

No. 10-4122

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

THE SCO GROUP, INC.,

Plaintiff-Appellant,

v.

NOVELL, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Utah
Hon. Ted Stewart, Presiding
No. 2:04-CV-00139-TS

**BRIEF FOR APPELLANT, THE SCO GROUP, INC.
ORAL ARGUMENT REQUESTED**

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CORPORATE DISCLOSURE STATEMENT

Appellant, The SCO Group, Inc. (“SCO”), is not owned by a parent corporation. No publicly held corporation owns 10% or more of SCO’s stock. On September 14, 2007, SCO filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. On August 25, 2009, that Bankruptcy Court appointed former United States District Judge Edward N. Cahn as Chapter 11 Trustee for SCO.

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JURISDICTIONAL STATEMENT

Jurisdiction in the district court was grounded under 28 U.S.C. §§ 1331, 1338(a), 2201(a), and 2202. SCO timely filed its notice of appeal on July 7, 2010. Jurisdiction in this Court is grounded under 28 U.S.C. § 1291.

ISSUES ON APPEAL

1. Did the district court err in finding that SCO does not require any of the UNIX and UnixWare copyrights in connection with the UNIX and UnixWare technology and software business it acquired from Novell, and in thus denying SCO's Rule 50(b) motion for judgment as a matter of law?
2. Did the district court abuse its discretion in denying SCO's alternative motion for a new trial on copyright ownership, and err in denying SCO's alternative claim for specific performance?
3. Did the district court err in finding that under the Asset Purchase Agreement at issue Novell was entitled to waive SCO's claims with respect to IBM's alleged breaches of license agreements that SCO acquired?
4. Did the district court abuse its discretion by (i) changing course from its rulings in the first two weeks of trial, in which it found that such evidence was extremely prejudicial to SCO, and allowing Novell to inform the jury of judicial decisions in Novell's favor that this Court had reversed;

(ii) allowing Novell to confuse the jury by relying upon “exclusion of copyright” language that had been replaced by an amendment to the Asset Purchase Agreement; and (iii) admitting double-hearsay of SCO’s purported reputation as the “Most Hated Company” in the technology industry?

STATEMENT OF THE CASE

SCO owns the UNIX source code and licensing business, including the current versions of UNIX known as UnixWare. UNIX is a computer operating system originally developed by AT&T in the 1960s. This case arises from Novell’s public claims in 2003 and 2004 that it had retained the UNIX copyrights when it sold the UNIX business and technologies to SCO’s predecessor-in-investment under the APA, and Novell’s actions seeking to prevent SCO from pursuing legal claims against International Business Machines Corp. (“IBM”) for breaching contractual agreements acquired by SCO as part of the UNIX business.

This is an appeal from a jury verdict following a three-week trial, from Findings of Fact and Conclusions of Law that the district court (Stewart, J.) subsequently issued, and from the court’s Memorandum Decision and Order denying SCO’s renewed motion for judgment as a matter of law or, in the alternative, for a new trial, and the Final Judgment entered thereon, on remand

from this Court's decision in The SCO Group, Inc. v. Novell, Inc., 578 F.3d 1201 (10th Cir. 2009).

STATEMENT OF FACTS

I. DEVELOPMENT AND SALE OF UNIX

SCO is the successor-in-interest to all of the assets that The Santa Cruz Operation, Inc. (unless otherwise indicated, also "SCO") acquired under an amended Asset Purchase Agreement ("APA") with Novell in the mid-1990s, concerning the "UNIX" operating system and its derivatives.

UNIX is a computer operating system developed by AT&T in the late 1960s. Starting in the early 1980s, AT&T built a business on licensing the source code to releases of the then-current version of UNIX known as UNIX System V to all the major computer manufacturers. Source code is the human-readable form of a computer program, in contrast to binary code, which runs on computers but cannot be read by people. Manufacturers, such as IBM, Sun Microsystems, Hewlett-Packard, and others, used the System V source code to develop their own UNIX-derived "flavors" best suited for use on their respective computers. A licensee paid one-time fees for the rights to use the source code of a particular release to create and distribute its flavor, and continuing royalties for each binary copy of the flavor sold to end-users. While licensees could distribute their flavors to end-users in

binary form, the Software and Sublicensing Agreements licensees executed required licenses to keep the UNIX source code confidential. IBM was such a licensee and developed its own flavor of UNIX, which it named AIX. The SCO Group, Inc. v. Novell, Inc., 578 F.3d 1201, 1204-05 (10th Cir. 2009).

UNIX System Laboratories, the AT&T spin-off that owned the UNIX business, was sold to Novell in 1993 for over \$300 million. Id. at 1205. Only two years later, however, Novell decided to sell its UNIX business. In the summer of 1995, Novell started negotiations with Santa Cruz, a software company that was itself a UNIX licensee. Novell sought to sell everything it owned related to UNIX, but after initial negotiations, the parties realized that Santa Cruz could not afford to pay the full price in cash or stock. Santa Cruz paid Novell in stock, worth approximately \$50 million, plus two revenue streams. (A2187:106-07;A2206:183-84;A2351:735-36.) First, as a financing device, the parties agreed that although SCO would acquire legal title to the royalty stream, Novell would retain an interest in 95% of “SVRX Royalties,” defined as the per-copy fees that existing UNIX licensees paid to the UNIX business owner for distributions of certain pre-UnixWare versions of UNIX System V designated in the APA as “SVRX” for “System V Release ___.” This revenue stream was estimated to be \$50 million for the 1995 year alone. (A2224:248;A2235:292;A2350:730-32.) In addition, Novell

received a conditional interest of up to \$84 million in UnixWare sales through 2002 (A3168¶c;A2338) – an interest that expired without ever vesting.

A. The Sale of Assets Pursuant to the Amended APA.

The transfer of UNIX-related rights occurred as an asset sale, through the APA; an Amendment No. 1 signed by the parties at the actual closing of the APA on December 6, 1995; and Amendment No. 2 executed on October 16, 1996.

SCO, 578 F.3d at 1205.

Article 1.1(a) of the APA identifies “all of Seller’s right, title, and interest in and to the assets” listed in the Assets Schedule, and not listed in the Excluded Assets Schedule, as assets transferred in the transaction. (A3110.) Item I of the Assets Schedule summarizes the transferred “assets and properties of Seller” as “All rights and ownership of UNIX, UnixWare and Auxiliary Products, including but not limited to” the assets and properties listed in the Schedule, “without limitation.” (A3160;A3207¶k. (Emphasis added.) The schedule then lists all source code and binary code versions of UNIX, both old and new with no distinction drawn between SVRX and UnixWare, including all prior and existing versions of UNIX. (A3160-63.) Item V.A of the Excluded Assets Schedule, as amended by Amendment No. 2, identifies:

All copyrights and trademarks, except for the copyrights and trademarks owned by Novell as of the date of the

[APA] 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.

(A3219 (emphasis added).) Prior to Amendment No. 2, Item V.A had excluded: “All copyrights and trademarks, except for the trademarks UNIX and UnixWare,” without more. But Amendment No. 2 excised that language from the APA by stating that “Subsection A [of Item V] shall be revised to read” the language set forth in the Amendment. SCO, 578 F.3d at 1210-11;A3219.

There was no license provision to Santa Cruz to use the intellectual property associated with the assets it had acquired. In a section entitled “License Back of Assets,” however, the APA provided for a Technology License Agreement (the “TLA”) under which SCO granted Novell a restricted license to the “Licensed Technology” in connection with SCO’s concurrent purchase of the UNIX business under the APA. (A3114§1.6;A3381.) The APA and TLA define the Licensed Technology as “all of the technology included in the Assets” and “all derivatives” of that technology. (A3114§1.6;A3381¶I.) It is undisputed that the “technology included in the Assets” includes all UNIX and UnixWare source code, products, versions, and copies, and that Novell received a restricted license from Santa Cruz to use such UNIX and UnixWare source code after the closing of the APA.

In its prior decision, this Court held that the language of Amendment No. 2 indisputably replaced, as a matter of law, the old language in the Excluded Assets Schedule of the APA. SCO, 578 F.3d at 1210-11. The Court further explained that “any change to the set of Excluded Assets in Schedule 1.1(b) necessarily implicated those copyrights actually transferred under Schedule 1.1(a). . . . Whatever the Amendment means, it refers to the ownership of copyrights, not to licenses.” Id. at 1213-14, 1216 (emphasis added). The Court remanded for trial to determine whether the APA, as amended, transferred to SCO the UNIX and UnixWare copyrights either because those copyrights were “required” within the meaning of Amendment No. 2, or because Amendment No. 2 effectuated the intent of the parties to transfer the copyrights. Id. at 1217-19.

This Court found that ambiguity in the amended APA as to the transfer of copyrights compelled the consideration of extrinsic evidence of the parties’ intent and noted that under California law the parties’ course of performance is the “best evidence” of the parties’ contractual intent. Id. at 1217. Reversing the district court, this Court also held that the amended APA was sufficient, without a separate bill of sale, to satisfy Section 204(a) of the Copyright Act. Id. at 1213-14.¹ The

¹ Novell filed a petition for a writ of certiorari to the U.S. Supreme Court from this ruling. In August 2010, after prevailing at trial, Novell dismissed the petition.

Court also pointed to the importance of copyright ownership for SCO to protect the assets it had acquired under the amended APA. Id. at 1218 n.4.

B. Novell’s “Waiver Rights” Under the Amended APA.

Article 4.16(b) of the APA grants Novell rights to “amend, supplement, modify or waive any rights” under certain licenses called “SVRX Licenses” in the APA. The issues concerning the identity of the “SVRX Licenses” over which Novell had retained rights became meaningful when Novell purported in 2003 to waive SCO’s claims against IBM under its Software and Sublicensing Agreements. Those Agreements provided IBM access to the valuable UNIX source code but required IBM to keep that source code strictly confidential in order to maintain the value of the UNIX technology and licensing business.

