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*Attorneys for Defendant/Counterclaim – Plaintiff
International Business Machines, Corporation.*

UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

THE SCO GROUP, INC.

Plaintiff/Counterclaim-Defendant,

v.

INTERNATIONAL BUSINESS MACHINES
CORPORATION,

Defendant/Counterclaim-Plaintiff.

**DECLARATION OF JOSEPH A.
LASALA, JR. ON BEHALF OF NOVELL,
INC.**

Civil No. 2-03CV0294 DAK

Honorable Dale A. Kimball

Magistrate Judge Brooke C. Wells

I, Joseph A. LaSala, Jr., declare as follows:

1. I am an attorney duly licensed to practice law in the District of Columbia. I am Senior Vice President and General Counsel at Novell, Inc. ("Novell").

2. Novell is a Delaware corporation that was incorporated in 1983. Its headquarters and principal executive offices are located in Waltham, Massachusetts. Novell's principal product development facility is located in Provo, Utah. Novell also has offices in numerous cities worldwide.

3. 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) (the "SCO v. IBM Litigation").

4. 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.

**I. NOVELL'S LICENSE OF UNIX SYSTEM V SOFTWARE AND NOVELL'S
SUBSEQUENT ACQUISITION OF UNIX ASSETS**

5. UNIX is the name of a computer operating system originally developed beginning in the late 1960s by a group of software engineers at AT&T's Bell Laboratories. Over time, AT&T licensed its UNIX family of operating systems to universities, corporations, other entities and individuals, including Novell. AT&T executed UNIX licenses with these licensees to govern each party's rights and obligations with respect to UNIX.

6. Novell entered into a UNIX license with AT&T Information Systems, Inc. in January 1989. The license was entitled "Software Agreement" and the number of the Agreement was SOFT-01460. Section 2.01 of that Agreement, entitled "Grant of Rights", stated:

Such right to use includes the right to modify such SOFTWARE PRODUCT and to prepare derivative works based on such SOFTWARE PRODUCT, provided that any such modification or derivative work that contains any part of a SOFTWARE PRODUCT subject to this Agreement is treated hereunder the same as such SOFTWARE PRODUCT. AT&T-IS claims no

ownership interest in any portion of such a modification or derivative work that is not part of a SOFTWARE PRODUCT.

7. Novell understands that at the time it entered into this Agreement with AT&T, AT&T had taken the position that AT&T did not assert ownership or control over modifications or derivative works prepared by its licensees, except for any UNIX "SOFTWARE PRODUCT" (as that term is used in the UNIX license agreement) included in such modifications or derivative works. For example, in the *§ echo* newsletters of April and August 1985, distributed by AT&T to licensees to advise them of news regarding the UNIX licenses, AT&T explained that it had revised the language of Section 2.01 of the UNIX licenses (implemented by August 1985) to make clear to all licensees that AT&T claimed no ownership interest in its licensees' modifications to, or derivative works of, UNIX "SOFTWARE PRODUCT" except for the portions of UNIX "SOFTWARE PRODUCT" contained therein. The Novell Software Agreement with AT&T (see Paragraph 6, above) contained the same language of Section 2.01 referenced in the *§ echo* publication.

8. In April 1991, Novell invested \$15.0 million in United Systems Laboratories, Inc. ("USL"), the AT&T subsidiary that held the UNIX assets. In December 1991, Novell formed Univel, a joint venture with USL designed to accelerate the expanded use of the UNIX operating system in the personal computer and network computing marketplace.

9. In 1993, Novell acquired all of the UNIX assets held by USL. Among other things, Novell purchased UNIX copyrights, patents, trademarks and all active UNIX licenses, including contracts relating to UNIX System V, the most recent version of the UNIX operating system. At the same time, there had been several major releases of System V, including Releases 1, 2, 3 & 4, also referred to as SVR1, SVR2, SVR3, and SVR4, or generically as SVRX.

10. As the new owner of AT&T's UNIX assets, Novell assumed AT&T's rights and obligations under its UNIX licenses, including those with IBM (referred to as the "IBM Agreements") and Sequent Computer Systems (which IBM later acquired) (referred to as the "Sequent Agreements"). Like AT&T and USL before it, Novell negotiated and entered into

UNIX licenses and explained the terms of these licenses to its licensees.

