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November 30, 2005

**VIA FACSIMILE AND U.S. MAIL**

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

**Re: SCO v. IBM; IBM v. SCO**

Dear Ted:

This letter follows our telephone conversation of November 14, 2005 regarding the deposition of Christopher Sontag, the November 16, 2005 30(b)(6) deposition of Mr. Sontag, and our conversation which took place at the conclusion of Mr. Sontag's deposition. I write to document our conversations and to respond to requests made or issues which have arisen at the recent depositions of Erik Hughes, Jeff Hunsaker and Mr. Sontag.

**Telephone Conversation of November 14, 2005**

We discussed Mr. Sontag's then upcoming deposition. You stated that Mr. Sontag would not testify on November 16, 2005 with respect either Topics 2 and 11 of the September 2, 2005 notice, or Topics 6, 7, 11, 12, 15, 20, 23 and 24 of the March 19, 2004 notice. It is SCO's intent to produce witnesses to address these topics with a combination of Mr. Sontag, Ryan Tibbitts and others. With respect to Topic 6, it is anticipated that SCO will produce an engineer and perhaps another witness. With respect to Mr. Tibbitts, it is anticipated that he will address Topics 15 and 20 of the March 19, 2004 notice.

You indicated that SCO would produce witnesses for these topics in the next few weeks. I explained that extending the depositions over the course of the next few weeks was unacceptable. It is essential that the depositions on these topics be scheduled as soon as possible.

You explained that SCO has given further consideration to Todd Shaughnessy's letter to you of August 26, 2005 (the "Shaughnessy Letter"), and that SCO is willing to produce documents that are responsive to some or all of the topics which are listed in the Shaughnessy Letter. In lieu of producing documents for a second time, SCO may choose to identify

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previously produced and responsive documents by bates number. I stated that while IBM welcomes production of documents which will make future depositions more efficient and productive, it does not waive its right to require testimony from witnesses on any or all of the identified topics. SCO will produce the documents as soon as they become available or are identified.

This summary reflects my recollection and understanding of the highlights of our conversation. If you disagree, please let me know.

IBM believes that SCO's last-minute shuffling of topics and witnesses is unjustified in light of the fact that the topics and witnesses have been in place for weeks, as well as the fact that SCO's response to the Shaughnessy Letter could have come shortly after it was written or certainly in response to follow-up inquiries by IBM regarding any planned response from SCO. IBM will not seek relief from the court in the expectation that SCO's document production will be reasonable, responsive and prompt.

#### **Erik Hughes Deposition**

During the November 1, 2005 30(b)(6) deposition of Mr. Hughes, it became apparent to IBM that Mr. Hughes was not prepared to testify with reasonable specificity on most of the topics for which he was designated. The following descriptions will provide some examples.

- Topic 5 (March 19, 2004 notice)

As an initial matter, Mr. Hughes acknowledged that SCO's answer to IBM's Interrogatory No. 11 is incomplete and fails to include, at least, the following products:

SCO Update  
Volution Messaging Service  
Volution Manager  
Volution Authentication Server  
SCO Office 2.0  
SCO Office 4.1 for Unix  
SCObiz  
Several other "subproducts and minor things" (Hughes Dep., 11/1/05, p. 21)

In light of this admission, IBM requests that SCO supplement its answer to Interrogatory No.11 to include "all products ever marketed, sold or distributed" by

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SCO or its predecessors in interest. IBM further seeks and is entitled to, at least, a description of the terms on which each product was marketed, sold or distributed. IBM seeks this information for each discrete product. Mr. Hughes testified that SCO does not calculate revenues received, cost or profit for each release of a particular product; rather, SCO calculates such figures for the entire line. For instance, SCO apparently calculates such figures for all of UnixWare 7, but not separately for UnixWare 7 release 7.1.2, 7.1.3 and 7.1.4. (Hughes Dep., 11/1/05, p. 49) IBM is skeptical about the accuracy of Mr. Hughes' testimony on this subject. It seems reasonable to expect that any sophisticated business like SCO would calculate cost, revenues and profit for each and every product. Even if Mr. Hughes is correct, SCO should still be able to use existing data to calculate this information. If, in fact, SCO calculates profits by product line only, IBM requests such information. Product line profitability should include revenue, cost of goods sold, gross margin and all other relevant costs to arrive a product line net profit margin (e.g., selling costs, administrative costs, overhead, commissions, etc.).

- Topic 13 (March 19, 2004 notice)

Mr. Hughes was unable to identify with specificity all of the SCO educational materials and was unable to identify all persons and companies who have purchased SCO educational materials.

- Topics 14(a) and 14(b) (March 19, 2004 notice)

Mr. Hughes was unable to provide the requested information for SCO's Linux products. SCO maintains a computer log of the IP addresses of the customers who obtain products through the website. (Hughes Dep., 11/1/05, p. 96) The computer log should be produced. IBM's additional expectations are the same as those described above for Topic 5.

- Topic 18 (March 19, 2004 notice)

Mr. Hughes was unable to provide specific information on this topic.

#### **Jeffrey Hunsaker Deposition**

Mr. Hunsaker testified that he had reviewed financial and other information dating from 1996 and pertaining to SCO customers, revenues and product sales. Mr Hunsaker referred to a spreadsheet or spreadsheets that he had reviewed. These documents should be produced. It

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became readily apparent that IBM was seeking reasonably detailed and specific information with respect to the Subject Companies. Mr. Hunsaker was not prepared to provide this type of information. Mark James requested that IBM send a letter to specify the areas in which IBM believes Mr. Hunsaker's knowledge and testimony was insufficient. The following descriptions are intended to satisfy the request made by Mr. James.