Believing that IBM had violated those restrictions by releasing UNIX technology to the competing Linux operating system, SCO filed suit against IBM in March 2003. At IBM’s request (A2665;A2668), Novell then claimed that the “SVRX Licenses” over which it had retained rights under the APA included the Software and Sublicensing Agreements that SCO alleged IBM had violated, and Novell proceeded to direct SCO to waive its rights to pursue those claims against IBM (A3461-63;A3480-81;A3620-21;A3623-24). When SCO contested Novell’s position that it had retained authority over those agreements (see, e.g., A4382-86),

Novell purported to act on SCO's "behalf" in waiving IBM's violations (A3461-63;A3480-81;A3620-21;A3623-24).

In its prior decision, this Court reversed the district court's (Kimball, J.) summary judgment ruling that under Section 4.16 of the amended APA Novell possesses broad "waiver" rights over licenses that SCO owns. The Court found that the contract was ambiguous as to the scope of these rights, requiring the consideration of extrinsic evidence at trial. SCO, 578 F.3d at 1219-24. The Court also remanded SCO's alternative claim that even if Novell had the right to waive SCO's contract claims, Novell's exercise of its rights under Section 4.16 to waive SCO's claims against IBM violated the duty of good faith and fair dealing, and therefore is of no force and effect. Id. at 1224-25.

II. THE TRIAL ON REMAND

A. Evidentiary Rulings.

On remand from this Court, in March 2010, the district court held a three-week jury trial on SCO's claim for slander of title, in which was embedded the issue of copyright ownership.² There are three evidentiary rulings from that trial that are raised in this appeal.

² Novell's counterclaim for slander of title was also tried but dismissed as a matter of law following the close of the evidence. (A3055-56.)

First, over SCO's objections (A2548-49), the district court permitted Novell to tell the jury about the prior, reversed decisions the district court had issued in Novell's favor. (A2548-50.) Novell had repeatedly sought to have the decisions introduced, beginning with its motions in limine (A400-19) and continuing throughout the first half of trial (A1117-21;A1471-75;A1638-72;A1734-41). The court denied all of those requests on the grounds that informing the jury of the decision would be unduly confusing and prejudicial. (A1112-16;A1334-38;A1476-79;A2363:775-76.) In so doing, the court acknowledged that the prejudicial effect to SCO of such evidence was "extremely high." (A2628:1794.)

In the second week of trial, however, the court decided to permit Novell to quote from the prior decisions in cross-examining Dr. Christine Botosan, SCO's damages expert, on the theory that the decisions pertained to the "but for" world of Dr. Botosan's damages model. (A2549:1494-95.) Novell's counsel proceeded to read from the district court's June 2004 and August 2007 decisions, with respect to Novell's motion to dismiss and motion for summary judgment, respectively. Novell first read from the June 2004 decision, including the language stating that Amendment No. 2 "is not retroactive to the date of the APA" and that "although Amendment Number 2 states that its effective date is the date of the amendment,

the language of Amendment Number 2 does not state that a transfer of the copyrights is to occur as of the date of the amendment.” (A2549:1494-95.)

After the district court gave a further instruction in a futile attempt to cure the prejudice to SCO (A2550:1498), Novell continued with its cross-examination of Dr. Botosan and asked further questions about the August 2007 “grant to Novell [of] judgment as a matter of law that Novell did not under the Asset Purchase Agreement, including Amendment Number 1 and Amendment Number 2, transfer ownership of the UNIX copyrights to Santa Cruz Operation or its successor The SCO Group.” (A2553-2555:1511-18; see also A2555-2556:1521-22.) Dr. Botosan explained at length the irrelevance of those decisions to the but-for world on grounds that Novell never sought to contradict. (A2550;A2555.)

Second, over SCO’s objections (see e.g., A2192-3), the district court permitted Novell to focus extensively on the old, removed exclusion of copyright language. (See, e.g., A2236-38;A2866-67.) Given the potential for the jury to be misled into relying on language that no longer existed, SCO moved in limine to restrict Novell’s use of the prior language in accordance with this Court’s decision. (A2192-93.) This motion was denied. (A1092-94;A2186;A2192-93.) While permitting Novell to question witnesses extensively about the removed language, the district court also precluded SCO even from asking several witnesses –

including SCO's initial witnesses, Robert Frankenberg, Novell's CEO at the time of the APA transaction, and Duff Thompson, Novell's business development executive charged by the CEO to sell the UNIX business to SCO – whether they knew that the original copyright language in the APA had been amended. (See, e.g., A2186;A2227;A2249-59.) The court's rationale was that such witnesses were not involved in negotiating Amendment No. 2. (See, e.g., A2193.)

In light of these rulings, Novell came out of the gate seeking to convey the impression that the original copyright language of the APA was the only relevant language. (See, e.g., A2173-78;A2236-38;A2860-63;A2866-67;A2871.) Novell refused to use the admitted exhibit comprising the APA and the amendments thereto, insisting instead on using an exhibit that was just the text of the original APA. (See, e.g., A2216;A2234;A2236-37.) SCO's objections to that were overruled. (See, e.g., A2237:298.) Novell even pointed to the original copyright language in conjunction with the integration clause of the APA – as if the jury could consider only the original language. (A2202-03.) When the district court warned counsel for Novell that if he further pursued his questions about the integration clause, then SCO would be permitted to revisit the issue of the application of Amendment No. 2, Novell's counsel candidly stated: “Well, I don't want the answer that badly, Your Honor.” (A2736.)

Third, over SCO's objection, the district court allowed Novell to present the jury with a slide featuring the title to a Business Week article from 2004 describing SCO as the "Most Hated Company in Tech." (A5091;A2815-16.) This was permitted on the basis that it was relevant for Novell's expert, Terry Musika, to refute the testimony of Dr. Botosan that in a "but for" world in which Novell had not falsely claimed to own the UNIX and UnixWare copyrights, SCO would have made substantially greater revenues and profits. (A2510-61;A2829-36.)

B. The District Court's Rule 50(b) Decision.

SCO moved at the close of evidence for judgment pursuant to Rule 50(a) and renewed its motion under Rule 50(b) on the grounds that the evidence showed that the UNIX and UnixWare copyrights were required for SCO "to exercise its rights in the UNIX and UnixWare technologies" acquired under the APA, the standard set forth in the APA as amended by Amendment No. 2. The district court denied the initial motion as moot, misunderstanding it to be directed to Novell's counterclaim, which the court had dismissed at the close of the evidence pursuant to an ore tenus motion. (A1899-1910;A2591-95;A2602;A3006.)

The jury answered one question on the slander of title claim. In response to the first question on the verdict form: "Did the amended Asset Purchase

Agreement transfer the UNIX and UnixWare copyrights from Novell to SCO?”

The jury answered: “No.” (A1914.)

The district court subsequently denied SCO’s renewed Rule 50(b) motion on the grounds that the jury adopted Novell’s view that “Santa Cruz only acquired the UnixWare business” and that “Novell retained significant rights in the UNIX business,” including the copyrights. (A3008.) The court’s view was that “Amendment No. 2 was meant to address use rights, not ownership” (A3010), relying on testimony of Novell’s principal negotiator of Amendment No. 2, Alison Amadia, that “Amendment no. 2 was meant to affirm that SCO had the right to use, manufacture, and make modifications to the UNIX technology” – in other words, a license. (Id.)

The district court did not cite or even comment on Ms. Amadia’s admission that “if there are copyrights that are required for SCO to exercise its rights, like the UNIX and UnixWare trademarks, they were transferred.” (A2728:2177 (emphasis added); see also A2728-2729:2176-78;A2724:2160.) Similarly, the district court ignored her admission with respect to Amendment No. 2 that “it’s reasonable to interpret this language as saying that among the copyrights included in the transfer are those that SCO needs to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies.” (A2724:2160-61.)

The district court dismissed the testimony of SCO's negotiator of Amendment No. 2, in-house counsel Steven Sabbath, who testified that SCO "bought the UNIX business from Novell, all copyrights pertaining to that business came with the product. Amendment Number 2 was meant to confirm that." (A2397:911.) The court did so because Mr. Sabbath had signed a conflicting declaration concerning Amendment No. 2, notwithstanding Ms. Amadia's testimony that Mr. Sabbath told her that the copyrights had been excluded as a result of a "typographical error in the original APA" that required correction. (A2730:2184-85.) Ms. Amadia further testified that she understood that Mr. Sabbath's understanding was that "the purpose of the Amendment was to clarify that the UNIX and UnixWare copyrights had transferred." (A2726-29:2169-79.)

The district court also cited testimony from SCO witnesses Darl McBride and Ryan Tibbitts for the proposition that SCO could run its UnixWare product business without the copyrights (A3010-11), although their testimony carefully and consistently pointed out that protecting the underlying technology from infringement – in contrast to simply licensing a software product – required the copyrights. (A2421:997(McBride);A2640-41:1844-46(Tibbitts);A2642:1850-51(Tibbitts).)

C. Denial of SCO's New Trial Motion.

SCO moved in the alternative for a new trial under Rule 59 on the grounds that the jury's verdict on copyright ownership was clearly against the manifest weight of the evidence. SCO argued that a new trial was justified not only because the copyrights were "required" under Amendment No. 2, but also because of the overwhelming evidence that both SCO and Novell had intended that copyrights be transferred as part of the UNIX and UnixWare business.

