

SCO, or its predecessors to Sequent, have not granted IBM permission to make available, either directly or indirectly, all or portions of the Software Product or IBM's modifications or derivative works to any other countries outside the United States including India and particularly those that are subject to strict technology export control by the United States government: viz., Cuba, Iran, Syria, North Korea and Libya. By exporting the Software products or modifications or derivative works based on the Software Products (i.e., Dynix/ptx) to India, IBM has breached this term of the agreement. Moreover, by contributing IBM's modifications and derivative works based on the Software Products to Linux, including but not limited to those items previously identified in SCO's supplemental answer to Interrogatory 1 served on January 12, 2004, IBM breached § 4.01 of the AT&T / Sequent Software Agreement. By contributing the Software Products and modifications or derivative works based thereon (i.e., Dynix/ptx) to Linux, IBM has directly or indirectly exported such resulting materials to anyone in the world with a computer.

Based on the foregoing breaches of the license agreement, SCO had the self-executing, contractual right to terminate IBM's right to use and distribute the Software Product, including modifications and derivative works based thereon. This authority is contractually granted under the following provisions:

If License fails to fulfill one or more of its obligations under this Agreement, AT&T may, upon its election and in addition to any other remedies that it may have, at any time terminate all the rights granted by it hereunder by not less than two (2) months' written notice to Licensee specifying any such breach, unless within the period of such notice all breaches specified therein shall have been remedied; upon such termination Licensee shall immediately discontinue use of and return or destroy all copies of Software Products subject to this Agreement. [AT&T / Sequent Software Agreement, §6.03]

Consistent with these rights, SCO delivered a notice of termination to Sequent (the "Dynix/ptx Termination Notice") for IBM's breaches of the Software (and Sublicensing) Agreement. Following delivery of the Dynix/ptx Termination Notice, IBM did not take any steps during the two months provided to cure.

IBM disregarded SCO's rights under the Sequent Agreements by failing to undertake any efforts to cure its numerous and flagrant violations thereunder. As a result, effective July 30, 2003, SCO properly terminated the Sequent Agreements and, accordingly, IBM has no further rights thereunder. Despite SCO's proper termination, IBM nonetheless continues to operate under the Sequent Agreements and use the Software Products and Source Code thereunder as though its rights under the Agreements have not been terminated. IBM no longer has any right to use the UNIX Software Code or make modifications or derivative works thereunder. In fact, IBM is contractually obligated to "immediately discontinue use of and return or destroy all copies of Software Products subject to this Agreement." As a result, IBM's contractual right to license, distribute or use Dynix/ptx has been properly and validly terminated, and any claim based thereon is barred.

Additionally, SCO is the successor to AT&T under that certain Sequent Sublicensing Agreement originally executed by and between AT&T and Sequent designated as Sublicensing Agreement Number SUB-000321A ("AT&T / Sequent Sublicensing Agreement"). The AT&T / Sequent Sublicensing Agreement grants the right to distribute object-based code of UNIX System V and modifications thereto and derivative works based thereon. As stated above, SCO validly terminated IBM's right to use and distribute under the Sequent Agreements the Software Product, including derivative works and methods based thereon as of the Dynix/ptx Termination Date. Accordingly, from and after the Dynix/ptx Termination Date, any and all distributions of Dynix/ptx by IBM, or any part or sub-program or sub-routine thereof, is in violation of the AT&T

/ Sequent Sublicensing Agreement. As a result, IBM's contractual right to license, distribute or use Dynix/ptx has been properly and validly terminated, and any claim based thereon is barred.

To the extent that additional facts are uncovered during the course of discovery, SCO reserves the right to supplement this response when fact and expert discovery have been completed.

4. IBM's claims are barred by license.

IBM became a licensee of Unix System V, on which UnixWare (alleged to infringe U.S. Patent No. 4,814,746 ("the '746 patent") and U.S. Patent No. 4,953,209 ("the '209 patent")) and OpenServer (alleged to infringe the '746 patent) are based, in the 1980s. In addition, IBM has known of UnixWare and OpenServer for more than six years. Since at least 1991, Unix System V has incorporated LZ-type data compression methods. Unix System V is a "core" operating system, of which UnixWare and OpenServer are specific modifications and/or derivative works. These modifications typically enable Unix System V to operate on a particular machine type. SCO (or its predecessor) has entered into service support agreements with IBM to provide support for SCO's products, including UnixWare and OpenServer. Further, IBM has resold UnixWare and OpenServer.

SCO entered into a joint development agreement with IBM on October 23, 1998 to develop Project Monterey (the "Project Monterey agreement"). Project Monterey established a high-volume, enterprise-class UNIX product line that ran across Intel IA-32 and IA-64 processors and IBM's Power processors in systems that range from departmental to large data center servers. Project Monterey aggregated IBM's AIX, SCO's UnixWare and Monterey for IA-64 (code name Monterey/64) into a single product line. As part of the Project Monterey initiative, a UNIX operating system was developed for Intel's IA-64 architecture using IBM's AIX operating

system's enterprise capabilities complemented with technology from SCO's UnixWare operating system and Sequent's enterprise technologies. In addition, IBM licensed AIX technology to SCO for inclusion in UnixWare and to promote this offering to the IA-32 market. Based on the cooperative nature of Project Monterey, IBM knew that UnixWare incorporated LZ-type data compression methods since at least 1998.

