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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP, INC., a Delaware corporation, Plaintiff, vs. NOVELL, INC., a Delaware corporation, Defendant.	Case No. 2:04CV00139 **NOVELL'S MOTION IN LIMINE NO. 12: TO EXCLUDE CERTAIN TESTIMONY FROM WILLIAM BRODERICK FOR LACK OF PERSONAL KNOWLEDGE AND VIOLATION OF PAROL EVIDENCE RULE** Judge Ted Stewart
AND RELATED COUNTERCLAIMS.	

Pursuant to Federal Rules of Evidence 602 and 701, defendant Novell, Inc. respectfully moves the Court in limine to exclude the testimony of lay witness William Broderick regarding the intended meaning of the copyright ownership provisions of the Asset Purchase Agreement ("APA") and Amendment 2 of the APA. As explained below, Mr. Broderick lacks personal knowledge to speak on the copyright ownership provisions and is, therefore, barred by Rule 602 from offering testimony on that subject. Additionally, to the extent that such testimony interprets and contradicts the clear language of the APA, it constitutes inadmissible parol evidence.

I. MR. BRODERICK LACKS PERSONAL KNOWLEDGE TO SPEAK ON THE COPYRIGHT OWNERSHIP PROVISIONS OF THE APA AND AMENDMENT 2

Under Rule 602, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602; *Zokari v. Gates*, 561 F.3d 1076, 1089 (10th Cir. 2009) (affirming district court ruling excluding testimony of witness who lacked personal knowledge of matters relevant to trial). Under the personal knowledge standard, testimony is inadmissible if "the witness could not have actually perceived or observed that which he testifies to." *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1200 (10th Cir. 2006) (citations omitted) ("'statements of mere belief' in an affidavit must be disregarded").

Moreover, a lay witness may not testify as to matters which call for a legal conclusion, such as the interpretation and effect of a contract or an amendment thereto. *See, e.g., Evangelista v. Inlandboatmen's Union of the Pac.*, 777 F.2d 1390, 1398 n.3 (9th Cir. 1985) (opinion of union chairman as to correct construction of collective bargaining agreement was inadmissible because it was a legal conclusion).

Mr. Broderick lacks personal knowledge to testify as a lay witness about the intended meaning of the copyright ownership provisions of the APA and whether the APA transferred the UNIX and UnixWare copyrights to Santa Cruz. Around the time the APA was negotiated, Mr.

Broderick worked for Novell as a contracts manager. (Ex. 12A (Broderick Dep.) at 23:18-24:24, 33:8-11.) Mr. Broderick plainly admits that he had no involvement in negotiating the APA. (*Id.* at 158:5-7 ("Q: And did you have any involvement at all in negotiating the APA? A: No, I did not."); *id.* at 152:14-153:11 ("… I didn't write it. I don't know if there are any kind of legal nuances that you're trying to get at.").) In fact, Mr. Broderick could not recall there ever being a specific discussion of copyrights during the APA transition, and instead relies on an *assumption* he made from attending company-wide meetings. (*Id.* at 48:6- 51:8 ("There was no specific discussion of copyrights . . . they were not specifically addressed in any of our discussions, because it was just assumed totally illogical for copyrights not to go with the source code if you're selling all title, right and interest in the source code.").)

Mr. Broderick offered inadmissible speculation throughout his deposition that the intended meaning of the APA was to transfer the UNIX and UnixWare copyrights. (*E.g., id.* at 57:19-58:24; 138:2-15 ("it's strongly inferred"); 159:7-15 (Novell "knew that the copyrights went with the technology when they sold the UNIX business to Santa Cruz.").) Because he has no percipient knowledge, Mr. Broderick theorizes, "why . . . did they sign a technology license agreement . . . there would be no reason for them to take a license for the product." (*Id.* at 108:6-110:14.) Mr. Broderick offered inadmissible opinions about what the APA means since he did not draft or negotiate it. (*Id.* at 112:25-113:23 ("I don't see the word copyright on schedule 1.1A, but as I stated earlier on the assets being sold . . . To me, this says copyrights went. That's my opinion."); *id.* at 122:25-123:7 ("and it's my opinion that copyrights went.").)

Additionally, Mr. Broderick lacks personal knowledge of the intent and meaning of Amendment 2 and plainly admits that he had no involvement with it. (*Id.* at 144:7-16 ("I don't know for a fact. I was not in on the negotiation – or the writing of Amendment 2."); 158:8-10 ("Q: Any involvement at all in negotiating any of the amendments to the APA? A: No, I did not.").) Nevertheless, he speculates on its intended meaning and purpose. (*E.g., id.* at 141:10 –

144:16 (stating that it transferred the copyrights and the reason it was drafted was "because some people were reading the [APA] in an improper way" and that "[a]pparently, there was some people [sic] that were misinterpreting parts of the [APA], the excluded assets form.").) Accordingly, any testimony by Mr. Broderick about the meaning of Amendment 2 is inadmissible opinion testimony.

II. PAROL EVIDENCE IS INADMISSIBLE WITH REGARD TO THE CLEAR LANGUAGE OF THE APA

The parol evidence rule is a substantive rule of law that functions to exclude evidence contradicting the terms of an integrated agreement. *EPA Real Estate P'ship v. Kang*, 12 Cal. App. 4th 171, 175-176 (1992). The Tenth Circuit in this case explained that extrinsic evidence "can only be used to expose or resolve a latent ambiguity in the language of the agreement itself," and that the language of the APA itself – without regard to Amendment 2 – "unambiguously excludes the transfer of copyrights" because Schedule 1.1(b) "explains straightforwardly that 'all copyrights' were excluded from the transaction." *SCO Group, Inc. v. Novell, Inc.*, 578 F.3d 1201, 1210 (10th Cir. 2009). While the appellate court ruled that "extrinsic evidence of the business negotiators' intent concerning the transaction" is admissible (*id*. at 1211), testimony interpreting and contradicting the specific unambiguous terms of the APA should be excluded as improper parol evidence. Any such testimony from Mr. Broderick interpreting the APA's unambiguous copyright exclusion provisions – as distinct from testimony concerning the general business intent behind the APA – should be excluded. (*E.g.*, Ex.12A at 92:18-95:1; 103:15-104:15 (stating that "all copyrights" in Schedule 1.1(b) means only Netware and Tuxedo copyrights); 112:25-113:23 ("this says copyrights went.").)

III. CONCLUSION

For the reasons stated herein, Novell moves to exclude the testimony of Mr. Broderick regarding the intended meaning of the APA and Amendment 2.

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Respectfully submitted,

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