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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 MOTION FOR PARTIAL SUMMARY JUDGMENT ON ITS FOURTH CLAIM FOR RELIEF** *[REDACTED pursuant to the August 2, 2006 Stipulated Protective Order]* Case No. 2:04CV00139 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 at 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. I submit this declaration in support of Novell's Motion for Partial Summary Judgment on its Fourth Claim for Relief. The statements made herein are based on my personal knowledge.

2. As discussed below, some of the exhibits attached hereto include information that may be subject to the August 2, 2006 Stipulated Protective Order. Accordingly, the complete version of this declaration, which includes full and unredacted copies of all exhibits, is being filed under seal. A public version of this declaration, which deletes or redacts confidential documents and information, is also being submitted.

3. Attached as **Exhibit 1** is a true and correct copy of the Asset Purchase Agreement ("APA"), dated September 19, 1995, which SCO attached as part of Exhibit A to its Complaint, filed January 20, 2004. For ease in referencing this document as a citation, this exhibit has been Bates stamped with new page numbers 001 through 097.

4. Attached as **Exhibit 2** is a true and correct copy of the Operating Agreement, stated as effective September 19, 1995, as produced by Novell in this litigation at BATES Nos. NOV10141 to NOV10162. For ease in referencing this document as a citation, this exhibit has been Bates stamped with new page numbers 001 through 022.

5. Attached as **Exhibit 3** is a true and correct copy of Amendment No. 1 to the APA, dated December 6, 1995, which SCO attached as part of Exhibit A to its Complaint, filed January 20, 2004.

6. Attached as **Exhibit 4** is a true and correct copy of Amendment No. 2 to the APA, dated October 16, 1996, which SCO attached as part of Exhibit A to its Complaint, filed January 20, 2004.

7. Attached as **Exhibit 5** is a true and correct copy of the IBM Software Agreement (SOFT-00015), dated February 1, 1985, as produced by SCO in this litigation at BATES Nos. SCON0019909 to SCON0019928. This exhibit includes Supplements 1-3 to the IBM Software Agreement, as well as the Schedule for UNIX System V, Release 2.0 Version 1 and UNIX System V, Release 2.0 Version 1, International Edition. For ease in referencing this document as a citation, this exhibit has been Bates stamped with new page numbers 001 through 020.

8. Attached as **Exhibit 6** is a true and correct copy of the IBM Sublicensing Agreement (SUB-00015A), dated February 1, 1985, as produced by SCO in this litigation at BATES Nos. SCON0019930 to SCON0019938. For ease in referencing this document as a citation, this exhibit has been Bates stamped with new page numbers 001 through 009.

9. Attached as **Exhibit 7** is a true and correct copy of the IBM Substitution Agreement, dated February 1, 1985, as produced by SCO in this litigation at BATES No. SCON0019940. For ease in referencing this document as a citation, this exhibit has been Bates stamped with a new page number 001.

10. Attached as **Exhibit 8** is a true and correct copy of the IBM Side Letter, dated February 1, 1985, as produced by SCO in this litigation at BATES Nos. SCON0019942 to SCON0019952. For ease in referencing this document as a citation, this exhibit has been Bates stamped with new page numbers 001 through 011.

11. Attached as **Exhibit 9** is a true and correct copy of Supplement No. 36 to the IBM Software Agreement, dated April 21, 1986, as produced by SCO in this litigation at BATES Nos.

SCO1153002 to SCO1153007. This exhibit is being filed under seal pursuant to the August 2, 2006 Stipulated Protective Order. The public version of this declaration does not include this document. For ease in referencing this document as a citation, this exhibit has been Bates stamped with new page numbers 001 through 006.

12. Attached as **Exhibit 10** is a true and correct copy of Supplement No. 47 to the IBM Software Agreement, dated February 15, 1988, as produced by SCO in this litigation at BATES Nos. SCO1234295 to SCO1234314. This exhibit is being filed under seal pursuant to the August 2, 2006 Stipulated Protective Order. The public version of this declaration does not include this document. For ease in referencing this document as a citation, this exhibit has been Bates stamped with new page numbers 001 through 019.

13. Attached as **Exhibit 11** is a true and correct copy of Supplement No. 140 to the IBM Software Agreement, dated December 6, 1988, as produced by SCO in this litigation at BATES Nos. SCO1152813 to SCO1152845. This exhibit is being filed under seal pursuant to the August 2, 2006 Stipulated Protective Order. The public version of this declaration does not include this document. For ease in referencing this document as a citation, this exhibit has been Bates stamped with new page numbers 001 through 033.

14. Attached as **Exhibit 12** is a true and correct copy of Supplement No. 170 to the IBM Software Agreement, dated January 25, 1989, as produced by SCO in this litigation at BATES Nos. SCON0000672 to SCON0000715. For ease in referencing this document as a citation, this exhibit has been Bates stamped with new page numbers 001 through 044.