At trial SCO presented testimony from ten witnesses that such a transfer was intended. These included not only all of the witnesses from the Santa Cruz side of the transaction, but also five Novell executives, including then-CEO Robert Frankenburg; Novell's lead negotiator of the APA, Ed Chatlos; and in-house Novell lawyer Burton Levine, who went so far as to testify that it would have been "unethical" to sell the ownership rights to a software business and seek to withhold the copyrights. (A2183-84(Frankenberg);2204(Frankenberg);A22192(Thompson); 2251(Chatlos);2253(Chatlos);2336(Mattingly);2294-95(Levine);2280(Mohan); 2287(Michels);2290-91(Michels);2275-76(Wilt);2395-96(Sabbath);2364-65(Madsen). In denying SCO's motion, the district court acknowledged this testimony but discounted it because some of the witnesses dealt with high-level negotiations, while others had a financial interest in SCO in the form of stock or

stock options from having worked or served at the company. The court found more credible the testimony of Novell's witnesses who claimed Novell intended to withhold the copyrights because of concerns with SCO's financial condition and to protect the royalty-stream in which it had a continuing interest.

The district court also rejected as unpersuasive SCO's evidence that the parties' course of performance after the APA showed that both sides believed the copyrights had been transferred. That evidence included the undisputed facts that (i) Novell's own engineers replaced the "Novell" copyright notice with a "Santa Cruz" copyright notice on the source code and the CD for the current version of UnixWare transferred under the APA (A2609:1725-28;A2608:1723-36;A3281-88); (ii) Novell left the copyright registrations with SCO (A2319); and (iii) Novell wrote thousands of letters to key customers and partners shortly after the APA closed expressly informing them that it had transferred to SCO Novell's "existing ownership interest in UNIX System-based offerings and related products," which were identified as all versions and releases of UNIX and UnixWare (A2313:586; A3528-33).³ Until November 2003, Novell never claimed to own the copyrights.

³ The official press release that SCO issued on September 20, 1995, quoted Novell CEO Robert Frankenberg and stated: "According to the terms of the agreement, SCO will acquire Novell's UnixWare business and UNIX intellectual property." (A3507-09;A2188:110-11.) Mr. Frankenberg testified that, in

Indeed, a few weeks after the APA was signed, Novell submitted a premerger notification form under the Hart-Scott-Rodino Act representing that SCO would acquire “All rights and ownership of UNIX and UnixWare,” “All of Novell’s claims,” and “All copies of UNIX and UnixWare.” (A3327;A3308;A2791-92:2411-14.) Just months after Amendment No. 2 was signed, through the law firm that represented SCO in connection with the APA, SCO (Santa Cruz) took the position in public litigation against Microsoft Corporation in the European Union that SCO had acquired the UNIX copyrights and was the UNIX copyright holder. (A2371-2372;A3364§3.4; A3366§4.9.) In resolving that dispute, SCO entered into a settlement agreement with Microsoft stating: “SCO has acquired AT&T’s ownership of the copyright in the UNIX System V Operating System Program.” (A3439.)

D. Non-Jury Findings on Novell’s Waiver Rights.

After the trial, the district court entered its own findings on SCO’s alternative claim for specific performance for transfer of the copyrights and on Novell’s counterclaim that it had the authority under Section 4.16(b) of the APA to force SCO to waive its claims against IBM for alleged breach of the restrictions on disclosure of UNIX technology. The court found that Section 4.16’s language approving that press release for Novell, he understood the term “intellectual property” to include the copyrights. (A2188:112.)

regarding “SVRX Licenses” applied to any “contract” concerning SVRX and therefore applied to all software development agreements or licenses. The court did not address SCO’s argument that the “Software Agreement” and “Sublicensing Agreement” subject to which IBM obtained access to UNIX source code, and which imposed limitations on IBM’s disclosure of such code, are included among the “Software and Sublicensing Agreements” referenced in Item III.L of Schedule 1.1(a), and is not an “SVRX License” as to which Novell had unrestricted waiver rights.

The district court also did not expressly discuss witnesses, including former Novell employees, who testified that in order to make sense, Novell’s “waiver” rights under Section 4.16(b) of the APA extended only to the terms of the Product Schedule Licenses through which particular UNIX products were licensed. Those witnesses included Messrs. Broderick (A2331-2332), Frankenberg (A2188), Chatlos (A2254-56), Thompson (A2223-2224), Wilt (A2276), Mohan (A2282), Michels (A2288-90), Sabbath (A2396), and Ms. Madsen (A2382;A2392-93). The court also rejected SCO’s argument that such a broad waiver right would permit Novell to undermine the UNIX and UnixWare business SCO had acquired. (A2392-93:892-93;A2315:593-94;A2316:599-600.)

Finally, the district court did not find persuasive the parties' own conduct shortly after the APA, when SCO disputed Novell's effort to unilaterally grant IBM a buyout of its binary royalty obligations and expanded source code rights, and "began to institute a law suit" against Novell. (A3433-34;A2600-2601:1690-95.) The court found no significance in the fact that during the months of negotiations between Novell and SCO over this issue, Novell did not once assert ownership of the UNIX copyrights or the broad Section 4.16(b) rights it now claims.

SUMMARY OF ARGUMENT

The district court's denial of SCO's Rule 50(b) motion rests on the fiction that SCO obtained only some sort of unidentified license to develop and market a new UnixWare product when it purchased the UNIX and UnixWare business from Novell in the mid-1990s, and that SCO did not "require" any of the UNIX and UnixWare copyrights to exercise any of its rights. The term "license" is never mentioned in the APA with respect to SCO's rights to the UNIX and UnixWare technology. (The term "license" is mentioned, however, with respect to the contemporaneous agreement in which SCO licensed back to Novell a restricted right to use the UNIX and UnixWare technology – a license-back that is in itself irreconcilable with the decision below.) The language excluding copyrights in the

original APA was removed and replaced by Amendment No. 2 with language making clear that copyrights “required” for SCO to conduct the UNIX and UnixWare business it acquired were indeed part of the transferred assets. As this Court held: “Whatever the Amendment means, it refers to the ownership of copyrights, not to licenses.” SCO, 578 F.3d at 1213-14, 1216.

Novell presented no meaningful evidence that the copyrights are not “required.” SCO, by contrast, presented extensive evidence that confirmed the common-sense proposition that the UNIX and UnixWare copyrights are required to license certain rights to other users, and most importantly, to protect the valuable technology against infringement – a task which possession of an “implied license” indisputably does not allow. Given the language of the APA, as amended, and the record evidence, it was legal error for the district court to have denied SCO’s Rule 50(b) motion. On those same principal bases, it was error for the court to deny SCO’s alternative motion for a new trial and claim for specific performance.

The district court also erred in its non-jury findings that Novell had the authority under the APA to waive essentially any and all of SCO’s rights concerning license agreements that SCO unquestionably acquired. Novell’s waiver of SCO’s rights to enforce restrictions on the disclosure of UNIX technology by IBM goes to the heart of SCO’s business. Such broad waiver rights,

as this Court previously stated, “would enable Novell, at its sole discretion, to destroy a substantial part of the value of Santa Cruz’s acquisition of the UNIX business.” SCO, 578 F.3d at 1221. The district court’s construction ignored the fact that the IBM software development agreements were transferred to SCO under a different section of the APA, one that is not subject to the waiver rights Novell had preserved to protect its remaining royalty interest in UNIX licenses.

During the trial, moreover, the district court abused its discretion with respect to several evidentiary issues in ways that necessitate a new trial.

First, after steadfastly rejecting numerous efforts by Novell to inform the jury that it previously had secured a summary judgment (which this Court then reversed), the district court changed course midway through trial and allowed Novell to inform the jury of the previous ruling in its favor on the ownership of copyrights. The district court previously had recognized that “Plaintiff would be prejudiced if the jury was informed that this Court once entered judgment against it on those very claims that the jury will be asked to decide,” and this prejudice was not removed by an instruction that the district court’s summary judgment order had been reversed.

Second, the district court wrongly denied SCO’s motion in limine and objections related to Novell’s efforts to confuse the jury with respect to the

“exclusion of copyrights” language that Amendment No. 2 had removed. This Court made clear that the APA and Amendment No. 2 must be construed “together” as a unified instrument. SCO, 578 F.3d at 1211. The district court nevertheless allowed Novell to proceed to confuse the jury by lines of questioning predicated on the “exclusion of copyright” language that had been removed and replaced by Amendment No. 2. The prejudice to SCO was magnified by rulings that restricted SCO’s ability to elicit on its own examinations from certain witnesses that this language had been removed from and does not exist in the operative contract.

Third, the district court abused its discretion by allowing Novell to introduce a highly prejudicial, double-hearsay article in Business Week magazine labeling SCO the “Most Hated Company” in technology.

STANDARD OF REVIEW

The Court reviews de novo the denial of a post-trial motion for judgment as a matter of law under Rule 50. Wagner v. Live Nat’l Motor Sports, Inc., 586 F.3d 1237, 1243 (10th Cir. 2009). The Court reviews for abuse of discretion the denial of a motion for a new trial under Rule 59. Henning v. Union Pac. R.R. Co., 530 F.3d 1206, 1216-17 (10th Cir. 2008). The Court reviews the district court’s findings of fact for abuse of discretion and conclusions of law de novo. Lyons v.

Jefferson Bank & Trust, 994 F.2d 716, 727 (10th Cir. 1993). The Court reviews for abuse of discretion the district court’s evidentiary rulings. Bryant v. Farmers Ins. Exch., 432 F.3d 1114, 1122 (10th Cir. 2005).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING SCO’S MOTION FOR JUDGMENT UNDER RULE 50(B).

