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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. 15: TO EXCLUDE CERTAIN TESTIMONY FROM ROBERT FRANKENBERG 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 Robert Frankenberg regarding the meaning of the copyright ownership provisions of the Asset Purchase Agreement ("APA") and Amendment 2 of the APA. As explained below, Mr. Frankenberg 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. FRANKENBERG 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. Frankenberg 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. As CEO of Novell at the time the APA was

drafted, Mr. Frankenberg testified that he did not draft the agreement, but instead relied on the negotiation team and lawyers to implement the intellectual property provisions of the deals. (Ex. 15A (Frankenberg Dep.) at 7:4-12, 73:10-18). Mr. Frankenberg testified that he did not review all of the provisions when he signed the APA, and that he does not specifically recall looking at the schedules of included and excluded assets. (*Id.* at 113:10-16, 68:9-21.) Mr. Frankenberg signed the APA on the recommendation of Novell's negotiating team, much like he has in the "[a]t least hundreds, if not more" transactions that he has concluded as a high-ranking executive in computer companies. (*Id.* at 68:9-69:6.) Thus, while Mr. Frankenberg has personal knowledge of the instructions he initially gave to the negotiating team, he does not have personal knowledge of the APA negotiations themselves or the drafters' intended meaning of the language in the APA.

Nothwithstanding his lack of firsthand knowledge of the meaning of the APA (as distinct from his knowledge of the high level business strategy behind the APA), Mr. Frankenberg offered inadmissible speculation throughout his deposition as to the intended meaning of the copyright provisions of the APA. For instance, he agreed that in retrospect, the APA could have been drafted more clearly (*id.* at 156:9-17 ("[a]t the present time, now that you've had a chance to see a variety of issues that have arisen . . .")) and that it does not accurately reflect his personal intent with regard to which copyrights were retained or transferred. (*Id.* at 83:13-84:8.)[1] Mr. Frankenberg also speculated and provided inadmissible legal conclusions as to how the APA's copyright provisions might contradict the license back provisions in the APA and the Technology License Agreement. (*See, e.g., id.* at 66:8-22, 105:11-106:5.)

Mr. Frankenberg also lacks personal knowledge of the intent and meaning of Amendment 2, because he was not employed by Novell or SCO at the time it was negotiated.

[1] Notably, Mr. Frankenberg also testified that he believed the APA was well-drafted when he signed it and a highly accurate reflection of the parties' intent at the time. (*Id.* at 71:13-72:17, 68:18-21.)

Mr. Frankenberg left his employment at Novell in August of 1996, and testified that he has no information from the actual negotiators of Amendment 2 about their intent. (*Id.* at 86:4-16.) In fact, Mr. Frankenberg had not read Amendment 2 until he was preparing for his deposition in this litigation, taken in 2007. (*Id.*)

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 No. 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. Frankenberg 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. Frankenberg 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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