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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF UTAH**

THE SCO GROUP, INC.,

Plaintiff/Counterclaim-Defendant,

v.

INTERNATIONAL BUSINESS MACHINES  
CORPORATION,

Defendant/Counterclaim-Plaintiff.

**DECLARATION OF DAVID McCRABB**

Civil No. 2:03CV-0294 DAK

Honorable Dale A. Kimball

Magistrate Judge Brooke C. Wells

I, David McCrabb, declare as follows:

1. This declaration is submitted in connection with the lawsuit brought by The SCO Group, Inc. ("SCO") against IBM, titled The SCO Group, Inc. v. International Business Machines Corporation, Civil No. 2:03CV-0294 DAK (D. Utah 2003). I make this declaration based upon personal knowledge.

2. From 1995 through 2001, I was employed by the Santa Cruz Operation, Inc. ("Santa Cruz") in various executive management positions. I was President of Santa Cruz's Server Software Division when that division was sold to Caldera International, Inc. ("Caldera") in May 2001. Following the acquisition, I became President and Chief Operating Officer ("COO") of Caldera. I left Caldera in October 2001 to become Chief Executive Officer of NewMonics, Inc.

**Career at Santa Cruz**

3. I joined Santa Cruz in 1995 as Vice President of Corporate Marketing, then soon after became Vice President of Marketing and Channel Sales, where I directed the company's branding, awareness, and channel architecture strategies. A "channel" is essentially a route of distribution for products where, for example, a Santa Cruz product would be sold to a computer hardware manufacturer, loaded onto the manufacturer's hardware and then sold to the consumer.

4. I later became Senior Vice President of Worldwide Sales and Field Operations, where I led a unified worldwide sales organization, responsible for channel, OEM (original equipment manufacturer) and strategic sales.

5. I ultimately became President of the Server Software Division in 2000, where I was responsible for Santa Cruz's UNIX and Linux products and support services. In that capacity I became familiar with software licenses because I was the executive in charge of all negotiations with OEMs and other major licensees.

#### **Santa Cruz's Purchase of UNIX Assets from Novell**

6. In December 1995, soon after I had joined the company, Santa Cruz acquired certain UNIX assets from Novell for approximately \$53,000,000. The assets included the UnixWare product line, the rights to the UNIX System V code and certain existing System V licenses.

7. I believe that Santa Cruz overpaid for the UNIX assets it acquired from Novell. While UnixWare was in some ways a more reliable operating system, it was also more difficult to install than Santa Cruz's own product, OpenServer. In addition, Santa Cruz did not acquire a large customer base from Novell, and also did not dramatically increase the size of its channel, gaining only a few additional OEMs and independent software vendors ("ISVs") in the transaction.

#### **Santa Cruz's Rights with Respect to Code Developed by Its Licensees**

8. As the President of Santa Cruz's Server Software Division, I understood and believed that the UNIX System V licenses that Santa Cruz acquired from Novell entitled Santa Cruz to control certain rights regarding its licensees' use of the System V code. I did not understand or interpret the System V licenses to allow Santa Cruz to control or limit the code, modifications and derivative works, including any methods or concepts therein, which were developed by its licensees. I understood and believed that the licenses permitted Santa Cruz to

prohibit the disclosure of System V code, but did not permit the company to limit or prohibit the use or disclosure of the licensees' own code. My reading of the language of the licenses led me to conclude that System V licensees were free to do as they wished with their own code, modifications and derivative works, so long as the code, modifications and derivative works did not contain System V code. Santa Cruz told licensees that it interpreted the license agreements in this manner. In fact, I can recall personally expressing this viewpoint in license negotiations that I conducted on Santa Cruz's behalf with Lucent Technologies.