A verdict must be set aside where the “evidence points but one way,” Wagner v. Live Nat’l Motor Sports, Inc., 586 F.3d 1237, 1244 (10th Cir. 2009), or “so overwhelmingly favors the moving party as to permit no other rational conclusion,” Shaw v. AAA Eng’g & Drafting, 213 F.3d 519, 529 (10th Cir. 2000). This Court has repeatedly seen fit to reverse the erroneous denials of motions under Rule 50(b). See, e.g., Burrell v. Armijo, 603 F.3d 825, 832-35 (10th Cir. 2010); Ward v. Siebel Living Trust, 365 Fed. Appx. 984, 986-88 (10th Cir. 2010); Wagner, 586 F.3d at 1244; Keylon v. City of Albuquerque, 535 F.3d 1210, 1215-16 (10th Cir. 2008); Milligan-Hitt v. Bd. of Trustees of Sheridan Cnty. Sch. Dist. No. 2, 523 F.3d 1219, 1230 (10th Cir. 2008); Shaw, 213 F.3d at 529; Vanmeveren v. Whirlpool Corp., 65 Fed. Appx. 698, 700-01 (10th Cir. 2003); J.I. Case Credit Corp. v. Crites, 851 F.2d 309, 311-16 (10th Cir. 1988).

The language of the amended APA, as interpreted by this Court, and the trial testimony concerning that provision, show that copyrights “required” for the

exercise of SCO's rights were transferred to SCO. The district court relied on testimony from several Novell witnesses – but notably not its CEO, chief negotiator on the deal, or in-house counsel working on the deal (not to mention the unanimous testimony of Santa Cruz witnesses) – to support its conclusion that the exclusion of copyrights in the original APA was intentional. But this testimony cannot be reconciled with the fact that Amendment No. 2 replaced the original exclusionary language. If the intent of the transaction was that no copyrights transfer, there would have been no reason for that part of Amendment No. 2 to exist, no reason for a change in language to have occurred at all. The proposition that Amendment No. 2 was meaningless and had no effect on the copyrights being transferred runs against the principles of contract interpretation and this Court's prior opinion. "A written instrument must be construed as a whole, and multiple writings must be considered together when part of the same contract." Nish Noroian Farms v. Agric. Labor Relations Bd., 35 Cal. 3d 726, 735 (1984). "A contract may not be interpreted in a manner which would render one of its terms meaningless." Kavruck v. Blue Cross of Cal., 108 Cal. App. 4th 773, 783 (2003).

SCO shows below that the amended language of the APA, combined with the schedule of assets being transferred, could only mean that the copyrights "required for SCO to exercise its rights with respect to the acquisition of UNIX

and UnixWare technologies” were transferred; and that ownership of UNIX and UnixWare copyrights were “required” to effectuate and enforce SCO’s rights.

A. The Amended APA Transferred Copyrights That SCO “Required.”

The only reasonable interpretation of the amended APA is that SCO acquired all copyrights “required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies.”

First, the amended APA provides for transfer of copyrights required for SCO to exercise its rights with respect to the UNIX and UnixWare technologies it acquired through the APA. Under settled precedent, the transfer of “all rights and ownership” in the UNIX and UnixWare source code, if there were no exclusion of copyrights, transfers the copyrights. SCO, 578 F.3d at 1213. Thus, as this Court held, “any change to the set of Excluded Assets in Schedule 1.1(b) necessarily implicated those copyrights actually transferred under Schedule 1.1(a).” Id. Amendment No. 2, which amends the list of assets excluded from the sale, replaced the exclusion of all copyrights with an exclusion of all copyrights and trademarks, except those “required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies.” The amended APA thus provides for a transfer of “all rights and ownership” in UNIX and UnixWare

source code and excludes from transfer only those copyrights not required for SCO to exercise its rights.

It should take compelling extrinsic evidence to avoid that straightforward interpretation. The district court pointed to testimony from two Novell attorneys, Tor Braham and David Bradford, regarding their intent in excluding copyrights, but the language Braham wrote and Bradford supported⁴ was removed and replaced by Amendment No. 2 – and neither of them was materially involved in Amendment No. 2. If Braham’s and Bradford’s testimony had reflected the intent of the parties to the APA, Amendment No. 2 would not exist.

Second, the district court referred to the testimony of Alison Amadia, Novell’s negotiator of Amendment No. 2. While contending on direct examination that she did not envision Amendment No. 2 as doing more than confirming a license to use technology (an untenable position itself), on cross-examination Amadia admitted that “if there are copyrights that are required for SCO to exercise its rights, like the UNIX and UnixWare trademarks, they were transferred.”

⁴ In addition, this “support” was highly equivocal. Bradford admitted that he did not have a recollection of what had occurred independent of his review of selected documents he was provided in meeting with Novell’s counsel. (A2797-2800:2434-35,2438,2441,2444,2446-47.) Bradford further acknowledged that his review of documents did not include Amendment No. 2. (A2804:2461.) The evidence showed that he authored a memo to the Novell Board at the time of the transaction that pointedly did not report on the exclusion of any UNIX or UnixWare copyrights. (A2800-01.)

(A2728:2177 (emphasis added).) The court made no mention of, much less sought to account for, this critical (and arguably dispositive) admission in favor of SCO.

In addition, to give Amendment No. 2 an interpretation contrary to its plain language, the district court also had to ignore the operation of the same language with respect to trademarks, which the parties unquestionably intended to transfer. (A2724:2160;A2727-29:2170-78.) Amendment No. 2 placed the trademarks and copyrights in the same boat – they both transferred to SCO where “required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies.” (A2728:2176;A2728-29:2177-78.) Because Amendment No. 2 changed the APA to make no distinction between trademarks and copyrights, and Novell admitted that the trademarks referenced in Amendment No. 2 were being transferred, the same language used to describe the copyrights could not reasonably mean something different.

Indeed, the language of Amendment No. 2 and Ms. Amadia’s admission are consistent with Novell’s own position before the lawsuit started, as expressed in its worldwide press release dated June 6, 2003, which it issued after SCO reminded Novell of the existence of Amendment No. 2, that ownership of copyrights “did transfer” to SCO under the amended APA. (A3352 (emphasis added).) While Novell then changed its position in a letter that Novell General Counsel Joseph

LaSala sent to SCO in August, 2003, even he admitted that Amendment No. 2 required Novell to transfer the “copyrights required for SCO to exercise its rights.” (A2208:192.) Only later did Novell “discover” that Amendment No. 2 simply confirmed a license to use – a position, it bears repeating, that this Court has already rejected. SCO, 578 F.3d at 1213, 16.

The testimony of the only other Novell witness on Amendment No. 2, James Tolonen, cannot support a contrary result. He expressed the view that Amendment No. 2 must have only confirmed a license (A2692;A2703), but that view cannot be squared with the fact that to “confirm” a license, the contract would have said “SCO has a license.” It would have been neither necessary nor appropriate to revise the schedule of assets excluded from transfer to confirm a license. As this Court stated: “[A]ny change to the set of Excluded Assets in Schedule 1.1(b) necessarily implicated those copyrights actually transferred under Schedule 1.1(a),” and that “[w]hatever the Amendment means, it refers to the ownership of copyrights, not to licenses.” SCO, 578 F.3d at 1213-14, 1216 (emphasis added).

There is no reference in the APA to SCO being “licensed” to use technology. On the contrary, the APA provided for a “license-back” by SCO to Novell of the technology SCO acquired and derivatives of that technology. The district court reasoned that “one of the purposes of that agreement was to allow

Novell the right to use post-APA SCO-developed code.” (A3005:14.) No one disputes that the TLA licensed to Novell post-APA UNIX derivatives. But the TLA also licensed back to Novell the pre-APA UNIX technologies that Novell sold to SCO in the same transaction. Those are technologies for which Novell would not have needed a license, much less accepted the restricted license as stated in the TLA, had it owned the copyrights at issue.

The district court also relied on testimony of former Novell executive Michael DeFazio for the proposition that Novell must have retained the copyrights to “bulletproof” Novell’s royalty stream. The testimony of DeFazio, who was uninvolved with Amendment No. 2, does not support this conclusion.

- He testified that he did intend under the APA for “Novell to transfer the intellectual property of the UNIX program to Santa Cruz through the asset purchase agreement.” (A2766:2321.)
- He says he directed his team to “bulletproof” Novell’s royalty stream, but he merely assumed, because the language “just appeared” in the text of the original APA, that the retention of copyrights implemented the directive he said he gave. (A2763-64:2308-10,2311-13.)
- He did not have any discussions one way or the other about Novell retaining any copyrights. (Id.)

The only rational conclusion from the evidence is that Amendment No. 2 transferred those copyrights required for SCO to exercise rights in the UNIX and

UnixWare business it acquired. We now turn to the evidence that the UNIX and UnixWare copyrights were in fact required.

In remanding, this Court pointed to the importance of copyright ownership for SCO to protect the assets it had acquired under the APA. SCO, 578 F.3d at 1218 n.4. The evidence at trial confirmed that ownership of the copyrights was required for SCO to protect its technology against third parties that “copied and attempted to resell the core UNIX assets Santa Cruz received in the deal.” Id.

B. The UNIX and UnixWare Copyrights are “Required” by SCO.

1. The Copyrights Are Required for SCO to Protect the Source Code Underlying Its Business.

If SCO does not own the copyrights, it cannot bring suit to protect the copyrighted source code. Davis v. Blige, 505 F.3d 90, 98 (2d Cir. 2007); Silvers v. Sony Pictures Entmt., Inc., 402 F.3d 881, 885 (9th Cir. 2005); 1 Copyright Throughout the World § 19:29 (2009); Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity, 3 J. High Tech. L. 1 (2003); see also 3 Patry on Copyright § 7:2 (2010) (explaining that “copyright is not just a bundle of rights; it is also the ability to enforce those rights”).

Novell’s “license” theory of Amendment No. 2 does not give SCO the right to bring claims to enforce the copyrights. Novell’s former General Counsel took the position, for example, that SCO acquired only an “implied license.”