II. NOVELL'S UNDERSTANDING OF THE UNIX LICENSING PROGRAM

11. Novell understands that from the inception of the UNIX licensing program, and for most of the time until Novell acquired the UNIX business in 1993, the group responsible for licensing UNIX to customers was headquartered in Greensboro, North Carolina. The business people who comprised the UNIX licensing group in Greensboro (including account representatives and their managers) negotiated the UNIX licenses, executed them on behalf of AT&T and USL, and explained the terms of the UNIX licenses to licensees.

12. Novell understands that persons in the Greensboro group, the head of the Greensboro group, and the head of the business organization responsible for product management, marketing and licensing terms and conditions for UNIX (from 1984 to 1995), have provided declarations and deposition testimony in the *SCO v. IBM* Litigation, and that this evidence confirms that AT&T and USL intended Section 2.01 of the UNIX Software Agreements ("Software Agreements") to have the following meaning: (1) licensees owned their modifications to, and derivative works of, UNIX "SOFTWARE PRODUCT", exclusive of any UNIX "SOFTWARE PRODUCT" included in these modifications or derivative works; and (2) licensees were free to do as they wished with their modifications to, and derivative works of, UNIX "SOFTWARE PRODUCT", exclusive of any UNIX "SOFTWARE PRODUCT" included in these modifications or derivative works.

13. Novell understands that in the 1980s several UNIX licensees asked for clarification of AT&T's intent with respect to ownership and control of licensees' modifications and derivative works. In response, AT&T explained its intent to its licensees, and clarified the meaning of the agreements through various means, including oral conversations with licensees and written communications to licensees. These written communications clarifying the UNIX licenses included the *S echo* newsletter discussed above in Paragraph 7, as well as agreements such as the Side Letter AT&T executed with IBM on February 1, 1985.

14. Novell understands that the business personnel responsible for negotiating the UNIX licenses and explaining their terms to customers remained largely the same through the transition from AT&T to USL. Thus the manner in which the licenses were understood and explained by the UNIX licensing group remained consistent throughout AT&T's and USL's administration of the UNIX licensing program.

15. For example, Novell has the understandings described in paragraphs 16-22 below.

16. Otis Wilson, who was head of the group responsible for licensing the UNIX system worldwide from 1983 until his retirement in 1991, personally negotiated UNIX licenses with licensees and explained the terms of the licenses to licensees. As head of the group, Mr. Wilson personally signed—or gave specific delegation to others to sign on his behalf—each UNIX license executed by AT&T or USL during his tenure. Novell understands that, according to Mr. Wilson, neither AT&T nor USL intended to assert ownership or control over licensees' own modifications to, and derivative works of, UNIX software, exclusive of any UNIX software included in these modifications or derivative works.

17. David Frasure, who was the national sales and licensing manager for the UNIX licensing program at AT&T from 1984 through 1987, personally negotiated agreements with licensees, explained the terms of the agreements to licensees, and supervised the account representatives who negotiated licenses with licensees. Mr. Frasure was supervised in this work by Mr. Wilson, and Mr. Frasure participated in the negotiation of the IBM Agreements and the Sequent Agreements. Novell understands that, according to Mr. Frasure, AT&T did not intend to assert ownership or control over licensees' own modifications to, and derivative works of, UNIX software, exclusive of any UNIX software included in these modifications or derivative works.

18. Michael J. DeFazio was head of the organization within AT&T and USL (and later Novell) responsible for product management, marketing and licensing terms and conditions for UNIX from 1984 to 1995, and while at USL, he was Executive Vice President, UNIX System V Software. Mr. DeFazio was the business person ultimately responsible for the terms and

conditions of the UNIX licenses executed during his tenure, including the IBM Agreements and the Sequent Agreements. Mr. DeFazio supervised the UNIX licensing group in Greensboro, and Mr. Wilson reported directly to him. Novell understands that, according to Mr. DeFazio, neither AT&T nor USL intended to assert ownership or control over licensees' own modifications to, and derivative works of, UNIX software, exclusive of any UNIX software included in these modifications or derivative works.