9. Prior to Santa Cruz's acquisition of the UNIX assets from Novell, Santa Cruz was itself a System V licensee and distributed its OpenServer product under that license agreement. During that time, Santa Cruz developed source code, methods, and concepts for its OpenServer product and considered that code and those methods and concepts to be Santa Cruz's intellectual property. This "value add" was an essential portion of the operating system, and Santa Cruz believed that it had the right to control all portions of OpenServer that it had developed itself. Santa Cruz did not believe that Novell (or any of Novell's predecessors in ownership to UNIX System V) had the right to control the code, methods, and concepts developed by Santa Cruz that were part of OpenServer.

10. During the time that I was President of Santa Cruz's Server Software Division, I believed that Santa Cruz's System V licensees were free to do as they wished with their own code, modifications, derivative works, methods, and concepts, so long as they did not disclose System V code.

11. During my years in executive management positions in the software industry, I have become familiar with how software licenses work and how companies and licensees

interpret their respective rights under licensing agreements. I would be surprised if any established software company takes a public position that agrees with what I understand to be SCO's interpretation of its rights with respect to source code, modifications, derivative works, methods, and concepts developed by its licensees. If a software company were to take a position consistent with SCO's interpretation, I believe that licensees would be extremely reluctant to agree to such restrictive terms and would likely decline to enter into such licensing agreements. Licensees would be very hesitant to enter into such agreements because they would never realize any value from their own work.

#### **IBM's System V License Buyout**

12. In 1996, Santa Cruz, Novell, and IBM entered into Amendment No. X which, in exchange for IBM's one-time payment of \$10,125,000, gave IBM the "irrevocable, fully-paid-up, perpetual right to exercise all of its rights under [the IBM Software and Sublicensing Agreements] beginning January 1, 1996 at no additional royalty fee."

13. I understood this language from the agreement to mean that Novell and Santa Cruz no longer had any termination right with respect to IBM's System V license, though Novell and Santa Cruz retained the right to seek to enjoin or otherwise prohibit conduct that violated their rights.

#### **Project Monterey**

14. In the Summer of 2000, I became the Santa Cruz executive who was responsible for Santa Cruz's involvement in Project Monterey. For several reasons, I believed that the decision to participate in Project Monterey was a bad business decision for Santa Cruz. I believed it was a bad business decision because Santa Cruz received no money or additional

license revenue in the deal and IBM, rather than Santa Cruz, would lead the development efforts. I believed that Santa Cruz should have taken the lead in development for several reasons, chief among them that IBM already had a 64-bit operating system and would likely have little incentive to move quickly to create a competing product within that market. Nonetheless, IBM did move forward with development on the project and was making progress towards delivering a product.

15. In the Fall of 2000, during the time that Caldera was conducting due diligence for the transaction in which it would acquire Santa Cruz's Server Software and Professional Services divisions, Caldera specifically asked me about Project Monterey. I shared with Caldera my belief that the Project Monterey contract was a bad agreement for Santa Cruz. I also told Caldera that, because there was a change of control provision clearly in the contract, IBM would have the option to withdraw from the Project Monterey agreement after the Caldera transaction. In addition, I expressed my opinion that it was unlikely that the 64-bit UNIX on Intel chip would actually be delivered and that Project Monterey would probably not produce a product within five years.

16. The Joint Development Agreement ("JDA") entered into by Santa Cruz and IBM in October 1998 specifically envisioned IBM's use of UnixWare/SVR4 code in IBM's AIX for Power product. Indeed, the JDA, which set forth the parties' rights and obligations with respect to Project Monterey, specifically gave IBM a royalty-free license to include such UnixWare/SVR4 code in its products, including AIX for Power. I was aware as early as August 2000 that IBM incorporated UnixWare/SVR4 code into AIX for Power. IBM made clear to us—in fact, to the whole market—that it had included UnixWare/SVR4 code into AIX for Power.