(A2675:1975.) Amadia acknowledged that with an implied license, SCO could not enforce the UNIX and UnixWare copyrights in court. (A2723:2157.) Whether implied or express, such a non-exclusive licensee did not provide SCO the ability to go into court to defend its rights by a copyright action. (A1951.)⁵

UNIX and early UnixWare technology lies at the heart of UnixWare at the time of the APA and today. UnixWare is just the name of the latest version or iteration of the SVRX technology. (A363;2610;2623-24;A2766.) The source code of the versions of UnixWare that SCO acquired in 1995 (and built its business around licensing in the ensuing years) consists almost entirely of prior “UNIX” source code (A2610:1732;A2623:1781), and the current version of UnixWare that SCO sells still consists in significant part of that “UNIX” source code (A2624:1784). UnixWare was a “version of UNIX – [that] was essentially

⁵ Under the Copyright Act, if SCO had obtained an “exclusive license,” then it necessarily had acquired ownership of the copyrights. (A3086-87.) See 17 U.S.C.A. § 101. At trial, Novell affirmed its view that SCO does not have any “exclusive license.” (A3082-85.) Only an exclusive licensee possesses all of the exclusive rights of copyright ownership, including the right to sue for infringement. 1 Copyright Throughout the World § 19:29 (2009); 1 Copyright Law in Business and Practice § 9:1 (2009); 2 Patry on Copyright § 5:1118 (2010). “[A]n implied license can only be non-exclusive.” Robinson v. Buy-Rite Costume Jewelry, Inc., No. 03 Civ. 3619(DC), 2004 WL 1878781, at *4 (S.D.N.Y. Aug. 24, 2004); accord Gillespie v. AST Sportswear, Inc., No. 97 Civ. 1911 (PKL), 2001 WL 180147, at *7 (S.D.N.Y. Feb. 22, 2001); SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 316 (S.D.N.Y. 2000); 2 Patry, supra, § 5:1118; Copyright Litigation Handbook § 13:12 (2d ed. 2009).

rebranded and some cosmetic and a few minor features added to it to create UnixWare 2.0. UnixWare 2.0 is almost entirely UNIX System V release 4.2.” (A2610:1732.) Thus, “90, 95 percent” of UnixWare was older UNIX code that existed prior to the APA. (A2624:1782.) UnixWare is not a separate, stand-alone version or block of UNIX that can be detached from the UNIX code and run on its own; it is the latest release of UNIX. (A363.) Neither the early version of UnixWare nor the latest version of UnixWare would work if the “UNIX” source code were removed. (A2624:1784.) All of this testimony went un rebutted.⁶

Given the technological reality of UnixWare’s development and ancestry, without copyright ownership, SCO does not have the right to enforce in court the copyrights at issue in the UNIX and UnixWare technology, and thus to protect the core technology in UnixWare. The need for the copyrights to enforce SCO’s rights was supported by unequivocal testimony of witnesses who have been involved in the various aspects of the UNIX and UnixWare business, including former Novell and current SCO UNIX Contracts Manager William Broderick (A2333:666; A2334:667-68); Santa Cruz General Counsel Steven Sabbath (A2398:913-15); former SCO CEO Darl McBride (A2421:997); former Novell and current SCO

⁶ There was no issue at trial as to which specific UNIX or UnixWare copyrights were required; the parties and the witnesses addressed them as a whole as identified on the asset schedule attached to the amended APA.

UNIX Product Manager & OEM Relations Manager John Maciaszek (A2599:1686-87); and former Santa Cruz Manager of Law and Corporate Affairs Kimberlee Madsen (A2364:780;A2369:802-03;A2386:865,866;A2388:875; A2390-91:884-85).

SCO's need to bring copyright enforcement actions does not turn on the existence of the SCOsource program whose demise Novell focused on at trial, and which the district court cited. As SCO's General Counsel Ryan Tibbitts explained, if SCO "could not protect" the "core intellectual property" in UnixWare, then "this venerable UNIX business that has been around for many years that many customers around the world are using would simply die off, and we have got to have that intellectual property to protect those crown jewels." (A2641:1845-46.) SCOsource was simply the name given to the licensing program and division by which SCO sought to monetize, without the need for litigation, those parties who were, in SCO's view, infringing on its rights by using UNIX technology. Without the ability to sue or license such users, particularly of a "free" Linux product, SCO's UNIX business "would simply die off," as Tibbitts testified. (Id.) Thus, "the intellectual property in UNIX [was] an important part of the going forward UnixWare business" that SCO had purchased. (A2321:12-14.) The district court was simply wrong when it found that SCO did not acquire the rights to pursue

SCOsource (A2996-97¶125); even Novell’s General Counsel admitted that SCO obtained the right to protect its business (A2675), and that is what SCO was attempting to do through SCOsource.

The district court agreed with the proposition that the copyrights are required to protect SCO’s intellectual property. (A2996¶124.) The court then stated the following: “However, SCO was not the owner of the copyrights and, thus, had no right to enforce them.” (*Id.*) In this regard, respectfully, the district court’s reasoning was entirely circular. If the copyrights are required for SCO to exercise its rights in the technologies it acquired, it does own the copyrights under the APA as amended by Amendment No. 2. The copyrights are, in fact, required for SCO to protect its source code and business. Without the copyrights, SCO would be unable effectively to preclude others from using the code and running their own UNIX-based business based on it. SCO, 578 F.3d at 1218 n.4.

2. The Copyrights Are Required for SCO to Exercise Source-Code Licensing Rights.

In addition to requiring copyright ownership to protect UNIX and UnixWare, SCO requires the copyrights to facilitate source code licensing, which was an indisputable portion of the UNIX and UnixWare business SCO acquired. Such source code licensing was historically part of the UNIX and UnixWare business; SCO’s business included entering into new source code licenses, as

contemplated by the APA; and the copyrights were needed for such licensing to occur, as there was nothing in the APA which granted a license for such activity. (A2825:2543-44;A2222:241-42;A2333-34:666-68;A2290:503-04;A2275:442-43;A2397-98:912-15.) In its Order denying Rule 50(b) relief, the district court did not deal with this point or the testimony that supports it. (A2971-72¶¶65-69.)

The district court instead merely reiterated Novell's position that former SCO CEO Darl McBride and Tibbitts had acknowledged that, in the court's words, "SCO could operate its Unix Ware [sic] business without the copyrights." (A2971-73¶¶66-71.) Their testimony does not support that proposition.

McBride referred to only one part of SCO's business – its ability to sell UnixWare binary products directly to customers – as is evident from (1) his comparison of UnixWare to OpenServer and the products of "HP, IBM and all other UNIX licensees," and (2) the distinction he drew between the UnixWare business and "the licensing side" of SCO's overall business. (A2479:1225-26.) That SCO, like UNIX licensees, could continue to sell its UnixWare binary products without the copyrights did not mean that the copyrights were not required to exercise critical rights "on the licensing side" that SCO also acquired under the APA. Indeed, even selling binary products would be more tenuous if infringers could copy protected UNIX and UnixWare code with impunity.

Tibbitts testified about a proposed deal, in connection with SCO's Chapter 11 reorganization proceedings, where SCO would have sold certain aspects of the UNIX product business, but kept other aspects, including IP licensing rights and SCO's legal claims based on the unauthorized use of the UNIX and UnixWare technologies. (A2642:1850-51.) Because the law requires ownership of the UNIX and UnixWare copyrights to pursue the claims SCO would have kept, the proposed deal contemplated that the copyrights would remain with SCO until it completed prosecuting those claims. That proposed transaction was consistent with the reading of Amendment No. 2 that SCO, as the party who indisputably acquired those claims under the APA, required ownership of the UNIX and UnixWare copyrights.

3. The Copyrights Are Required for SCO to Pursue the Legal Claims It Acquired Under the APA.

Novell's former General Counsel Joseph LaSala admitted both generally that "the agreements speak to what copyrights SCO requires in order to exercise its rights under the agreement" and specifically that "SCO has the rights to bring claims to protect its business." (A2675:1976-77.)

Among the "rights and ownership" in UNIX and UnixWare that SCO acquired are all of Novell's claims relating to the UNIX and UnixWare source code. Item II of the Assets Schedule identifies "All of Seller's claims arising after

the Closing Date against any parties relating to any right, property or asset included in the Business” as having transferred. SCO thus acquired all of the claims, which otherwise Novell would have, relating to the UNIX and UnixWare source code.⁷ Ownership of the copyrights is required to prosecute such claims. A copyright owner cannot transfer its copyright claims without also transferring the copyrights. Silvers v. Sony Pictures Entmt., Inc., 402 F.3d 881, 885 (9th Cir. 2005). Novell presented no evidence at trial to the contrary.

The district court nevertheless concluded that SCO “provided no evidence of any such claims that it was entitled to pursue.” That is plainly incorrect. In addition to the reference in Item II of Schedule 1.1(a) to “All of Seller’s claims arising after the closing date against any parties relating to any right, property or asset included in the business” (emphasis added), former Novell senior executive Duff Thompson testified without contradiction “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.” (A2224:249-50.) In addition, as noted, the evidence showed claims SCO pursued post-closing against Microsoft (A2371-72:807-11; A3364-66§§3.4,4.9; A3439), expressly referring to ownership of

⁷ The fact that SCO formed a new division in 2003 to protect its UNIX technology and intellectual property, and called it SCOSource, does not mean it did not acquire the right to pursue the SCOSource initiative as the court found.

copyrights. The copyright claims relating to alleged Linux infringement are another obvious example. (A3526-26.)

The district court's denial of SCO's Rule 50(b) motion that the UNIX and UnixWare copyrights are "required" and therefore were transferred by operation of the amended APA was error and should be reversed.

II. IN THE ALTERNATIVE, THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING SCO'S MOTION FOR A NEW TRIAL AND ITS ALTERNATIVE CLAIM FOR SPECIFIC PERFORMANCE.

