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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. 17: TO EXCLUDE CERTAIN TESTIMONY FROM TY MATTINGLY 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 Ty Mattingly 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. Mattingly 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. MATTINGLY 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. Mattingly lacks personal knowledge to testify as a lay witness about the meaning of the APA and whether the APA transferred the UNIX and UnixWare copyrights to Santa Cruz. At the time of the APA negotiations, Mr. Mattingly was working for Novell and reporting to Mr. R.

Duff Thompson. (Ex. 17A (Mattingly Dep.) at 10:1-11:19; 16:18-21.) Mr. Mattingly did not draft the APA, did not work with the attorneys in crafting specific provisions, was not involved in the details of the legal document, and characterized his participation in the negotiation discussions of the APA as "superficial." (*Id.* at 66:11-69:22, 61:18-62:8 ("I participated in some of those discussions superficially").) Mr. Mattingly explained that his involvement was limited to only the high level business strategy that took place at an earlier phase in the negotiations. (*Id.* at 66:11-69:22.) He testified that the "real detail back and forth" and the "detailed final contracting" regarding the legal provisions took place during the last two to three weeks of negotiations and that he was involved "[v]ery superficially" and did not "wordsmith[]" the drafts. (*Id*. at 68:12-69:18.)

Mr. Mattingly admitted he has no recollection of specifically considering the copyright ownership issue, but nonetheless opined that the copyrights transferred under the APA. (*Compare id*. at 29:3-14 ("You know, I, personally do not recall sitting there saying, yes. The Unix copyrights are part of this lock-stock-and-barrel Unix business that we are selling.") *with id.* at 96:20-97:4 ("[SCO] bought the UnixWare business, including its copyrights. They bought all of the Unix business, including the copyrights.").) Notwithstanding his lack of firsthand knowledge of the intended meaning of the APA (as distinct from his knowledge of the high level business strategy preceding the APA), Mr. Mattingly speculated that under the APA, Novell did not retain the UNIX copyrights, but that they would have retained other copyrights. (*Id*. at 51:9-52:11 ("Not the Unix copyrights, but Novell . . . would not have transferred any of their copyrights around NetWare and ZenWorks and GroupWise or any of the bundled products that Novell sold with UnixWare").) Mr. Mattingly lacks personal knowledge to testify as to the intended meaning of the APA's copyright ownership provisions.

Additionally, Mr. Mattingly lacks personal knowledge of the intent and meaning of Amendment 2 because he did not write, negotiate, or even read Amendment 2. (*Id*. at 85:1-

86:2.) He testified that "it's important to understand that [his] involvement was up front in divesting the business. . . when it comes to this [APA] and follow-on amendments, that would have been the folks that were more involved from the corporate development side." (*Id.* at 38:19-39:2.) Accordingly, any testimony by Mr. Mattingly 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. Mattingly 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. Mattingly regarding the intended meaning of the copyright ownership provisions of the APA and Amendment 2.

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Respectfully submitted,

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