### **Santa Cruz's Involvement In Standardization**

17. Santa Cruz participated in UNIX standardization efforts during the time I was employed by the company. Santa Cruz believed standardization was important to the growth and success of UNIX and the various flavors of UNIX operating systems, and encouraged its licensees to adopt the standards set forth in IEEE's POSIX and The Open Group's Single UNIX Specification.

18. Santa Cruz did not view its licensees' compliance with such UNIX standards as a violation of their UNIX license agreements with Santa Cruz. Santa Cruz was aware that its licensees were complying with the POSIX and Single UNIX Specification standards and had no intention of taking legal action in response to such activity.

19. Santa Cruz also supported the standardization movement with regard to Linux. Santa Cruz encouraged adoption of the Linux Standard Base (LSB) and saw compliance with standards as vital to the future success and adoption of Linux.

20. In May 2000, I was interviewed by Slashdot regarding Santa Cruz's plans regarding Linux. Slashdot is an internet news source that specializes in technology-related news. In that interview, I stated: "With our investments throughout the Linux Community, we care about the success of the Linux market more than ever. This being the case, we are very concerned about fragmentation. This is why we stand whole-heartedly behind the Linux Standard Base".

### **Santa Cruz's Linux Strategy**

21. Santa Cruz was aware of the development of Linux as a UNIX-like operating system and knew that there were many similarities between Linux and UNIX.



22. During the time that Santa Cruz owned the UNIX assets, individuals within Santa Cruz raised the issue of whether Linux might infringe on Santa Cruz's UNIX intellectual property rights. At one point, Santa Cruz considered selling intellectual property insurance to Linux users that would include a guarantee and indemnification from Santa Cruz that users who purchased the insurance would not be liable for violating any of Santa Cruz's intellectual property rights through their use of Linux. Such a program was discussed in late 1999 and early 2000, but ultimately was not pursued.

23. In early 2000 Santa Cruz changed its business strategy and decided to develop and distribute its own Linux product. Santa Cruz saw that the Linux tide was coming and decided that it needed to ride the wave; the company also knew that sales of its aging product, OpenServer, were declining and that Linux provided a tremendous opportunity. Santa Cruz studied the Linux opportunity and developed a roadmap to pursue it. A primary part of the roadmap was to phase out OpenServer and work toward migrating Santa Cruz's OpenServer customer base to Linux.

24. Santa Cruz believed that it would be well positioned to use its UNIX expertise to improve Linux and produce a high-quality Linux distribution.

25. Santa Cruz had incorporated a considerable amount of open source code into its own OpenServer product and had widely distributed that product since before I began my employment with the company; therefore, the company was familiar with open source code and how to incorporate it into its products.

26. In the Spring of 2000 Santa Cruz announced to its OEMs and partners that it was developing a Linux product. The Santa Cruz Linux product was planned to be a server, rather than a desktop, project.

27. Santa Cruz did not have any concerns about following clean room procedures in developing its Linux product because it believed that it could control any code that was ultimately open-sourced to the public. Therefore, the company selected programmers who were experienced in writing effective UNIX code and put them to work on writing and compiling Santa Cruz's Linux product.

28. In my May 2000 interview with Slashdot, I stated: "[Santa Cruz] is accelerating its participation in and contributions to, the Open Source Community. In some cases, we will be taking current technology that we think is needed in the Linux market and driving it forward as the project maintainers. Right now, we are focusing on bringing some of our high-performance Intel development tools to Linux".

29. I also told Slashdot: "When making comparisons between UNIX and Linux platforms, there are still meaningful and significant areas where Linux falls short. We see ourselves as being in a position to help address these areas".

30. Santa Cruz was also interested in developing the capability to run Linux binaries on its UNIX operating systems, and worked toward developing programs, including the Linux Kernel Personality ("LKP"), that would make it possible to run Linux applications on UNIX operating systems.

31. In my May 2000 Slashdot interview, I stated: "Linux is experiencing tremendous momentum and attracting ISVs who have never ported applications to SCO Unix platforms. To

leverage this activity, SCO is currently developing better Linux binary compatibility for our existing UNIX platforms”.