At minimum, the district court should have ordered a new trial. With respect to the grounds for a new trial, "[t]he inquiry focuses on whether the verdict is clearly, decidedly or overwhelmingly against the weight of the evidence." Black v. Heib's Enters., Inc., 805 F.2d 360, 363 (10th Cir. 1986). After a long and complicated trial, a trial judge should be especially vigilant in examining the verdict. See, e.g., Siemens Med. Solutions USA, Inc. v. Saint-Gobain Ceramics & Plastics, Inc., 615 F. Supp. 2d 884, 899 (N.D. Iowa 2009). Where the copyrights were required for SCO's exercise of its rights in the UNIX and UnixWare technologies acquired, as set forth above, the verdict clearly was against the weight of the evidence.

Similarly, the court's non-jury findings rejecting SCO's alternative claim of specific performance were erroneous. Specific performance of a contract is

appropriate where “(1) its terms are sufficiently definite; (2) consideration is adequate; (3) there is substantial similarity of the requested performance to the contractual terms; (4) there is mutuality of remedies; and (5) plaintiff’s legal remedy is inadequate.” Blackburn v. Charnley, 117 Cal. App. 4th 758, 766 (2004).

“An order of specific performance or an injunction will be so drawn as best to effectuate the purposes for which the contract was made and on such terms as justice requires.” Restatement (Second) of Contracts § 358(1) (1981).

SCO asked the district court to order Novell to execute the documentation necessary to transfer the UNIX and UnixWare copyrights from Novell to SCO. The APA itself provided for such a procedure if the documents failed to effectuate the purposes of the Agreement. (See, e.g., A3115§1.7(c).) The performance that SCO seeks follows from Amendment No. 2 as interpreted with the APA as a whole and the overwhelming evidence of the parties’ intent. The copyrights, as shown, are “required.”⁸

⁸ The district court erred in concluding that the verdict resolved SCO’s claim. The Seventh Amendment so operates only where the verdict necessarily “resolves a factual issue.” Haynes Trane Serv. Agency, Inc. v. Am. Std., Inc., 573 F.3d 947, 959 (10th Cir. 2009). The principal question on this claim is whether the jury has already decided that there are no “required” copyrights. The verdict does not necessarily answer that question.

A court may order specific performance to account for some technical failure in the documentation of the parties' intent. See, e.g., Schuler v. Graf, 862 N.E.2d 708, 712-15 (Ind. Ct. App. 2007); O'Berry v. Gray, 510 So. 2d 1135, 1137-38 (Fla. Ct. App. 1987); Eliason v. Watts, 616 P.2d 427, 429-31 (Utah 1980). In assessing the intent of the parties, "a court will avail itself of all of the usual aids in determining the scope of the agreement." Restatement (Second) of Contracts § 362 (1981). Such extrinsic evidence includes the parties' course of performance. See, e.g., Okun v. Morton, 203 Cal. App. 3d 805, 819 (1988). SCO has shown that the overwhelming evidence demonstrates that the parties intended to transfer the UNIX and UnixWare copyrights, and that the grounds on which the district court reached the contrary conclusion are insufficient.

III. THE DISTRICT COURT ERRED IN CONCLUDING THAT NOVELL RETAINED BROAD WAIVER RIGHTS TO DIRECT SCO TO ABANDON LEGAL CLAIMS AGAINST IBM.

SCO contended that Novell's alleged waiver rights were limited to actions needed to protect its interest in its UNIX royalty revenue stream. Alternatively, SCO maintained that such waivers must be exercised in accordance with the implied obligation of good faith and fair dealing. Following trial, the district court found that Novell's waiver rights extended to the IBM software development

agreements, and also rejected SCO's alternative position regarding the implied covenant of good faith and fair dealing.

These findings were erroneous and should be reversed, because the waiver language of the APA does not apply by its terms to the agreements with IBM, and because an interpretation that allows one party to the contract to destroy the benefits received by the other party cannot be sustained. In addition, Novell's actions clearly violated the implied covenant of good faith and fair dealing.

A. Novell's Waiver Rights Did Not Extend to the IBM Software Development Agreement

Section 4.16 (b) of the APA provided Novell with the right to direct SCO's decisions pertaining to "SVRX Licenses." (A3134.) "SVRX Licenses" are defined in Section 4.16(a) as those Licenses listed under Item VI of Schedule 1.1(a). (Id.) As this Court recognized, and as the district court also recognized (A2978¶84), Item VI does not in fact list license agreements, but rather lists a series of products, leaving ambiguous the issue of what constituted the SVRX Licenses referred to in Section 4.16. (A3162.)

Source code agreements, like the licenses with IBM in question, are expressly listed in an entirely different Item of the Schedule of transferred assets. Item III.L provided for the transfer to SCO of all software development contracts, and it was undisputed at trial that the IBM Agreements were transferred under this

provision. (A3161-62;A2224;A2465.) The district court’s interpretation of the meaning of “SVRX License” identifies the same extensive set of agreements twice, which runs against normal rules of contract interpretation. Boghos v. Certain Underwriters at Lloyd’s of London, 36 Cal. 4th 495, 503 (2005); accord United States v. Gonzalez-Garcia, 85 Fed. Appx. 160, 164 (10th Cir. 2004).

The district court read the relevant contractual provisions as applying to “any SVRX License” (A2982¶92), but that begs the question of what constitutes an SVRX License. In finding support from the language that Item VI of Schedule 1.1(a) refers to “all contracts relating to the SVRX Licenses listed below,” the court ignores that the definition of an SVRX License in Section 4.16 is not all of Item VI, but only the licenses supposedly listed within Item VI. The language of Item VI that “All contracts relating to the SVRX Licenses listed below” reflects that the term “all contracts” is separate from the term “SVRX Licenses,” which are to be listed below. The reference to “all contracts” thus is not part of any definition of “SVRX License” as such. The SVRX Licenses to which the waiver rights apply are clearly a subset of “all contracts,” SCO, 578 F.3d at 1223-24, and all contracts are not SVRX Licenses.

The district court also gave no weight to the extensive extrinsic evidence that Novell’s waiver rights did not extend to such agreements. This evidence

included direct testimony not only from the SCO (Santa Cruz) executives and negotiators involved in the transaction, but also Novell executives, including its former CEO. Those executives included Frankenberg (A2188), Chatlos (A2254-56), Thompson (A2223-24), Wilt (A2276), Mohan (A2282), Michels (A2288-90), Broderick (A2331-32), Sabbath (A2396), and Madsen (A2382;A2392-93). These witnesses cogently testified that the waiver provision was intended to protect Novell's interest in the royalty stream in SVRX Licenses which it would continue to receive post-closing, and was no broader than that. The IBM Software Agreement was not the source of SVRX royalties (A3231-36;A2303-04); the product supplement schedules for specific binary products provided those royalties (A3409-10;A2314), and in addition, in 1996 IBM had completely paid-up the royalties even under those agreements and was no longer paying any SVRX royalties that were passed through to Novell. (A2668:1948-49.)

The district court discounted this testimony, saying that one SCO witness, William Broderick, was not involved in the negotiation or drafting of the APA, and that many other SCO witnesses acknowledged that the language of Section 4.16 of the APA was not limited to product supplement schedules. (A2980¶89.) Broderick, however, worked at Novell (and at USL before that) and offered evidence as to how Novell, and later Santa Cruz, actually interpreted these

provisions. (A2303-04;A2310-12.) The other SCO witnesses to which the court referred testified that whether or not Section 4.16's waiver rights were limited to product supplement schedules, they did not extend to software development agreements. (A2188(Frankenberg);A2254-56(Chatlos);A2223-24(Thompson); A2276 (Wilt);A2282(Mohan); A2288-90(Michels);A2331-32(Broderick); A2396(Sabbath);A2382;A2392-93(Madsen).) Further, the court said nothing about Novell's own witnesses who endorsed SCO's position. (A2764.)

Finally, the district court found essentially irrelevant that less than a year after the APA, the parties had a dispute (also involving IBM) over the scope of Novell's rights. This 1996 dispute over a licensee's rights to source code was "the precise issue in controversy today." SCO, 578 F.3d at 1222. Yet in 1996 Novell never asserted that its "waiver rights" gave it the authority to act unilaterally in dealing with IBM, and indeed, Novell agreed to language in Amendment No. 2, which followed from this dispute, that "Novell may not prevent SCO from exercising its rights with respect to SVRX source code in accordance with the agreement." As this Court stated: "If Novell already had the right under the APA itself to force SCO to increase any SVRX licensee's rights to SVRX code, then this provision would be pointless and ineffectual." Id. at 1223.

B. Novell's Interpretation Must Be Rejected Because It Would Give Novell the Ability to Destroy SCO's Benefits Under the APA.

Where a contract is susceptible to different interpretations, courts will adopt one which will give it validity, rather than one which renders it illusory. Lexington Ins. Co. v. Travelers Indem. Co. of Ill., No. 00-15407, 2001 WL 1132677, at *3 (9th Cir. 2001) (applying California law). The Court cannot endorse an interpretation that would permit Novell to destroy SCO's UNIX-based business. See, e.g., Leo F. Piazza Paving Co. v. Found Constr., Inc., 128 Cal. App. 3d 583, 591 (1981).

There can be no reasonable dispute that Novell's proposed definition of "SVRX Licenses" renders illusory the rights SCO acquired under the APA. Since the umbrella Software Agreement governs a licensee's use of any UNIX version the licensee has licenses including UnixWare, for example, then Novell would have the right to amend, modify, or waive SCO's rights with respect to UnixWare, a business that SCO indisputably acquired. In addition, if (as Novell contends) any contract relating to any of the SVRX releases identified in Item VI of the Assets Schedule is an "SVRX License," then Novell could amend, modify, or waive any of SCO's rights under the TLA, creating the non-sensical result that, pursuant to

Section 4.16(b), Novell was free to lift the restrictions on its use of the SVRX code set forth in the TLA.

