

MORRISON & FOERSTER LLP
Michael A. Jacobs (pro hac vice)
Kenneth W. Brakebill (pro hac vice)
425 Market Street
San Francisco, CA 94105-2482
Telephone: (415) 268-7000
Facsimile: (415) 268-7522

ANDERSON & KARRENBERG
Thomas R. Karrenberg, #3726
John P. Mullen, #4097
Heather M. Sneddon, #9520
700 Chase Tower
50 West Broadway
Salt Lake City, UT 84101
Telephone: (801) 534-1700
Facsimile: (801) 364-7697

Attorneys for Novell, Inc.

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

THE SCO GROUP, INC., a Delaware
corporation,

Plaintiff and Counterclaim-
Defendant,

vs.

NOVELL, INC., a Delaware corporation,

Defendant and Counterclaim-
Plaintiff.

**DECLARATION OF KENNETH W.
BRAKEBILL IN SUPPORT OF
NOVELL'S EXPEDITED MOTION TO
COMPEL PRODUCTION OF
DEPOSITION TRANSCRIPTS AND
EXHIBITS FROM *SCO V. IBM***

Case No. 2:04-CV-00139

Judge Dale A. Kimball

I, Kenneth W. Brakebill, declare as follows:

1. I am an attorney duly licensed to practice law in the State of California and a partner in the law firm of Morrison & Foerster LLP, counsel of record for Defendant and Counterclaim-Plaintiff Novell, Inc. ("Novell") in this action. I was admitted to practice before this Court *pro hac vice* by this Court's Order of June 7, 2005.

2. I submit this declaration in support of Novell's Expedited Motion to Compel Production of Deposition Transcripts and Exhibits from *SCO v. IBM*. The statements made herein are based on my personal knowledge.

3. Attached hereto as Exhibit A is a true and correct copy of an October 2005 email exchange between myself and Ted Normand, counsel for SCO, in which Mr. Normand agrees to give Novell access to depositions in *The SCO Group, Inc. v. International Business Machines Corp.*, Case No. 03-CV-0294 ("*SCO v. IBM*").

4. Attached hereto as Exhibit B is a true and correct copy of my February 7 and 8, 2006, email exchange with David Marriott, counsel for IBM, on which SCO's counsel (Mr. Normand) was copied. Mr. Marriott confirms IBM's permission for Novell to have access to (among other things) the depositions and deposition exhibits from *SCO v. IBM*.

5. Attached hereto as Exhibit C is a true and correct copy of the Court's December 6, 2005 Scheduling Order. On page 2, the Court provides as follows:

The parties recognize that efficient resolution of this case will be aided by permitting Novell access to certain materials in the *SCO v. IBM* case. Pending the execution of an appropriate protective order, **SCO authorizes Novell to have attorneys eyes only access to those confidential materials in the *SCO v. IBM* case, including document productions, depositions, under-seal briefings, and discovery responses, that reasonably relate to a claim or defense in this litigation.**

6. Attached hereto as Exhibit D is a true and correct copy of Novell's First Set of Requests for Production, served on SCO by hand on December 6, 2005. Pages 3-4 of the Requests state:

REQUEST FOR PRODUCTION NO. 1:

Please produce the following documents from the IBM Litigation:

...

- (c) The depositions of all SCO witnesses deposed on subjects concerning claims and defenses at issue in this case;
- (d) The depositions of all former Novell employees deposed on subjects concerning claims and defenses at issue in this case;
- (e) All exhibits or other documents used in the depositions in (c) and (d) above;

7. SCO has not served any formal response or objections to Novell's First Set of Requests for Production.

8. I have made numerous attempts over the last year to get production of the IBM transcripts from SCO. To date, SCO has produced only ten transcripts from five individuals. Based on our review of IBM's recent summary judgment briefing, it appears that SCO has not made a complete production of even these five individuals' testimony. For example, IBM's briefing cites to testimony from William Broderick and Chris Sontag that SCO has not produced. It is my understanding that at least eighty-two witnesses have been deposed in the *SCO v. IBM* litigation, generating approximately 130 transcripts.

9. Novell resumed meet and confer with SCO in October 2006 and, over the course of several weeks, attempted to resolve this dispute. Attached hereto as Exhibit E is an email I sent to Mr. Normand on October 11, 2005 forwarding him the correspondence reflecting SCO's October 2005 agreement to give Novell access to the *SCO v. IBM* depositions and IBM's

subsequent authorization. I asked him to overnight me a CD of transcripts, with the appropriate confidentiality marking, and explained that Novell was prepared to move to compel because SCO had produced just a few depositions from the *IBM* case.

10. Attached hereto as Exhibit F is the culmination of the parties' meet and confer efforts, a true and correct copy of a November 2006 email exchange between myself and Mr. Normand, in which SCO indicates it is only willing to "begin" "rolling" production "as soon as practicable" of "those transcripts . . . or portions of transcripts" that "reasonably relate" to the *SCO v. Novell* case.

11. Attached hereto as Exhibit G is a true and correct copy of relevant excerpts from SCO's Responses and Objections to Defendant's First Set of Interrogatories and Second Set of Requests for Production.

12. Attached hereto as Exhibit H is a true and correct copy of relevant excerpts from Novell's Second Set of Requests for Production, served on SCO by hand on December 14, 2005.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed on this 7th day of November, 2006 in San Francisco, California.



Kenneth W. Brakebill

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of November, 2006, I caused a true and correct copy of the foregoing **DECLARATION OF KENNETH W. BRAKEBILL IN SUPPORT OF NOVELL'S EXPEDITED MOTION TO COMPEL PRODUCTION OF DEPOSITION TRANSCRIPTS AND EXHIBITS FROM *SCO V. IBM*** to be served to the following:

Via CM/ECF:

Brent O. Hatch
Mark F. James
HATCH JAMES & DODGE, P.C.
10 West Broadway, Suite 400
Salt Lake City, Utah 84101

Via e-mail:

Stuart H. Singer
BOIES, SCHILLER & FLEXNER LLP
401 East Las Olas Blvd., Suite 1200
Fort Lauderdale, Florida 33301

Edward J. Normand
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504

/s/ Heather M. Sneddon