15. Attached as **Exhibit 13** is a true and correct copy of Amendment No. X to the APA, executed by SCO, Novell, and IBM on October 16 and 17, 1996, as produced by SCO in this litigation at BATES Nos. SCON0000657 to SCON0000665. For ease in referencing this

document as a citation, this exhibit has been Bates stamped with new page numbers 001 through 009.

16. Attached as **Exhibit 14** is a true and correct copy of the Revenue to Cash and Cash & Other Offsets Reports for November, 1996, as produced by Novell in this litigation at BATES Nos. NOV9958 to NOV9960.

17. Attached as **Exhibit 15** is a true and correct copy of the Sequent Software Agreement (SOFT-000321), dated April 18, 1985, as produced by SCO in this litigation at BATES Nos. SCON0019954 to SCON0019959. For ease in referencing this document as a citation, this exhibit has been Bates stamped with new page numbers 001 through 006.

18. Attached as **Exhibit 16** is a true and correct copy of Supplement No. 2 to the Sequent Software Agreement, dated January 28, 1986, as produced by SCO in this litigation at BATES Nos. SCO0984259 to SCO0984265. This exhibit is being filed under seal pursuant to the August 2, 2006 Stipulated Protective Order. The public version of this declaration does not include this document. For ease in referencing this document as a citation, this exhibit has been Bates stamped with new page numbers 001 through 007.

19. Attached as **Exhibit 17** is a true and correct copy of the Sequent Sublicensing Agreement (SUB-000321A), dated January 28, 1986, as produced by SCO in this litigation at BATES Nos. SCON0019961 to SCON0019969. For ease in referencing this document as a citation, this exhibit has been Bates stamped with new page numbers 001 through 009.

20. Attached as **Exhibit 18** is a true and correct copy of Supplement No. 4 to the Sequent Software Agreement, dated February 13, 1986, as produced by SCO in this litigation at BATES Nos. SCO0984268 to SCO0984272. This exhibit is being filed under seal pursuant to the August 2, 2006 Stipulated Protective Order. The public version of this declaration does not

include this document. For ease in referencing this document as a citation, this exhibit has been Bates stamped with new page numbers 001 through 005.

21. Attached as **Exhibit 19** is a true and correct copy of Supplement No. 6 to the Sequent Software Agreement, dated August 20, 1986, as produced by SCO in this litigation at BATES Nos. SCO1142022 to SCO1142030. This exhibit is being filed under seal pursuant to the August 2, 2006 Stipulated Protective Order. The public version of this declaration does not include this document. For ease in referencing this document as a citation, this exhibit has been Bates stamped with new page numbers 001 through 009.

22. Attached as **Exhibit 20** is a true and correct copy of Supplement No. 9 to the Sequent Software Agreement, dated May 28, 1987, as produced by SCO in this litigation at BATES Nos. SCO1142031 to SCO1142034. This exhibit is being filed under seal pursuant to the August 2, 2006 Stipulated Protective Order. The public version of this declaration does not include this document. For ease in referencing this document as a citation, this exhibit has been Bates stamped with new page numbers 001 through 004.

23. Attached as **Exhibit 21** is a true and correct copy of Supplement No. 15 to the Sequent Software Agreement, dated August 31, 1988, as produced by SCO in this litigation at BATES Nos. SCO1033461 to SCO1033465. This exhibit is being filed under seal pursuant to the August 2, 2006 Stipulated Protective Order. The public version of this declaration does not include this document. For ease in referencing this document as a citation, this exhibit has been Bates stamped with new page numbers 001 through 005.

24. Attached as **Exhibit 22** is a true and correct copy of Supplement No. 31 to the Sequent Software Agreement, dated November 9, 1989, as produced by SCO in this litigation at BATES Nos. SCO0988502 to SCO0988515. This exhibit is being filed under seal pursuant to

the August 2, 2006 Stipulated Protective Order. The public version of this declaration does not include this document. For ease in referencing this document as a citation, this exhibit has been Bates stamped with new page numbers 001 through 014.

25. Attached as **Exhibit 23** is a true and correct copy of the SCO Annual Report, Form 10-K, for the year ended 2003, as downloaded from http://www.shareholder.com/common/edgar/1102542/1047469-04-2142/04-00.pdf

26. Attached as **Exhibit 24** is a true and correct copy of the letter from SCO to Novell dated May 12, 2003, as produced by SCO in this litigation at BATES Nos. SCON0024112 to SCON0024113.

27. Attached as **Exhibit 25** is a true and correct copy of the letter from SCO to IBM, dated March 6, 2003, as produced by SCO in this litigation at BATES Nos. SCON0000106 to SCON0000108.

28. Attached as **Exhibit 26** is a true and correct copy of the letter from SCO to Sequent, dated May 29, 2003, as produced by SCO in this litigation at BATES Nos. SCON0011987 to SCON0011990.