It follows under the law that the only question was whether the APA was susceptible to SCO's interpretation. As shown above, it is. Indeed, with respect to the plain language, this Court has already found that Novell's interpretation of Section 4.16 is problematic. Amendment No. 2 states that the "Amendment does not give Novell the right to increase any SVRX licensee's rights to SVRX source code." This Court stated: "If Novell already had the right under the APA itself to force SCO to increase any SVRX licensee's rights to SVRX code, then this provision would be pointless and ineffectual." SCO, 578 F.3d at 1223. The exact same reasoning applies with respect to the further statement in Amendment No. 2 that "Novell may not prevent SCO from exercising its rights with respect to SVRX source code in accordance with the Agreement."

The district court failed even to address the foregoing law or most of the foregoing evidence. The court pointed instead to the singular rationale that Novell sought "to protect and maintain control" over the "SVRX royalty stream" and that "[i]t only makes sense for Novell to retain control over all components of the SVRX licensing agreements in order to protect this significant asset." (A2981-82¶91.) As this Court recognized, however, while "it is reasonable to think that the

parties would have covenanted in such a manner as to protect Novell’s substantial pecuniary interest in the revenue stream that . . . financed the acquisition,” “[i]t is less easy to accept that SCO would have consented to giving Novell the unilateral power to unravel its exclusive and undisputed ownership rights in the underlying source code of UNIX.” SCO, 578 F.3d at 1224. The IBM Software Agreement was not a source of a royalty revenue stream to Novell. (A3231-36;A2303-04.) The product supplement schedules provided that revenue (A3409-10;A2314), and with respect to IBM, even that revenue stream was already bought out or “paid in full” by IBM many years earlier. (A2668:1948-49.) While Novell may have wanted to advance its relationship with IBM in 2003, or even its support of the open-source Linux community, there is no plausible rationale that Novell required (or secured) an unlimited waiver right that went beyond its right to protect its interest in legacy SVRX royalties.

C. Novell Breached the Implied Covenant of Good Faith and Fair Dealing in the Amended APA.

If Novell did have expansive waiver rights under Section 4.16(b), those rights should be constrained by the implied covenant of good faith and fair dealing. The district court concluded that application of the implied covenant was not required to constrain Novell’s discretion or to avoid making the agreement’s benefit illusory, circumstances that this Court had referred to as where the implied

obligation may apply even to a contractual provision that seemingly provided one party unrestricted discretion. These findings were erroneous.

1. The District Court’s Interpretation of Section 4.16 Makes the Amended APA Contradictory and Ambiguous, as Well as Illusory.

The district court acknowledged SCO’s argument that Novell’s interpretation would allow Novell to destroy “the UNIX-based business that Novell transferred,” but then reasoned that the “faulty premise” of SCO’s argument was “that Novell transferred the UNIX business to SCO.” (A3002-03¶144 (emphasis added).) This line of reasoning reflects a fiction. (See A3122§1.3(a)(i).)

The plain language of the APA transferred the UNIX source code, and all versions and copies of UNIX – not just UnixWare – to SCO. Novell’s retention of royalties does not negate that transfer. (A3160-62.) Amendment No. 2 clearly states that SCO acquired the UNIX and UnixWare technology, and the district court acknowledged this fact. (A2997¶126.) In addition, the SVRX source code that the “UNIX business” comprises, and whose use and distribution the SVRX Licenses govern, is a fundamental and crucial component of UnixWare. The “commercially valuable technology from the prior versions is included in UnixWare, and UnixWare would not operate without its System V components.

(A2624:1784.) The current version of UnixWare supports the newest industry-standard hardware.” (A363-64.) UnixWare is simply another name for the latest release of SVRX. (A363.) The first release of “UnixWare” was interchangeably referred to as an “SVRX” release. (A363.) How SVRX source code is used by third parties directly and critically affects the UnixWare business – “UNIX-based” business.

Under the district court’s interpretation of Section 4.16, as in April Enterprises v. KTTV, 147 Cal. App. 3d 805 (1983), there are contractual provisions that contradict one another, if Novell had unlimited waiver rights under Section 4.16. On the one hand, SCO has acquired and supposedly is free to operate a UnixWare business and protect the technology therein. On the other hand, by the court’s lights, Novell has retained the right to permit the free and unfettered use, by whomever Novell chooses, of the very technology on which the UnixWare business is based. Given that contradiction, application of the implied covenant is appropriate.

As shown, moreover, under its interpretation of Section 4.16 and “SVRX Licenses,” Novell retained the authority to impact even the UnixWare business that the district court conceded that SCO had bought, and retained the authority to

eliminate the restrictions in the license-back that Novell obtained in the TLA.

Such authority renders the amended APA illusory.

2. The District Court's Finding that Novell Acted in Its Economic Self-Interest Does Not Mean It Complied With the Implied Covenant.

The district court “finds that Novell’s actions were motivated to protect its own interests and those of the open source community and were not taken because of influence by IBM or any ill-will toward SCO.” (A3003-04¶146.) That conclusion is legally meaningless and factually erroneous. It is legally irrelevant because the implied covenant is not met simply when a party acts in its own economic interest; as shown below, it must act to further the objectives of the contract it entered. Moreover, Novell’s explanation that it was seeking to avoid having to return royalties to IBM does not withstand scrutiny.

In 1996 IBM secured a buy-out of the royalties it had been paying under its Product Schedule Licenses underlying AIX. (A2668:1948-49.) On the one hand, if SCO were not to prevail on its contract claims against IBM, there would be no arguable effect on IBM’s prior buyout. (A2668-69:1950-51.) On the other hand, if SCO were to prevail, there would be a finding or verdict that IBM has acted in breach of its Software and Sublicensing Agreements and that SCO had the right to terminate those Agreements, and thus IBM would have no basis to demand a

refund. (Cf. A2668-69:1950-51.) Novell cannot identify any legal basis where IBM, if in breach of the license, could nevertheless demand that Novell return to IBM the money IBM had paid for its buy-out. When confronted with this line of analysis on cross examination, Mr. LaSala responded “I don’t know” and ultimately admitted that IBM “would not have come and asked us for the \$10 million.” (A2668:1950.)⁹

Similarly, Novell’s waiver decision cannot be justified on the basis of Novell (or IBM) business interests in the success of the Linux operating system arising years later. “The fundamental purpose of the implied covenant of good faith and fair dealing is that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.” Major v. W. Home Ins. Co., 169 Cal. App. 4th 1197, 1209 (2009) (citations and quotations omitted); Bosetti v. U.S. Life Ins. Co. in City of New York, 175 Cal. App. 4th 1208, 1235 (2009) (same). Accordingly, the covenant “imposes upon each party the obligation to do everything that the contract presupposes they will do to accomplish its purpose,” Bosetti, 175 Cal. App. 4th at 1235, and a party breaches the covenant if it engages “in a conscious and deliberate act, which unfairly frustrates the agreed

⁹ These same points apply with respect to Novell’s purported waiver of SCO’s rights to enforce restrictions in the license agreement with Sequent Computer Systems, which IBM had acquired in the late 1990s, as IBM also was not paying any royalties under the Sequent Schedules.

common purposes and disappoints the reasonable expectations of the other party thereby depriving the party of the benefits of the agreement.” Nieto v. Blue Shield of Cal. Life & Health Ins. Co., 181 Cal. App. 4th 60, 86 (2010) (citations and quotations omitted). That would be a meaningless restriction if a party’s own economic self-interest were sufficient justification for its action.

IV. THE DISTRICT ABUSED ITS DISCRETION IN MAKING CRITICAL EVIDENTIARY RULINGS THAT PREJUDICED SCO.

The reversal of a district court’s evidentiary decision is warranted where the Court “has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.” Bryant v. Farmers Ins. Exch., 432 F.3d 1114, 1122 (10th Cir. 2005). “A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.” Lyons v. Jefferson Bank & Trust, 994 F.2d 716, 727 (10th Cir. 1993) (quotations omitted).

A. The District Court Wrongly Informed the Jury of Prior Judicial Decisions Rendered Against SCO.

After steadfastly rejecting numerous efforts by Novell to inform the jury that it previously had secured a summary judgment (which this Court then reversed) on the ownership of copyrights, the district court changed midway through trial and allowed Novell to inform the jury of the previous rulings.

It was extremely prejudicial to SCO for the jury to find out that the district court had previously dismissed SCO's claim for slander of title as a matter of law, and that the court had dismissed other of SCO's claims as well. Indeed, the basis on which the district court repeatedly refused to have the jury learn of the decision in the first half of trial was that the information would cause SCO undue prejudice. The court had concluded, correctly, that "Plaintiff would be prejudiced if the jury was informed that this Court once entered judgment against it on those very claims that the jury will be asked to decide." (A1094.2.) Inexplicably, the district court allowed this information to be used in cross-examination of SCO's damages expert, while noting that "as a general rule," it was both "unnecessary" and "highly prejudicial." (A2541:1465.)

The admission of such information not only was highly prejudicial but was erroneous. The reversed decisions of a court would, of course, be irrelevant and not made known to the jury charged with deciding those issues. The district court here permitted the jury to be told of the prior decisions on the grounds that they were relevant to Dr. Botosan's "conclusions about damages." (A2550:1498.) They were not. Dr. Botosan, as noted, based her analysis of the damages that SCO had suffered by calculating the revenues and profits that SCO would have made in the "but for" world – that world in which Novell had never claimed to own the

copyrights.¹⁰ In that world, of course, the court’s decision concerning SCO’s claim for slander of title against Novell would not have existed because the slander of title itself would not have occurred. Dr. Botosan expressly told Novell’s counsel – before he disclosed the ruling – that in her “but-for world ... none of those [rulings] would matter.” (A2548:1492.) SCO again objected to the introduction of the reversed rulings, but the objection was overruled. (A2548.)

