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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. 16: TO EXCLUDE CERTAIN TESTIMONY FROM R. DUFF THOMPSON 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 R. Duff Thompson 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. Thompson 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. THOMPSON 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's 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. Thompson 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. Mr. Thompson was Senior Vice President of

Business Development and Strategic Relations for Novell at the time the APA was drafted, and admits that he relied on others to draft the APA:

> Q. By the time of the asset purchase agreement you are no longer in a legal function?
>
> A. No. That's correct.
>
> Q. And so this -- and so in the -- when you were involved in the asset purchase agreement negotiations, who were you relying on for the detailed drafting of the agreement?
>
> A. Our counsel, Wilson Sonsini.
>
> Q. Tor Braham in particular?
>
> A. Tor and his team . . . he had people within his firm who were specialists in these items that were probably doing the bulk of the actual drafting.

(Ex. 16A (Thompson Dep.) at 30:22-31:12; Ex. 16B (Thompson Decl.) at ¶ 2.). Mr. Thompson's role in reviewing the drafters' work was to "assign his team to work with them." (Ex. 16A at 31:15-32:7). Although he stated that he "saw drafts" of specific provisions that had issues, he did not review drafts of the overall document. (*Id.*) Mr. Thompson does not recall "any specific discussion around copyrights" or any "discussion with SCO about the excluded asset schedule" during the negotiation of the APA. (*Id*. at 24:25-25:5, 86:1-20.) Mr. Thompson's direct report, Mr. Ty Mattingly, agreed that Mr. Thompson was "checked out" during the drafting of the APA and was not involved in the details of the APA transaction. (Ex. 16C (Mattingly Dep.) at 16:18-21, 70:17-71:23 (Mr. Thompson was "not in the office that often.").)

Although Mr. Thompson could not recall a single conversation he had about the APA's intention to transfer copyrights, he offered inadmissible opinion testimony throughout his deposition that the copyrights did transfer under the agreement. Mr. Thompson testified that the intent of the APA was to transfer the entire UNIX business, including copyrights (Ex. 16A at 132:6-133:3), and states that "if we [Novell] intended not to transfer the copyrights, we would have been very careful to say . . . you get all the business except the copyrights." (*Id*.).

Additionally, Mr. Thompson lacks personal knowledge of the intent and meaning of Amendment 2. He testified that he was "not given any information by either party, by either side as to how it was being negotiated" and said, "I have no recollection that there was any specific input that I was asked to give nor that I actually gave that resulted in the creation of Amendment 2." (*Id*. at 21:8-22:24 (he had excused himself from the discussions).) Thus, any testimony by Mr. Thompson 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. Thompson interpreting the APA's unambiguous copyright exclusion provisions – as distinct from testimony concerning the general business intent behind the APA – should be excluded.

III. CONCLUSION

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

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Respectfully submitted,

By: /s/ Sterling A. Brennan
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