29. Attached as **Exhibit 27** is a true and correct copy of the letter from Novell to SCO, dated June 9, 2003, as produced by SCO in this litigation at BATES No. SCON0024125.

30. Attached as **Exhibit 28** is a true and correct copy of the letter from SCO to Novell, dated June 11, 2003, as downloaded from http://www.novell.com/licensing/indemnity/pdf/6_11_03_sco-n.pdf.

31. Attached as **Exhibit 29** is a true and correct copy of pages 1, 203-04 and 268 from the *SCO v. IBM* Jack L. Messman deposition transcript, taken April 14, 2006.

32. Attached as **Exhibit 30** is a true and correct copy of the first letter from Novell to SCO, dated June 12, 2003, as downloaded from http://www.novell.com/licensing/indemnity/pdf/6_12_03_n-sco.pdf.

33. Attached as **Exhibit 31** is a true and correct copy of the second letter from Novell to SCO, dated June 12, 2003, as downloaded from http://www.novell.com/licensing/indemnity/pdf/6_12_03_n-scoandibm.pdf.

34. Attached as **Exhibit 32** is a true and correct copy of the SCO's June 16, 2003 Press Release, as produced by SCO in this litigation at BATES Nos. SCO1556043 to SCO1556044.

35. Attached as **Exhibit 33** is a true and correct copy of the letter from Novell to SCO, dated October 7, 2003, as produced by SCO in this litigation at BATES Nos. SCON0024157 to SCON0024159.

36. Attached as **Exhibit 34** is a true and correct copy of the letter from SCO to Novell, dated October 9, 2003, as downloaded from http://www.novell.com/licensing/indemnity/pdf/10_9_03_sco-n.pdf.

37. Attached as **Exhibit 35** is a true and correct copy of the letter from Novell to SCO, dated October 10, 2003, as produced by SCO in this litigation at BATES Nos. SCON0024167 to SCON0024168.

38. Attached as **Exhibit 36** is a true and correct copy of the letter from SCO to Novell, dated October 13, 2003, as downloaded from http://www.novell.com/licensing/indemnity/pdf/10_13_03_sco-n.pdf.

39. Attached as **Exhibit 37** is a true and correct copy of the letter from SCO to Sequent, dated August 11, 2003, as produced by SCO in this litigation at BATES No. SCON0011986.

40. Attached as **Exhibit 38** is a true and correct copy of letter from IBM to SCO, dated August 14, 2003, as produced by SCO in this litigation at BATES Nos. SCO1328534 to SCO1328535.

41. Attached as **Exhibit 39** is a true and correct copy of the letter from Novell to SCO, dated February 6, 2004, as downloaded from http://www.novell.com/licensing/indemnity/pdf/2_6_04_n-sco.pdf.

42. Attached as **Exhibit 40** is a true and correct copy of the letter from SCO's attorney, Brent Hatch, to Novell's litigation counsel, Tom Karrenberg, dated February 11, 2004. Our firm also received a copy of this letter as Novell's litigation counsel in this matter.

43. Attached as **Exhibit 41** is a true and correct copy of the letter from Novell to SCO, dated February 11, 2004, as downloaded from http://www.novell.com/licensing/indemnity/pdf/2_11_04_n-sco.pdf.

44. Attached as **Exhibit 42** is a true and correct copy of the Caldera Annual Report, Form 10-K, for the year ended 2002, as downloaded from http://www.shareholder.com/common/edgar/1102542/1047469-03-3091/03-00.pdf.

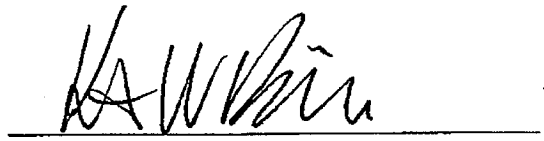
45. Attached as **Exhibit 43** is a true and correct copy of the Revenue to Cash, Misdirected Cash, and Cash & Other Offsets Reports for January, 1997, as produced by Novell in this litigation at BATES Nos. NOV7592 to NOV7595.

46. Attached as **Exhibit 44** is a true and correct copy of the General Release of Claims Agreement between Novell and Santa Cruz, as produced by SCO in this litigation at BATES Nos. SCO1579207 to SCO1579211. This exhibit is being filed under seal pursuant to the August 2, 2006 Stipulated Protective Order. The public version of this declaration does not include this document.

47. Attached as **Exhibit 45** is a true and correct copy of pages 1, 100-05, 202-03 and 211 from the *SCO v. IBM* Edward S. Chatlos deposition transcript, taken February 15, 2006.

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

Executed on this 1st day of December, 2006 in San Francisco, California.



Kenneth W. Brakebill

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of December, 2006, I caused a true and correct copy of the **DECLARATION OF KENNETH W. BRAKEBILL IN SUPPORT OF NOVELL'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON ITS FOURTH CLAIM FOR RELIEF** *[REDACTED pursuant to the August 2, 2006 Stipulated Protective Order]* to be served to the following:

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