32. In early 2001 and as part of its Linux product strategy, Santa Cruz obtained certification of Linux on Unixware from Oracle, a prominent software manufacturer. To “certify” Linux on UnixWare means that applications developed for Linux could be run on the UnixWare operating system. The significance of this certification was to assure customers that they could run Linux applications on UnixWare.

#### **Caldera’s Purchase of Divisions from Santa Cruz**

33. Santa Cruz had a successful year in 1999 due to the Y2K phenomenon. In 2000, however, businesses dramatically reduced their technology spending, resulting in shrinking revenues for Santa Cruz. At the same time, Santa Cruz was also hurt by increased competition from Microsoft, which was getting stronger in the server market. As a result of these factors, Santa Cruz downsized substantially in 2000.

34. Caldera did an initial public offering of stock in March 2000. The company, however, did not have a substantial distribution channel or any established products, so it decided to use the proceeds of the initial public offering to acquire another company with a large channel and existing portfolio of products.

35. In May 2001, Caldera purchased the Server Software and Professional Services Divisions of Santa Cruz. Included in this acquisition was Santa Cruz’s UNIX business, of which I was then in charge.

36. After the Caldera acquisition, I was offered the position as President and COO of Caldera. I accepted this position and served in that role from May to October of 2001.

37. Like Santa Cruz before it, Caldera's acquisition of the UNIX System V licenses entitled it to control certain rights regarding its licensees' use of the System V code, but the licenses did not allow Caldera to control or limit the code, modifications and derivative works, including any methods or concepts therein, which were developed by its licensees. I understood and believed that the licenses permitted Caldera to prohibit the disclosure of System V code, but did not permit the company to limit or prohibit the use or disclosure of code that licensees developed on their own.

38. The CEO of Caldera at that time was Ransom Love. Mr. Love believed that the company should develop desktop Linux to compete with Microsoft in the desktop operating system market. I did not want Caldera to pursue desktop Linux because I did not think that Caldera could compete effectively with Microsoft. I tried to prevent this strategy from being implemented because I thought that it would drain both the company's economic and technical resources without much promise of return on investment.

39. Ransom Love's vision for the combined Caldera company was to pursue a business plan that emphasized developing Linux compatibility for UnixWare and desktop Linux.

40. Caldera's plan was to sell Linux into the former Santa Cruz channel. Caldera's Linux product strategy was to use the newly acquired UNIX assets to make Linux more reliable, powerful and "enterprise hardened".

#### **Caldera Recognized Linux As "UNIX-like" and Encouraged Linux Standardization**

41. As both a Linux company and a UNIX company, Caldera recognized the many similarities between the two operating systems.

42. Caldera recognized the importance of Linux standardization and saw compliance with standards as vital to the future success and adoption of Linux. Caldera participated in standardization efforts and encouraged adoption of the Linux Standard Base (LSB).

43. In a 2001 presentation to the Hong Kong Computer Society entitled "Linux: Insuring the Future" on behalf of Caldera, I referred to Linux as a "simple technology with UNIX-like feel and capabilities" and stated that a critical factor to the success of Linux was the adoption of the Linux Standards Base standards.

44. In a presentation I gave on behalf of Caldera entitled "Unifying UNIX and Linux for Business", I listed five critical factors for insuring the success of Linux. Santa Cruz believed so strongly in the necessity of Linux standardization that factors one through three were "LSB". I also stated in that presentation that Caldera's "suggestion is for all Linux companies to support the LSB".

45. I believed that adopting the Linux Standards Base was important because Linux needed one common version and establishing standards would help to avoid fragmentation and was critical to encouraging adoption by enterprise users.

46. I declare under penalty of perjury that the foregoing is true and correct.

Executed: September 18<sup>th</sup>, 2006.

Los Gatos, California

  
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David McCrabb