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UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

THE SCO GROUP, INC.

Plaintiff/Counterclaim-Defendant,

v.

INTERNATIONAL BUSINESS MACHINES  
CORPORATION,

Defendant/Counterclaim-Plaintiff.

**DECLARATION OF GREG JONES ON  
BEHALF OF NOVELL, INC.**

Civil No. 2-03CV0294 DAK

Honorable Dale A. Kimball

Magistrate Judge Brooke C. Wells

I, Greg Jones, declare as follows:

1. I am Associate General Counsel at Novell, Inc. ("Novell"). I have been employed as counsel in the Legal Department of Novell since 1992.

2. This declaration is submitted in connection with the lawsuit filed by the SCO Group, Inc. ("SCO"), against International Business Machines, Corporation ("IBM"), Caldera Systems, Inc. v. International Business Machines, Corporation, Civil Action No. 2:03CV-0294 DAK (D. Utah 2003).

3. This declaration is based on Novell's knowledge and understanding of the matters described herein. I am authorized to submit this Declaration on behalf of Novell.

#### **Novell's Retention of UNIX Assets**

4. In 1995, Novell and a company called Santa Cruz Operation, Inc. ("Santa Cruz") entered into negotiations over the sale of certain business assets of Novell relating to its UNIX and UnixWare software business.

5. On September 19, 1995, Novell and Santa Cruz executed an Asset Purchase Agreement ("APA"). The APA provided each party with certain rights and obligations.

6. The parties entered into two Amendments to the APA. On December 6, 1995, Novell and Santa Cruz executed "Amendment No. 1." Novell and Santa Cruz subsequently executed "Amendment No. 2" on October 16, 1996.

7. Under the APA and its Amendments, Santa Cruz obtained a variety of assets, including assignment of tens of thousands of contracts and licenses, various trademarks, source code and binaries to UnixWare products, and physical assets such as furniture and personal computers. Santa Cruz also obtained the right to develop a "Merged Product," a derivative work that would run on Intel platforms.

8. Santa Cruz did not have the financial capacity to pay the purchase price contemplated by Novell for these acquired assets and rights. In order to bridge the price gap and consummate the transaction, Novell and Santa Cruz agreed that Novell would receive Santa Cruz

stock and retain certain rights as protection. For example, Novell retained the right to receive royalty payments under SVRX licenses, prior approval rights relating to new SVRX licenses and amended SVRX licenses, the right to direct Santa Cruz to take certain actions relating to SVRX licenses and the right to conduct audits of the SVRX license program.

9. Santa Cruz assumed several related obligations. One such obligation that Santa Cruz assumed under the APA was responsibility for administering the collection of royalty payments from SVRX Licenses. "SVRX Licenses" are defined by the APA to include "[a]ll contracts relating to" the various UNIX System releases and auxiliary products enumerated at Schedule 1.1(a)(VI) and Attachment A to Amendment No. 1. The APA provided that Santa Cruz shall collect and pass through to Novell 100% of all "SVRX Royalties" -- a term defined in the APA as "all royalties, fees and other amounts due under all SVRX Licenses." In return, Novell agreed to pay Santa Cruz an administrative fee of 5% of those royalty amounts. Under the APA, Santa Cruz also agreed to pay additional royalties to Novell relating to other products.

10. The APA transferred certain assets from Novell to Santa Cruz. However, as specified by Section V.A of Schedule 1.1(b) to the APA, certain assets were excluded from the transfer. Among the "Excluded Assets" from the APA asset transfer were "[a]ll copyrights and trademarks, except for the trademarks UNIX and UnixWare," "all patents," and "all right, title and interest to the SVRX Royalties, less the 5% fee for administering the collection thereof." The APA as executed on September 19, 1995, therefore, did not transfer any copyrights.

