

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

NOVELL, INC., Plaintiff, vs. TIMPANOGOS RESEARCH GROUP, INC., et al., Defendants.	CASE NO. 970400339 DATE: January 6, 1999 ORDER JUDGE STEVEN L. HANSEN
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Before the Court is an affidavit of prejudice against Judge Anthony W. Schofield, filed by Defendant Jeff V. Merkey as well as responsive pleadings. Pursuant to Rule 63, Utah Rules of Civil Procedure, Mr. Merkey's Affidavit was forwarded to the Presiding Judge, Judge Steven L. Hansen for ruling on the legal sufficiency of the affidavit. Under Rule 63(b), the complaining party must submit an affidavit stating the "facts and reasons for the belief that such bias or prejudice exists, and [the affidavit] shall be filed as soon as practicable after the case has been assigned or such bias or prejudice is known" and the judge to which the matter is passed must then "pass upon the legal sufficiency of the affidavit." Having read and considered Mr. Merkey's Affidavit as well as responsive pleadings, this Court finds that the Affidavit is untimely and that the Affidavit fails to set forth any legally sufficient showing of bias or prejudice.

Rule 63(b) of the Utah Rules of Civil Procedure requires parties to file an affidavit of

prejudice "as soon as practicable after the case has been assigned or such prejudice is known." See Madsen v. Prudential Fed. Sav. & Loan, 767 P.2d 538, 543 (Utah 1988) (finding affidavit of prejudice untimely where defendant filed affidavit 39 days after court's ruling). Here, Mr. Merkey filed his affidavit November 16, 1998, almost eleven months after Judge Schofield issued the January 30, 1998 ruling upon which Mr. Merkey's allegations of prejudice are based, and approximately eleven weeks after Judge Schofield issued an order dismissing the case.¹ Novell argues that Mr. Merkey's affidavit is untimely as Mr. Merkey was aware of all of the allegedly disqualifying facts long before the affidavit was filed. See Response to Affidavit of Prejudice at 2. Mr. Merkey responds to the untimeliness argument, explaining that the affidavit was delayed due to issues involving the Utah Judicial Commission and in order to conduct an investigation and put the affidavit together in a "credible fashion that shows beyond doubt that prejudice existed in the proceedings." See Reply to Response to the Affidavit of Prejudice at 3.

While the Court recognizes that some time is necessary in order to prepare an affidavit, it sees no reason why Mr. Merkey should have taken eleven months to prepare the affidavit. Each of Mr. Merkey's allegations concern either statements made during hearings or findings

¹ Judge Schofield issued a ruling granting Novell, Inc. a preliminary injunction on January 30, 1998. Mr. Merkey's allegations of prejudice concern this January ruling and the court proceedings which preceded the ruling. Judge Schofield issued an order dismissing the case on August 31, 1998. However, the Court retains jurisdiction to enforce the injunctions and other orders in the case.

of fact and rulings issued in this matter. All of the facts alleged were known to Mr. Merkey in or before January of 1998. Judge Schofield has retained jurisdiction in this case for the eleven months between the January ruling and the November affidavit. As such, Mr. Merkey did not object to Judge Schofield presiding over this case for a period of approximately eleven months during which additional orders and rulings were made and during which he was aware of the facts leading to his affidavit. This Court can think of no situation in which waiting eleven months to file an affidavit after knowing of bias would satisfy the "as soon as is practicable" requirement of Rule 63(b). Therefore, this Court finds that Mr. Merkey's affidavit of prejudice is untimely under Rule 63(b).

The Court now turns to the claims of bias or prejudice made in Mr. Merkey's affidavit. Canon 3 of the Code of Judicial Conduct supplies the standard for disqualification based on bias or prejudice. Disqualification is proper when a judge's impartiality might reasonably be questioned where "the judge has a personal bias or prejudice concerning a party or a party's lawyer, a strong personal bias involving an issue in a case, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . ." None of Mr. Merkey's allegations rise to the level required for disqualification based on bias or prejudice. Mr. Merkey has alleged no facts which show that Judge Schofield has any type of personal interest in the outcome of his case, any bias or prejudice toward him or any other party or attorney acting in the case, or that he has any personal knowledge of any disputed evidentiary fact. Further, Mr. Merkey has

presented no facts which suggest that Judge Schofield lacked the ability to reach an impartial resolution to this case. Rather, Mr. Merkey's Affidavit expresses disagreement with findings of fact and rulings made by Judge Schofield acting in his proper official capacity.

As such, I find that Mr. Merkey's Affidavit of Prejudice is untimely and that in substance it fails to support any allegation of bias or prejudice with legal sufficiency.

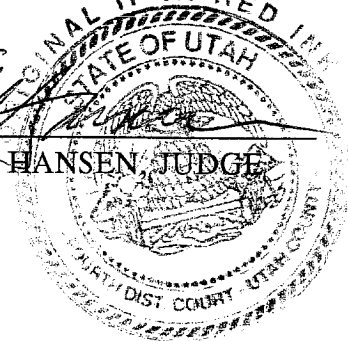
Therefore, Judge Anthony W. Schofield shall remain the judge of record in this matter.

DATED this 7 day of Jan, 1999,

BY THE COURT



STEVEN L. HANSEN, JUDGE



CERTIFICATE OF MAILING

I hereby certify that on the 7 day of January, 1999, a true and correct copy of the foregoing ORDER was mailed, postage prepaid, to each of the following:

Elisabeth R. Blattner
Attorney for Novell, Inc.
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, Utah 84145-0898

Jeff V. Merkey
Attorney Pro Se
895 W. Center Street
Orem, Utah 84058

W. Andrew McCullough
McCullough, Jones & Ivins
853 W. Center Street
Orem, Utah 84058

Steve Stewart
Utah Judicial Commission
645 South 200 East #104
Salt Lake City, Utah 84111