Novell’s counsel then proceeded to read to the witness from prior district court rulings. He told her that “it is undisputed that the APA did not transfer any copyrights” (A2549:1494); that “there is no dispute that all copyrights were excluded on Schedule 1.1(b)” (referring to the replaced language of the original APA); that “Amendment Number 2 merely amends the schedule of excluded assets and does not constitute a transfer of copyrights on its own”, and that the amendment “is not retroactive to the date of the APA.” Having succeeded in putting before the jury these prejudicial statements, all of which were effectively reversed by this Court’s prior decision, Novell’s counsel again elicited from the witness what she had said before – that these decisions did not matter to her

¹⁰ Both Dr. Botosan and Novell’s expert, Mr. Musika, agreed that a “but-for world” analysis is commonly used and is acceptable for this type of analysis. (A2483:1239-40(Botosan);A2524:1399(Botosan);A2809:2479-80(Musika);A2819:2519(Musika).)

analysis because “nobody would be able to read this document because it wouldn’t exist.” (A2550:1499; see also A2555:1519.)

It is hard to imagine a more contrived basis upon which to secure the introduction of more highly prejudicial information before the jury. The jury was told flatly wrong statements about the ultimate issues they are to decide – all clothed with the imprimatur of a district judge’s decision; in fact, the jury was not even told it was a different district judge who had issued the decisions.

The instruction the jury received did not begin to cure the prejudice. The instruction simply said that the district court’s prior decision had been “reversed,” by a unanimous decision of the Tenth Circuit, and “those issues were to be decided by a jury.” (A2549:1495.) The court’s instruction did not state the basis for the reversal nor informed the jury that this Court had rejected the very statements that Novell’s counsel had quoted.

The district court abused its discretion by permitting Novell to introduce passages from a reversed judicial decision on the very issue of copyright ownership to be decided, and this error requires a new trial.

B. The District Court Improperly Permitted Novell to Rely on Language in the APA That Was Replaced.

SCO apprehended from the start that the jury could be confused if it were presented with the old, replaced language concerning the exclusion of all

copyrights without it being made clear that this language no longer existed in the APA and could be given no legal effect. SCO sought a motion in limine to this effect. The district court wrongly denied SCO's motion in limine, and wrongly denied subsequent objections related to Novell's seeking to confuse the jury with respect to the "exclusion of copyrights" language that had been removed from the APA by Amendment No. 2.

Under this Court's remand opinion, it was not a "permissible choice" for the district court to permit Novell to treat the original language of the APA in isolation. SCO, 578 F.3d at 1210-11. In its prior Order, this Court made clear that the APA and Amendment No. 2 must be construed together as a single instrument. Id. at 1211. Yet the district court allowed Novell to confuse the jury by lines of questioning predicated on the "exclusion of copyright" language that had been removed and replaced by Amendment No. 2. The prejudice to SCO was magnified by rulings that restricted SCO's ability to elicit on its own examinations from certain witnesses that this language had been replaced.

Starting with its opening statement, having secured the denial of SCO's motion in limine, Novell conveyed the misimpression that the original copyright language of the APA was the only relevant language. (See, e.g., A2173-82:56-60,62,65-73,75-67;A2236-38:296-301;A2860-63:2678-91;A2866-67:2703-

04;A2871:2722.) Holding a bound copy of only the original APA, Novell’s counsel contended that having shown the jury only the original language, he had shown them the “black and white letter of the agreement” (A2178:73); he repeatedly referred to Amendment No. 1 without acknowledging Amendment No. 2 (A2175-77:62,65,68-69); he contended that Amendment No. 1 made “no change to exclusion of copyrights,” (A2178:75-76). Although Novell’s counsel ultimately did acknowledge Amendment No. 2, he did not say that it replaced the language in the APA, arguing rather that the amendment itself did not transfer copyright ownership (A2179:78-79) – a straw man that this Court had previously knocked down. SCO, 578 F.3d at 1213. Novell even pointed to the original copyright language in conjunction with the integration clause of the APA – as if the jury could consider only the original language. (A2202-03:168-70.) Novell also declined to use the admitted exhibit comprising the APA and the amendments thereto, insisting instead on using an exhibit that was just the text of the original APA. (See, e.g., A2216:217.)

There can be no reasonable dispute about Novell’s intentions: During colloquy on the line of questioning concerning the integration clause, when the district court warned counsel for Novell that if he continued to pursue his questions about the integration clause, then SCO would be permitted to revisit the issue of

Amendment No. 2, Novell's counsel candidly, and transparently, stated: "Well, I don't want the answer that badly, Your Honor." (A2202-03:168-70.) The district court magnified the error by then precluding SCO from asking questions of two critical witnesses, Frankenberg and Thompson, to correct the misimpression Novell had created. (A2186;A2192;A2215-16;A2238.) The court did so on the basis that these witnesses, not having been involved in the negotiation or drafting of Amendment No. 2, lacked personal knowledge so as to testify concerning the Amendment. But that should not have precluded the witnesses from testifying that the old language had subsequently been replaced – a fact on which they could testify even if they were not involved in negotiating or drafting Amendment No. 2 and understandably could not testify to what was intended by the language selected. As an example, in cross-examining SCO's first witness, former Novell CEO Robert Frankenberg, Novell asked him to consider the old, replaced language "as you sit here today and look at the agreement." (A2192:130.) When SCO objected and asked if it could ask Frankenberg about the amendment to the original language, the court ruled that SCO could not, because he was not at the company at the time of Amendment No. 2. (A2193:132-33.)

These were not harmless errors. The "erroneous admission of evidence is harmless only if other competent evidence is sufficiently strong to permit the

conclusion that the improper evidence had no effect on the decision.” Dodge v. Cotter Corp., 328 F.3d 1212, 1229 (10th Cir. 2003) (quotations, citation and brackets omitted). In the crucial first part of the trial, in the first several days of evidence, Novell created the misimpression that the language excluding copyrights was still operative. The Court’s ruling created the impression that in all subsequent references to Amendment No. 2, SCO was scrambling to somehow make Amendment No. 2 relevant to the transaction in the face of the original exclusionary language – when, in fact, that language no longer existed and was not the language that the jury would be called upon to interpret.

C. The District Court Erred By Admitting Hearsay That SCO Was “The Most Hated Company in Tech.”

Over SCO’s objections, Novell’s expert witness was allowed to show the jury a slide of a Business Week magazine article describing SCO as the “Most Hated Company in Tech.” (A2815-16.) This article was hearsay. In addition, in describing SCO’s reputation, the article was purporting to describe what even further third parties – the participants in the industry – said and thought about SCO. The article’s title thus contained a second level of hearsay.

An expert witness is allowed to consider certain forms of hearsay (if reliable and of a type generally used by members of the profession), but that does not constitute a license to publish the hearsay before the jury. Estate of Parsons v. The

Palestinian Authority, Civil Action No. 07-1847 (JR), 2010 WL 2169617, at *3 (D.D.C. May 28, 2010); Malletier v. Dooney & Bourke, Inc., 525 F. Supp. 2d 558, 666 (S.D.N.Y. 2007); 30 C. Wright, et al., Fed. Prac. & Proc. Evid. § 6337 (2010). In other words, the ability of Novell's expert to rely on the Business Week article is not the issue; the problem is his serving as a conduit through which that hearsay is presented to the jury. To the extent Mr. Musika, Novell's expert, was seeking to criticize Dr. Botosan for not considering certain "real world" articles regarding SCO's reputation in connection with the effect of Novell's slander, it was unnecessary – and in any event, improper – to present the jury with the highly prejudicial hearsay article.¹¹ See, e.g., Malletier, 525 F. Supp. 2d at 666 (An expert is "precluded from disclosing the hearsay to the jury unless its probative value in illustrating the basis of the expert's opinion substantially outweighs the prejudicial effect of having the jury hear about the otherwise inadmissible hearsay.")

¹¹ In addition, the article did not tend to make it more likely that Dr. Botosan had failed to account adequately for perceptions of SCO in the market. The article, which was published after SCO filed its lawsuit against Novell – and which specifically referenced the "competing claims" of copyright ownership that SCO had made and quoted commentary regarding the substance of SCO's arguments against those claims – may not have published at all in the "but-for world" of Dr. Botosan's damages analysis.

CONCLUSION

SCO respectfully requests, for the foregoing reasons, that the Court reverse the district court's denial of SCO's motion for judgment as a matter of law on SCO's claim for slander of title, or, in the alternative, grant a new trial; and that the Court reverse the district court's findings of fact and conclusions of law as set forth herein.

ORAL ARGUMENT STATEMENT

SCO respectfully requests oral argument on the grounds that, given the size of the underlying record and the number and complexity of the issues involved in this appeal, such argument would help to frame the principal issues and arguments for the Panel after the appeal has been fully briefed.

Respectfully submitted on this 9th day of September, 2010.

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**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)**

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements
and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,822 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 14-point Times New Roman.

Dated: September 9, 2010

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I, Edward Normand, hereby certify that on this 9th day of September, 2010, a true and correct copy of the foregoing **BRIEF OF APPELLANT, THE SCO GROUP, INC.**, was filed with the court and served via ECF and Federal Express to the following recipients:

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The undersigned certifies with respect to this filing that no privacy redactions were necessary. This **BRIEF FOR APPELLANT, THE SCO GROUP, INC.**, submitted in digital form is an exact copy of the written document filed with the Clerk. The digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program (using Symantec Antivirus which is updated weekly) and, according to the program, is free of viruses.

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