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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.

AND RELATED COUNTERCLAIMS.

Case No. 2:04CV00139

**NOVELL'S MOTION IN LIMINE
NO. 13: TO EXCLUDE CERTAIN
TESTIMONY FROM LAWRENCE
BOUFFARD FOR LACK OF
PERSONAL KNOWLEDGE AND
VIOLATION OF PAROL EVIDENCE
RULE**

Judge Ted Stewart

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 Lawrence Bouffard 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. Bouffard 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. BOUFFARD 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. Bouffard 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. Bouffard worked in sales for Novell at the

time of the APA transaction and does not recall being “in any way involved” in the development of the APA. (Ex. 13A (Bouffard Dep.) at 11:10-15, 18:2-19:1, 161:12-23.) He was not involved in any of the negotiations. (*Id.* at 22:19-23:13, 117:21-118:13.) In fact, Mr. Bouffard said he “only saw the APA after it was completely signed and done.” (*Id.* at 26:9-18.) Notably, Mr. Bouffard admitted that he lacks personal knowledge to testify about the intent of the APA’s provisions:

Q. As you sit here today, with your recollection refreshed from what I have shown you so far, would you say that Santa Cruz bought the UNIX business lock, stock and barrel or that Santa Cruz bought certain specified assets associated with the Unix business?

THE WITNESS: It’s not for me to say. I was not involved in the negotiation of the APA. I don’t really have that knowledge.

(*Id.* at 84:7-23 (objection omitted) (also stating that “the only persons that can decide or clarify what [a certain provision] was supposed to do are the parties that negotiated it”).)

Although Mr. Bouffard never considered or discussed the issue of copyrights (*id.* at 123:9-124:8, 107:10-108:5), he offered inadmissible speculation that the APA “would not have made sense” if Novell had retained the copyrights. (*Id.* 123:2-126:6, 128:17-129:8.) He testified that “the intellectual property for UNIX had been transferred to SCO.” (*Id.* at 141:22-142:17 (however, “not having done Amendment 2 or the APA, I can’t say that that’s specifically what those people meant.”).) Accordingly, Mr. Bouffard lacks personal knowledge to testify as to the meaning of the APA’s copyright ownership provisions and such testimony should be excluded.

As to Amendment 2, Mr. Bouffard lacks personal knowledge of its intended meaning because he did not negotiate Amendment 2 nor was he involved in any discussions of it. (*Id.* at 137:22-138:1, 159:17-161:23 (he did not read the copyright language of Amendment 2 and does not have a view on it), 26:19-27:2.) Mr. Bouffard stated that “having not been a part of” Amendment 2, or interpreting it in 1996 when it was drafted, “[he]’d have to leave it to [the

parties]” to interpret it. (*Id.* at 193:8-13.) Accordingly, any testimony by Mr. Bouffard 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. Bouffard 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. Bouffard 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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