19. Charlton R. Greene was an account representative for AT&T and USL (and later Novell) from 1982-1993. In that capacity, he had responsibility for negotiating UNIX licenses and explaining the terms of those licenses to licensees. Novell understands that, according to Mr. Greene, neither AT&T nor USL intended to assert ownership or control over licensees' own modifications to, and derivative works of, UNIX software, exclusive of any UNIX software included in these modifications or derivative works.

20. Stephen D. Vuksanovich was an account representative responsible for negotiating UNIX licenses and explaining the terms of the licenses to licensees for AT&T and USL (and later Novell) from 1983 to 1994. Novell understands that, according to Mr. Vuksanovich, neither AT&T nor USL intended to assert ownership or control over licensees' own modifications to, and derivative works of, UNIX software, exclusive of any UNIX software included in these modifications or derivative works.

21. Jeanette Tilley was a district manager in charge of worldwide licensing at AT&T and USL (and later Novell) from 1965 to 1993, and had responsibility for UNIX licensing. Novell understands that, according to Ms. Tilley, neither AT&T nor USL intended to assert ownership or control over licensees' own modifications to, and derivative works of, UNIX software, exclusive of any UNIX software included in these modifications or derivative work.

22. Edward J. Riddle had responsibilities for UNIX from 1976 to 1994 with Western Electric, AT&T, and USL (and later Novell). From 1989 to 1994, he was a contract administration manager and responsible for collecting license fees and coordinating audits under the UNIX sublicensing agreements. Novell understands that, according to Mr. Riddle, neither

AT&T nor USL intended to assert ownership or control over licensees' own modifications to, and derivative works of, UNIX software, exclusive of any UNIX software included in these modifications or derivative works.

23. Novell understands that, after Novell purchased USL, many of the personnel responsible for UNIX licensing stayed at Novell and remained responsible for UNIX licensing, including Mr. DeFazio, Mr. Vuksanovich, Mr. Greene, Ms. Tilley, and Mr. Riddle. Novell also understands that while at Novell, they continued to negotiate UNIX licenses and explain their terms to licensees in the manner described above in Paragraphs 12-14 and 18-22.

III. NOVELL'S POSITION CONCERNING ITS INTERPRETATION OF THE UNIX LICENSES; NOVELL'S EXERCISE OF ITS RIGHTS UNDER THE APA

24. Novell has corresponded with SCO concerning the meaning of the IBM and Sequent Agreements. Novell's interpretation of these Agreements is consistent with Novell's understandings as described above.

25. After contacting Novell in an unsuccessful attempt to obtain a transfer of the UNIX copyrights in 2003, SCO undertook to terminate IBM's rights under the IBM Agreements.

26. Novell understands that on March 6, 2003, SCO's CEO, Darl McBride, sent a letter to IBM's CEO, Samuel Palmisano, stating that IBM had breached the IBM Agreements and threatening to terminate IBM's rights under the Agreements.

27. Similarly, Novell understands that on May 30, 2003, Mr. McBride sent a letter to the Legal Department at Sequent Computer Systems, Inc. (an IBM subsidiary) stating that Sequent had breached its agreements and would be subject to termination of its rights.

28. Novell further understands that on June 12, 2003, Mr. McBride sent a letter to Mr. Palmisano informing IBM that SCO was terminating IBM's rights under the IBM SVRX Agreements.

29. SCO's threats to terminate the IBM and Sequent Agreements presume the possession of rights that are not SCO's to assert and that implicate Novell's interests. Thus, Novell took steps to protect its interests by waiving the purported breaches of contract SCO

asserted against IBM and Sequent. In the process of doing so, Novell explained to SCO its interpretation of the UNIX licenses at issue.

30. On October 7, 2003, I wrote a letter to Ryan Tibbitts, General Counsel of SCO, to inform him that Novell had reviewed the terms of the UNIX license originally executed by AT&T and Silicon Graphics, Inc. ("SGI") and that SCO's position with respect to Section 2.01 of this license was not supportable given that the license specifically states, "ATT-IS claims no ownership interest in any portion of such a modification or derivative work that is not part of a SOFTWARE PRODUCT." Novell directed SCO to "waive any purported right SCO may claim to require SGI to treat SGI Code itself as subject to the confidentiality obligations or use restrictions of SGI's SVRX license." Attached as Exhibit 1 is a true and correct copy of that letter.

