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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. 14: TO EXCLUDE CERTAIN TESTIMONY FROM JEAN ACHESON 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 Jean Acheson regarding the intended meaning of the copyright ownership provisions of the Asset Purchase Agreement ("APA") and Amendment 2 of the APA. As explained below, Ms. Acheson 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. MS. ACHESON 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).

Ms. Acheson 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 of the APA, Ms. Acheson was

a revenue manager for Novell and then very soon thereafter, was hired by Santa Cruz. (Ex. 14A (Acheson Dep.) at 18:14-19:12.) Ms. Acheson was not involved in the drafting or negotiating of the APA and has no firsthand knowledge of its intended meaning:

> Q. Did you have any role in negotiating the Asset Purchase Agreement between Novell and Santa Cruz?
>
> A. No. Not directly on the first part. That was held way, you know, closely from any of the employees. The transition team may have shaped some of what went into the later addendums as we worked on trying to understand the APA.

(*Id*. at 20:23-21:13 (the negotiations were kept "highly confidential"), 66:20-22 (same).).

Despite her lack of personal knowledge, Ms. Acheson offered inadmissible hearsay about the meaning of the APA, based on statements made by others at a company-wide meeting and various smaller meetings in the months following the transaction. (*E.g.*, *id.* at 298:21-299:22 ("a lot of various things were discussed" and that she "[doesn't] remember any particular person" making certain statements), 63:15-65:13, 267:2-268:16.) From the company-wide meeting where specifics were not discussed (*id.* at 61:25-62:15), Ms. Acheson asserts that "it was just understood" that Novell had transferred its intellectual property to SCO. (*Id*. at 274:2-14, 270:5-20 ("Novell had sold the entire UNIX product line and its assets, its intellectual property"), 270:22-271:2 (agreeing that Novell retained the right to SVRX binary royalties).)

Additionally, Ms. Acheson lacks personal knowledge of the intent and meaning of Amendment 2. When asked about her involvement with either of the amendments to the APA, Ms. Acheson did not say she had any involvement in Amendment 2 and only testified about her limited involvement in Amendment 1. (*Id.* at 21:14-23:15 (the transition team she was a part of "probably would have requested clarifications" that "may have influenced some of the clarifications" in Amendment 1, but she "didn't sit and say, 'Oh, we need to change this or we

need to change that.'").) As Ms. Acheson lacks firsthand knowledge of the intent and meaning of Amendment 2, her testimony on these topics constitutes 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 Ms. Acheson 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, Ms. Acheson's testimony regarding the intended meaning of the copyright ownership provisions of the APA and Amendment 2 should be excluded.

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Respectfully submitted,

By: /s/ Sterling A. Brennan
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