint/United Mgmt. Co. v. Mendelsohn*,

552 U.S. 379, 384 (2008).  This deference is particularly important when it comes

to determinations under Federal Rule of Evidence 403.  (*Id.*)

### A.     The Prior Judicial Decisions

SCO challenges the district court's ruling that permitted Novell to present

limited evidence of the district court's prior rulings, concurrent with an instruction

that the district court's summary judgment order had been subsequently reversed

on appeal.  (SCO Br. 53-56.)  As discussed below, the district court did not abuse

its discretion, and, in any event, SCO opened the door to the evidence despite the

district court's numerous warnings.

To prove slander of title, SCO needed to show at trial that Novell published

allegedly slanderous statements with constitutional malice—i.e., knowledge of

their falsity or at least reckless disregard for their truth.  (A1952.)  Novell

requested and received this standard in a motion in limine, over SCO's objection,

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and it was incorporated into the jury instructions in this case.  (A1321-33.)  SCO

does not appeal the application of that standard to its slander-of-title claim.

From opening statements forward, SCO asserted that Novell was committing

slander "to this very day."  (A2163:13-14;A2167:32.)  But SCO's arguments

ignored the fact that, for a two-year period, Novell was making its statements in

light of the district court's as-yet-unreversed ruling that Novell owned the

copyrights.  That ruling (as well as the district court's prior order on Novell's

motion to dismiss) thus undermined SCO's claim that Novell was slandering, with

knowledge of falsity or reckless disregard for the truth, SCO's claimed title to the

UNIX and UnixWare copyrights.  Nevertheless, the court did not initially permit

the rulings' publication to the jury, and instead explicitly cautioned SCO that its

arguments were "unwise and inappropriate."  (A2363:775.)

Notwithstanding the court's warning, SCO selected a damages period for its

slander-of-title claim that included the two years during which the district court's

judgment that Novell owned the UNIX and UnixWare copyrights remained

unreversed.  SCO based its damages calculations on purportedly lost SCOsource

revenue, with estimates partially based on decreased SCO stock value.  SCO thus

tried to present a skewed version of the facts that omitted a potential cause of third-

party licensing decisions—in particular, that no one wanted to take a SCOsource

license because a court had ruled in a highly publicized opinion that SCO did not

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own the intellectual property it was trying to license.  In the face of SCO's

arguments to the jury, the court properly exercised its broad discretion to allow

Novell to present the district court's previous decisions as another possible cause

of lost SCO licenses and to cross-examine SCO's damages expert on this obvious

weakness in her testimony.  (A2521-22:1387-88.)

Moreover, even though SCO invited the introduction of the prior rulings

(which, in any event, were relevant under the constitutional-malice standard), the

district court emphasized that the prior summary judgment order had been reversed

in a unanimous decision by this Court.  (A2522:1391;A2549:1494-95.)  This

language decreased any potential prejudicial effect.  It ensured that if the jury were

to consider the prior rulings for an improper purpose—i.e., consider them as

controlling opinions as to which party should prevail at trial—such consideration

would work *against* Novell.  After all, the jurors were informed that a reviewing

court subsequently determined the rulings were incorrect.

### B.    The Original APA

SCO argues that the district court abused its discretion in allowing Novell to

use the unamended APA in its cross-examination of SCO witnesses who had no

involvement with or personal knowledge of Amendment No. 2.  SCO claims that

Novell attempted to confuse the jury and conceal the existence of Amendment

No. 2.

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As an initial matter, nothing in this Court's mandate precluded Novell from referencing the original APA. Indeed, at SCO's urging, this Court explained that extrinsic evidence concerning the original intent of the APA—before the execution of Amendment No. 2—could be considered by the fact-finders. *SCO*, 578 F.3d at 1209-11.

Moreover, Novell did nothing that might lead the jury to believe that the original APA remained operative. In its opening statement, Novell's counsel merely explained the negotiation history of the overall transaction by presenting the unamended APA, then Amendment No. 1, and finally Amendment No. 2. At no point did Novell suggest that Amendment No. 2 did not supersede the original APA. To the contrary, Novell and its witnesses discussed Amendment No. 2 in detail, summarizing for the jury the testimony of Amadia and Tolonen regarding the intent of Amendment No. 2. (A2865:2696.) SCO's argument that Novell "conveyed the misimpression that the original copyright language of the APA was the only relevant language" simply cannot be reconciled with the record. (SCO Br. 57.)