31. On the same day, I wrote Mr. Tibbitts another letter regarding the IBM Agreements. Exhibit 2 is a true and correct copy of that letter. Novell reviewed the language of the Agreements (including the February 1, 1985 Side Letter between AT&T and IBM) and Amendment X, and I thereupon stated to Mr. Tibbitts, "[T]he focus of the Agreements was on protecting AT&T Code, not on restricting IBM Code just because it happened to be combined with AT&T Code in a modification or derivative work. Any other result would defy logic as well as the intent of the parties."

32. Under Section 4.16(b) of the Asset Purchase Agreement ("APA") between Novell and the Santa Cruz Operation, Novell retains the "sole discretion" to direct SCO to amend, supplement, modify, waive or assign any rights under or to any SVRX Licenses; if SCO fails to take any such action, the APA specifically grants Novell the right to take these actions on behalf of SCO. Accordingly, Novell directed SCO to waive any purported right to assert a breach of the IBM Agreement based on IBM's use or disclosure of code that does not contain any UNIX System V source code. My October 7, 2003 letter to Mr. Tibbitts states:

[P]ursuant to Section 4.16(b) of the Asset Purchase Agreement, Novell hereby directs SCO to waive any purported right SCO may claim to require IBM to treat IBM Code itself as subject to the

confidentiality obligations or use restrictions of the Agreements. Novell directs SCO to take this action by noon, MST, on October 10, 2003, and to notify Novell that it has done so by that time.

33. In the same October 7, 2003 letter, Novell informed SCO that its position that IBM's own code "must be maintained as confidential and subject to use restrictions is contrary to the agreements between AT&T and IBM, including Amendment X, to which Novell is a party." I also explained that the agreements between AT&T and IBM provide "a straightforward allocation of rights":

(1) AT&T retained ownership of its code from the Software Products ("AT&T Code") and the Agreement's restrictions on confidentiality and use applied to the AT&T Code, whether in its original form or as incorporated in a modification or derivative work, but (2) IBM retained ownership of its own code, and the Agreement's restrictions on confidentiality and use do not apply to that code so long as it does not embody any AT&T Code.

34. Because SCO failed to take the actions directed by Novell, I wrote to Mr. Tibbitts again on October 10, 2003 and took the required actions on SCO's behalf. In two separate letters, one regarding the SGI Agreements and one regarding the IBM Agreements, I reiterated Novell's position on the issue, and waived, on SCO's behalf, any purported right SCO may claim to require SGI, on the one hand, or IBM, on the other hand, to treat their own code as subject to the confidentiality obligations or restrictions of the SGI Agreements or IBM Agreements, respectively. Attached as Exhibits 3 and 4 are true and correct copies of each letter. For example, as to the IBM Agreements, Novell stated:

Accordingly, pursuant to Section 4.16(b) of the Asset Purchase Agreement, Novell, on behalf of The SCO Group, hereby waives any purported right SCO may claim to require IBM to treat IBM Code, that is code developed by IBM, or licensed by IBM from a third party, which IBM incorporated in AIX but which itself does not contain proprietary UNIX code supplied by AT&T under the license agreements between AT&T and IBM, itself as subject to the confidentiality obligations or use restrictions of the Agreements.

35. As SCO continued to espouse its erroneous view regarding Section 2.01 of the UNIX licenses, I wrote to Mr. Tibbitts on February 6, 2004 to further emphasize Novell's position, as well as to advise him of the fact that AT&T's *§ echo* publications were clearly

contrary to SCO's position. I attached to that letter copies of these *§ echo* publications. In my letter, Novell also directed SCO to "waive any purported right SCO may claim to require Sequent (or IBM as its successor) to treat Sequent Code as subject to the confidentiality obligations or use restrictions of Sequent's SVRX license." Attached as Exhibit 5 is a true and correct copy of that letter and its attachments.

36. SCO also failed to take these actions as directed by Novell, and I wrote to Mr. Tibbitts on February 11, 2004, to waive, on SCO's behalf, "any purported right SCO may claim to require Sequent (or IBM as its successor) to treat Sequent Code as subject to the confidentiality obligations or use restrictions of Sequent's SVRX license." Attached as Exhibit 6 is a true and correct copy of that letter. In the letter, Novell reiterated that SCO's reliance on Section 2.01 of the Sequent Agreements was misplaced and stated that "SCO's interpretation of Section 2.01 is plainly contrary to the position taken by AT&T as author of and party to the SVRX licenses."

