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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. 18: TO EXCLUDE CERTAIN  
TESTIMONY FROM DOUGLAS  
MICHELS FOR LACK OF PERSONAL  
KNOWLEDGE AND VIOLATION OF  
PAROL EVIDENCE RULE**

Judge Ted Stewart

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AND RELATED COUNTERCLAIMS.

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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 Douglas Michels 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. Michels 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. MICHELS 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. Michels 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. At the time the APA was drafted, Mr. Michels

worked for Santa Cruz as its Chief Technology Officer (“CTO”). (Ex. 18A (Michels Dep.) at 7:25-8:5.) Although he states that he supervised the people negotiating the APA transaction, he did not draft any language of the Asset Purchase Agreement, did not review drafts of the APA, and does not even vaguely recall participating in any debates regarding the drafting of the APA. (*Id.* at 12:14-13:7, 11:2-13.) Indeed, Mr. Michels testified that he did not recall any discussions by anyone at either Novell or Santa Cruz regarding whether UNIX copyrights were being transferred as part of the APA. (*Id.* at 50:20-52:5.) When asked about the basis for his belief that the copyrights transferred under the APA, Mr. Michels responded: “I didn’t read it then, and I haven’t read it recently. I’ve never [read] it through. I’m not a lawyer, and I have no comment about the Asset Purchase Agreement.” (*Id.* at 54:20-55:7 (emphasis added).)

Notwithstanding his lack of firsthand knowledge of Santa Cruz’s drafting intent regarding the APA and his claim to have “no comment,” Mr. Michels offered inadmissible speculation throughout his deposition as to the intended meaning of the APA. For instance, Mr. Michels testified that the term “all copyrights” under APA Schedule 1.1(b) “makes no sense in the context of the agreement” and he “assume[s] it was an error.” (*Id.* at 76:25-77:4.) Further Mr. Michels opined on the copyrights issue and testified: “[W]e bought the entire business. That included the copyrights.” (*Id.* at 76:25-77:23.) With regard to how the copyrights were transferred, Mr. Michels testified that “[h]ow they transferred is a legal issue, and I don’t care.” (*Id.* at 79:6-17.)

Additionally, Mr. Michels lacks personal knowledge concerning the intent and meaning of Amendment 2. Mr. Michels testified that he had no involvement with that amendment:

Q. Is the same true of Amendment Number 2? Were you – do you have any recollections of being involved – specific recollections of being involved in the negotiations of Amendment Number 2?

A. I don’t even know what Amendment Number 2 is.

(*Id.* at 19:25-20:4.) Further, Mr. Michels testified that he does not recall any discussion or negotiation surrounding the language in paragraph A of Amendment 2 at the time of its execution. (*Id.* at 103:3-17.) Accordingly, any testimony by Mr. Michels 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. Michels 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. Michels regarding the intended meaning of the copyright ownership provisions of the APA and Amendment 2.

DATED: February 8, 2010

Respectfully submitted,

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