WORKMAN | NYDEGGER A PROFESSIONAL CORPORATION
Sterling A. Brennan (Utah State Bar No. 10060; E-mail: sbrennan@wnlaw.com)
David R. Wright (Utah State Bar No. 5164: E-mail: dwright@wnlaw.com)
Kirk R. Harris (Utah State Bar No. 10221; E-mail: kharris@wnlaw.com)
Cara J. Baldwin (Utah State Bar No. 11863; E-mail: cbaldwin@wnlaw.com)
1000 Eagle Gate Tower
60 E. South Temple
Salt Lake City, Utah 84111
Telephone: (801) 533-9800
Facsimile: (801) 328-1707

MORRISON & FOERSTER LLP
Michael A. Jacobs (Admitted *Pro Hac Vice;* E-mail: mjacobs@mofo.com)
Eric M. Acker (Admitted *Pro Hac Vice;* E-mail: eacker@mofo.com)
Grant L. Kim (Admitted *Pro Hac Vice*; E-Mail: gkim@mofo.com)
425 Market Street
San Francisco, California 94105-2482
Telephone: (415) 268-7000
Facsimile: (415) 268-7522

Attorneys for Defendant and Counterclaim-Plaintiff Novell, Inc.

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. 19: TO EXCLUDE CERTAIN TESTIMONY FROM EDWARD CHATLOS, BURT LEVINE, AND KIM MADSEN FOR LACK OF PERSONAL KNOWLEDGE** 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 witnesses Edward Chatlos, Burt Levine, and Kim Madsen regarding the intended meaning of the copyright ownership provisions of Amendment 2 of the APA. As explained below, Messrs. Chatlos and Levine, and Ms. Madsen lack personal knowledge to speak on the provisions of Amendment 2 and are, therefore, barred by Rule 602 from offering testimony on that subject.

I. CHATLOS, LEVINE AND MADSEN LACK PERSONAL KNOWLEDGE TO SPEAK ABOUT THE INTENT AND MEANING OF 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) (citation omitted) (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).

Mr. Chatlos lacks personal knowledge to testify as a lay witness about the intent and meaning of Amendment 2. Mr. Chatlos left his employment at Novell in January of 1996 – ten months before Amendment 2 was negotiated. (Ex. 19A (Chatlos Dep.) at 29:24-30:2; Ex. 19B (Chatlos IBM Dep.) at 134: 10-16). He admits, as he must, that he played no role in negotiating

or drafting the amendment. (Ex. 19A at 41:9-18 (stating "I wasn't party of that," and that he left Novell before it was negotiated), 42:15-18; Ex. 19B at 49:13-21 (he was not involved in the negotiation of Amendment 2).) Accordingly, any testimony by Mr. Chatlos about the meaning of Amendment 2 is improper opinion testimony based on speculation and hearsay. (*E.g.*, Ex. 19A at 42:19-43:11.)

Mr. Levine also lacks personal knowledge to testify as a lay witness about the intent and meaning of Amendment 2. He testified that he played no role whatsoever in negotiating or drafting Amendment 2. (Ex. 19C (Levine Dep.) at 190:11-22).) Consequently, any testimony by Mr. Levine about the meaning of Amendment 2 lacks foundation and is improper opinion testimony. (*E.g.*, *id.* at 161:22-162:10 (testifying that Amendment 2 confirms that the copyrights were intended to be transferred); 187:10-190:22.)

Ms. Madsen lacks foundation to testify as a lay witness about the intent and meaning of Amendment 2. At her 2007 deposition, Ms. Madsen testified that she "cannot recall any specific conversations regarding amendment 2" and testified that she could not recall any conversations with Novell or Santa Cruz relating to Amendment 2:

> Q. To clarify, you don't have any specific recollections contemporaneous with amendment number 2 of conversations with representatives of Novell about amendment 2; is that right?
>
> THE WITNESS: That's right.
>
> Q. And so as you sit here today you can't tell me anything specific that Novell may have told you or anyone else at Santa Cruz regarding amendment number 2; is that right?
>
> A. No, I don't recall anything specific.

(Ex. 19D (Madsen Dep.) at 202:9-203:16 (objections omitted).) Although Ms. Madsen could not recall any conversations concerning whether or not Amendment 2 transferred the UNIX and UnixWare copyrights to Santa Cruz, she offered inadmissible speculation about the intent of Amendment 2. (*E.g.*, *id*. at 204:4-206:25.) Testimony by Ms. Madsen about the meaning of

Amendment 2 lacks foundation and is improper opinion testimony.

II. CONCLUSION

For the reasons stated herein, Novell moves to exclude the testimony of Messrs. Chatlos and Levine and Ms. Madsen regarding the intent and meaning of Amendment 2 of the APA.

DATED: February 8, 2010

Respectfully submitted,

By: /s/ Sterling A. Brennan
WORKMAN NYDEGGER

MORRISON & FOERSTER LLP

Attorneys for Defendant and
Counterclaim-Plaintiff Novell, Inc.