37. Earlier in 2003, Novell also waived any purported right of SCO to terminate the IBM Agreements. On June 9, 2003, in a letter from Jack L. Messman to Darl McBride, Novell informed SCO that under the terms of Amendment X, SCO did not have the right to terminate the IBM Agreements. The letter, a true and correct of which is attached as Exhibit 7, stated:

Pursuant to Amendment No. X, however, Novell and SCO granted IBM the "irrevocable, fully paid-up, perpetual right" to exercise all of the rights under the IBM SVRX Licenses that IBM then held. IBM paid \$10,125,000 for the rights under Amendment No. X. Novell believes, therefore, that SCO has no right to terminate IBM's SVRX Licenses, and that it is inappropriate, at best, for SCO to be threatening to do so.

38. At that time, Novell further directed SCO to waive any purported right under the IBM Agreements to terminate those agreements, and any rights thereunder:

[P]ursuant to Section 4.16(b) of the Asset Purchase Agreement, Novell hereby directs SCO to waive any purported right SCO may claim to terminate IBM's SVRX Licenses enumerated in Amendment X or to revoke any rights thereunder, including any purported rights to terminate asserted in SCO's letter of March 6, 2003, to IBM. Novell directs SCO to take this action by noon,

MDT, June 12, 2003, and to notify Novell that it has done so by that time.

39. After SCO failed to follow Novell's instruction, on June 12, 2003, Novell expressly waived any purported right of SCO to terminate IBM's rights under the IBM Agreements. Novell stated in its letter to SCO (a true and correct copy of which is attached as Exhibit 8):

Accordingly, pursuant to Section 4.16(b) of the Asset Purchase Agreement, Novell on behalf of The SCO Group, hereby waives any purported right SCO may claim to terminate IBM's SVRX Licenses enumerated in Amendment X or to revoke any rights thereunder, including any purported rights to terminate asserted in SCO's letter of March 6, 2003, to IBM.

IV. NOVELL EXERCISED ITS RIGHTS UNDER THE APA INDEPENDENTLY OF IBM

40. Novell understands that SCO has asserted that IBM improperly induced Novell's exercise of its rights under the APA. According to SCO, IBM caused Novell to assert ownership over certain UNIX copyrights and to waive SCO's purported rights under the APA in an effort to injure SCO.

41. Contrary to SCO's claim, Novell asserted ownership of the UNIX copyrights and exercised its rights under the APA because Novell owns the copyrights, because it has the right of waiver under the APA, and because it was in Novell's interest to exercise these rights. IBM did not have the ability to require Novell to take the steps about which SCO complains and did not force or pressure Novell to do so. Novell acted independently of IBM.

42. Novell informed representatives of IBM of the actions it took with respect to the UNIX copyrights. However, at no time did any representative of IBM request or express a desire that Novell breach, or take any action contrary to, the APA, Amendment X, or any other agreement between Novell and Santa Cruz or Novell and SCO.

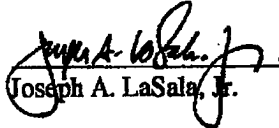
43. On March 23, 2004, Novell entered into a definitive agreement with IBM in connection with IBM's previously announced \$50 million investment in Novell. Publicized in conjunction with Novell's offer to acquire SuSE Linux GmbH in November 2003, the

investment, the primary terms of which were negotiated in November 2003, entailed the purchase by IBM of 1,000 shares of Novell Series B redeemable preferred shares that were convertible into 8 million shares of Novell common stock at a price of \$6.25 per share. The shares were entitled to a dividend of 2% per annum, payable quarterly in cash, and cash dividends paid during the quarter ended April 30, 2004 were \$0.1 million.

44. Novell's decision to assert its contractual rights under the APA and Amendment X was in no way caused or influenced by IBM's \$50 million investment. Novell would have taken the same actions even if it did not receive the \$50 million investment, and the \$50 million was never conditioned on Novell taking such actions.

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

Executed on this 12 day of September, 2006 in Waltham, Massachusetts.



Joseph A. LaSala, Jr.