11. Novell also retained rights to supervise Santa Cruz's administration of SVRX licenses. For example, under Section 4.16(b) of the APA, Novell retained the "sole discretion" to direct Santa Cruz to amend, supplement, modify, waive or assign any rights under or to any SVRX Licenses; if Santa Cruz fails to take any such action, the APA specifically granted Novell the right to take these actions on behalf of Santa Cruz. Novell also retained the right to veto Santa Cruz's attempts to amend SVRX Licenses, subject to two exceptions laid out in Amendment No. 1 to the APA (where the amendment (i) "may be incidentally involved through its rights to sell and license UnixWare software or the Merged Product ... or future versions of

the Merged Product, or (ii) to allow a licensee under a particular SVRX License to use the source code of the relevant SVRX product(s) on additional CPU's or to receive an additional distribution, from [SCO], of such source code"). Novell also retained the right to veto Santa Cruz's attempts to enter into new SVRX Licenses, subject to one exception (as specified in (i) above or as otherwise approved in writing in advance by Novell on a case by case basis).

12. The APA gave Novell the right to confirm Santa Cruz's compliance with its contractual obligations under the SVRX licensing program. The APA explicitly provided that Novell "shall be entitled to conduct periodic audits" of Santa Cruz "concerning all royalties and payments due to Seller hereunder or under the SVRX Licenses." The APA required Santa Cruz to "diligently seek to collect all such royalties, funds and other amounts when due" and to "investigate and perform appropriate auditing and enforcement." The APA also required Santa Cruz to provide Novell monthly reports detailing the SVRX royalties it received.

#### **SCO's Attempts to Acquire the UNIX Copyrights**

13. In late 2002, SCO repeatedly contacted Novell. SCO requested access to or copies of any records concerning rights to UNIX, including any agreements between Novell and Santa Cruz. SCO also expressed its interest in a campaign to assert UNIX infringement claims against users of Linux. SCO asked Novell to partner with SCO in a Linux licensing program, under which SCO contemplated extracting a license fee from Linux end users to use the UNIX intellectual property purportedly contained in Linux. Novell refused to participate.

14. SCO further requested that Novell transfer its UNIX copyrights to SCO, thereby acknowledging that it did not own the UNIX copyrights. SCO contacted Novell on multiple occasions in late 2002 and early 2003. For example, SCO's CEO, Darl McBride, repeatedly contacted Novell and asked Novell to amend the Novell-Santa Cruz agreement to give SCO the UNIX copyrights. Novell rejected all of these requests.

15. Notwithstanding Novell's rejections, SCO embarked on a campaign in which it falsely asserted ownership over the same copyrights via public statements, a series of letters to Linux end users, several lawsuits against Linux distributors and end users, and a licensing program purporting to offer SCO's Intellectual Property Licenses for Linux. SCO has falsely claimed that Novell acquiesced to SCO's claims. Novell has not acquiesced to SCO's claims.

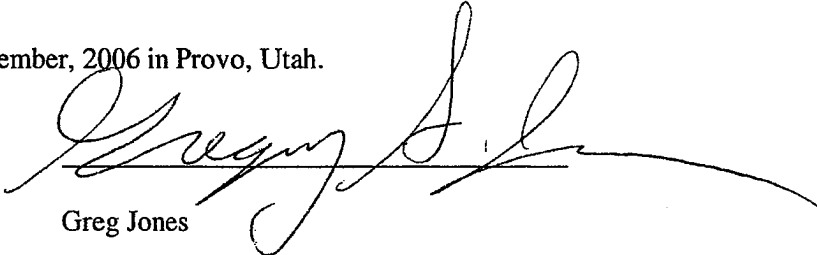
16. To the contrary, Novell vigorously contested SCO's claims in private correspondence with SCO at the very same time SCO was publicly claiming otherwise. For example:

- a. On May 12, 2003, SCO's CEO, Darl McBride, sent Novell a letter asserting that it owned the UNIX copyrights and that Linux end users were infringing those copyrights.
- b. On May 28, 2003, Novell's CEO, Jack Messman, responded by letter, asserting in no uncertain terms that "SCO is not the owner of the UNIX copyrights."
- c. After SCO registered its claim to the UNIX copyrights with the U.S. Copyright Office, Novell's General Counsel, Joseph LaSala wrote to SCO, again disputing its claim to ownership of the copyrights. In his August 4, 2003, letter, Mr. LaSala stated, "We dispute SCO's claim to ownership of these copyrights."

17. In September and October 2003, Novell attempted to protect its ownership of the UNIX copyrights and to correct SCO's erroneous registrations claiming ownership, by filing its own copyright registrations.

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

Executed on this 21 day of September, 2006 in Provo, Utah.

  
Greg Jones