SCO's real concern has nothing to do with potential jury confusion. Rather, SCO wanted it both ways—SCO sought to question its pre-amendment witnesses about the intent of the *original, pre-amendment* APA, then block Novell from cross-examining those witnesses as to why, if their intent was so clear, they

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allowed language that explicitly excluded copyright ownership. None of SCO's

witnesses had a coherent explanation. (*E.g.,* A2222:241;A2238:301-02

(Thompson testifies exclusion referred to Netware copyrights, then later testifies

words in agreement are inaccurate);A2962 ¶44 (Burt Levine admits he did not alter

exclusionary language during review).)

Finally, SCO's assertion that its witnesses Frankenberg and Thompson

should have been permitted to opine on Amendment No. 2 is without merit. (SCO

Br. 59.) As the district court correctly noted in its in limine order, neither witness

had personal knowledge of Amendment No. 2. (A1107.) They would have

testified based solely on their readings of that agreement. Such testimony would

have been irrelevant, would not have assisted the trier of fact, and was properly

excluded. *Id.*; Fed. R. Evid. 602 (no testimony without personal knowledge);

*Zokari v. Gates*, 561 F.3d 1076, 1089 (10th Cir. 2009) (affirming exclusion of

testimony where witness lacked personal knowledge).

### C.    Document Relied On By Novell's Expert

SCO argues that Novell's expert witness should not have been permitted to

show the jury a slide of a magazine article on which the expert relied. (SCO

Br. 60.) SCO misinterprets the hearsay rule.

Neither Novell nor its expert sought to prove the truth of the matter

asserted—i.e., that SCO was actually the "Most Hated Company in Tech." The

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relevant expert testimony was introduced to counter SCO's claims that, but for

Novell's public statements, users of Linux would have flocked to SCO to acquire

licenses.  Novell and its expert sought to show that, whether true or not, negative

statements about SCO were being published independent of Novell, and thus

damage to SCO's reputation and license revenue was not entirely caused by

Novell.  Because the basic definition of hearsay does not apply, the evidence was

not hearsay.  Fed. R. Evid. 801(c).[12]

Moreover, even if allowing the document to be shown amounted to an abuse

of discretion (and it did not), it was harmless.  The slide was a minor part of a

three-week trial, not unduly emphasized by Novell, and was relevant to causation

and damages, portions of the decision-making process the jury did not even reach.

## CONCLUSION

Six years ago, SCO initiated this suit against Novell.  After losing on

summary judgment, SCO asked this Court for a trial in which fact-finders could

decide, among other issues, who owned the UNIX and UnixWare copyrights.  SCO

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[12] SCO's citation of *Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d
558, 666 (S.D.N.Y. 2007), is inapposite, as *Malletier* involved evidence offered for
the truth of the matter asserted.

now has had its day in court, and the jury and judge found for Novell.  That

judgment should be affirmed.

Respectfully submitted.

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## ORAL ARGUMENT STATEMENT

While Novell believes the issues in this appeal are straightforward and the district court's judgment should be readily affirmed, Novell would be pleased to present oral arguments if the Court deems them appropriate.

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## CERTIFICATE OF COMPLIANCE

I, Michael A. Jacobs, certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), the typeface requirement of Fed. R. App. P. 32(a)(5), and the typestyle requirements of Fed. R. App. P. 32(a)(6).  This brief contains 13,997 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and is prepared in a proportionally spaced typeface (14-point Times New Roman).

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I, Michael A. Jacobs, certify that on this 29th day of October 2010, a true and correct copy of the foregoing APPELLEE NOVELL, INC.'S BRIEF was served via the ECF system and electronic mail in accordance with Fed. R. App. P. 25(c)(2), Tenth Circuit Local Rules 25.3 and 25.4, and the Court's General Order dated March 18, 2009, to the following recipients:

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