- Topic 10 (September 2, 2005 notice)

Mr. Hunsaker was unable to identify when SCO's business relationships with the Subject Companies began and, for those relationships which have ended, when the end occurred.

Mr. Hunsaker was unable to discuss the dates, subject matter, prices and other details of the contracts, agreements and purchase orders which SCO entered into with the Subject Companies. Mr. Hunsaker apparently did not even speak with William Broderick, the person whom Mr. Hunsaker identified as the "contract specialist" to obtain relevant and responsive information.

Mr. Hunsaker could not, in most instances, identify the SCO sales people and other representatives who would have had the most contact with the Subject Companies.

Mr. Hunsaker had not attempted to obtain copies of relevant contracts and other documents and could not identify the content or current location of the contracts and documents.

Mr. Hunsaker did not, despite conceding that members of the sales team and finance department would be most knowledgeable about responsive information and documents for the Subject Companies, speak with Paul Hurford, Janet Sullivan, Sean Cutler and Kerry Wallach. Mr. Hunsaker identified these persons as having had involvement on behalf of SCO with the Subject Companies.

- Topic 13 (September 2, 2005 notice)

Mr. Hunsaker provided only general information regarding SCO's competitors and products. He was unable to testify about specific dates when many of the SCO products were first and last distributed, which other products the SCO product competed against, the market share achieved by the SCO product, or revenues earned by each SCO product.

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**Christopher Sontag Deposition**

- Topic 8 (March 19, 2005 notice)

Mr. Sontag was prepared to testify regarding the complete list of SCOSource licensees. For those license agreements that have been previously produced to IBM, SCO should identify each such agreement by bates number. All agreements, whether in traditional document form or in "website" form, should be produced.

Mr. Sontag was unable to explain the method of calculation or reasons for the revenues received by SCO for the licenses which were issued to Sun Microsystems and Microsoft.

SCO should produce documents which include the SCOSource charter, all license agreements and a written explanation of how the fees which were charged for all licenses were calculated.

- Topic 10 (March 19, 2005 notice)

Mr. Sontag testified that he had reviewed what he believed to be a complete set of the transaction documents for the purchase by Caldera. SCO should produce a complete set of the transaction documents, including but not limited to the initial agreement dated August 1, 2000, the final agreement dated May 7, 2001, the three intervening amendments and all schedules, exhibits, attachments, assignments and supporting documents. To the extent that some of these documents have been previously produced to IBM, SCO should identify all such documents by bates number.

Mr. Sontag was unable to testify about any due diligence that was performed by Caldera prior to or as part of the transaction. He was unable to testify about any attempt by Caldera at any time to place a value on any of the assets that it purchased from the Santa Cruz Operation. SCO should produce documents which record or contain any aspect of due diligence, appraisal or valuation of assets by Caldera at or near the time of the purchase, as well as documents which, for any portion of the years 2001 through 2005, record or contain any appraisal, valuation or statement of value of the assets. For the purpose of this production, "assets" shall include, without limitation, all code, software and other items listed on the "Intellectual Property Assignment". (Sontag Dep., 11/16/05, Exhibit 624)

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- Topic 14(c) (March 19, 2004 notice)

SCO should produce documents which include the following: (1) the specific date when it suspended the distribution of Linux products; (2) a list of then existing customers to whom SCO believed it was obligated to continue to supply Linux products; (3) a list of products, including dates of distribution, which were distributed to then existing customers after the suspension date through the present; (4) a list of all Linux products which were available for purchase on SCO's FTP website after the suspension date; and (5) a list of all products, dates of purchase, identity of purchasers (including IP address) and sales revenues for all purchases which occurred after the suspension date.

At the conclusion of my questions on Topics 8, 10, 14(c) and 16 of the March 19, 2004 notice, I reserved the right to further examine Mr. Sontag on these topics if documents produced by SCO on these or other topics provide a basis for additional questions. You stated your understanding of my position without conceding or agreeing to its validity.

After Mr. Sontag's deposition had ended, I inquired about SCO's plans for producing documents and witnesses. You indicated that SCO intends to begin a rolling production of documents in the near future. You anticipated that this production might be significantly complete by Thanksgiving.

We tentatively scheduled Mr. Sontag to return on December 7, 2005 to testify. We will need to confirm a date for Mr. Sontag's deposition, and we will need to confirm the topics on which he will testify. Finally, Ryan Tibbitts will testify on December 15, 2005 and will be offered on Topics 15 and 20 of the March 19, 2004, in addition to previously identified topics.

IBM believes that prompt and responsive document production by SCO will facilitate the discovery process and will contribute significantly to the timely completion of upcoming depositions. IBM has recently received documents from SCO which are designated as having been produced from Jean Acheson, Mike Olson and Tia Hejny. These documents add relatively little information which pertains to the 30(b)(6) topics. Does SCO intend to produce additional documents? If so, when?

Two weeks have passed since the deposition of Mr. Sontag, and SCO has failed to identify a witness to testify on Topic 6 (Linux Kernel Personality) of the March 19, 2004 notice. Furthermore, the shifting of topics among witnesses and the delay in completing the depositions has resulted in significant prejudice to IBM. SCO has prevented IBM from obtaining

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information and testimony to which it is entitled. SCO's continuing failure to cooperate in the discovery process is unacceptable.

We look forward to discussing these matters with you at the earliest opportunity.

Very truly yours,

Snell & Wilmer



Curtis J. Drake

CJD:rdw

cc: David Marriott  
Peter Ligh  
Todd Shaughnessy  
Amy Sorenson