Reliant HA was developed by Pyramid Technology Corporation in the early 1990s. SCO acquired a non-exclusive license to sell this product to its customers in 1996. Other companies have similar licenses, of which IBM is aware.

In addition, although SCO maintains that the GNU General Public License ("GPL") is not enforceable, in the unlikely event that the GPL is deemed a lawful contract and enforceable, SCO has acted within the contractual rights granted to it concerning software made freely available by IBM under the GPL. IBM has admitted that it knowingly and in writing contributed source code to Linux according to Section 0 of the GPL for the free use of all licensees under the GPL. To the extent that additional facts are uncovered during the course of discovery, SCO reserves the right to supplement this response when fact and expert discovery have been completed.

5. IBM's claims are barred by illegality, collusion, conspiracy and/or lack of clean hands.

Without waiving the foregoing objections, SCO states that, as fully set forth in the Second Amended Complaint, SCO was poised and ready to expand its market and market share for UnixWare targeted to high-performance enterprise customers, when IBM approached SCO to jointly develop a 64-bit UNIX-based operating system for a new 64-bit Intel platform. This joint development effort was widely known as Project Monterey. At this point in time, IBM's UNIX

expertise was centered on its own Power PC processor. IBM had little or no expertise of running UNIX or its modifications or derivative works, such as AIX and Dynix/ptx, on Intel processors.

SCO, on the other hand, had over 15 years of expertise in adapting UNIX to Intel based systems. Moreover, SCO had spent the previous 18 months working closely with Intel to adapt its existing UnixWare product to work on the new 64-bit Intel processor. That project, known as "Gemini-64," was well underway when work on Project Monterey was started. In furtherance of, and in reliance on, IBM's commitment to Project Monterey, which included IBM's commitment to SCO to create joint sales and marketing opportunities, SCO ceased work on the Gemini-64 Project and expended substantial amounts of money and dedicated a significant portion of SCO's development team to Project Monterey. Specifically, plaintiff and plaintiff's predecessor provided IBM engineers with valuable confidential information with respect to architecture, schematics, and design of UnixWare and the UNIX source code for both 32- and 64-bit Intel-based processors.

By about May 2001, all technical aspects of Project Monterey had been substantially completed. The only remaining tasks of Project Monterey involved marketing and branding tasks to be performed substantially by IBM. Around that same time, IBM notified plaintiff that it refused to proceed with Project Monterey, and that IBM considered Project Monterey to be "dead."

At the same time that IBM was having its engineers learn from SCO about UNIX on Intel and touting the benefits of the joint development, unbeknownst to SCO, IBM decided it was going to embrace Linux. Specifically, during mid to late 1999 and continuing thereafter, IBM made the decision to invest its substantial resources—both technical and financial—into making Linux into an enterprise hardened operating system. Without disclosing that it was embarking on this plan designed to eliminate all value of the UNIX operating system, IBM spent the next 18 months

continuing to work with SCO's engineers to allow AIX to operate on Intel processors—the same type of processors Linux primarily uses.

Moreover, in furtherance of its plan to destroy its UNIX competitors, and as further detailed in the Second Amended Complaint, IBM announced its intention to make Linux, distributed to end users without a fee, the successor to all existing UNIX operating systems used by Fortune 1000 companies and other large companies in the enterprise computing market. However, as is widely reported and as IBM executives knew, or should have known; a significant flaw of Linux is the inability and/or unwillingness of the Linux process manager, Linus Torvalds, to identify the intellectual property origins of contributed source code that comes in from those many different software developers. If source code is code copied from protected UNIX code, there is no way for Linus Torvalds to identify that fact. As a result, a significant amount of UNIX protected code and materials are currently found in Linux 2.4.x, 2.5.x and Linux 2.6.x releases in violation of SCO's contractual rights and copyrights.

Before IBM's involvement, Linux was functionally limited. The first versions of Linux evolved through bits and pieces of various contributions by numerous software developers using single or dual processor systems. Unlike IBM, virtually none of these software developers and hobbyists had access to enterprise-scale equipment and testing facilities for Linux development. Without access to such equipment, facilities and knowledge of sophisticated development methods learned in many years of UNIX development, it would be difficult, if not impossible, for the Linux development community to create a grade of Linux adequate for enterprise use. Also, unlike IBM, the original Linux developers did not have access to multiprocessor code or multi-processor development methods needed to achieve high-end enterprise functionality. To make Linux of necessary quality for use by enterprise customers, it needed to be redesigned and upgraded to

accommodate complex multi-processor functionality that had taken UNIX nearly 20 years to achieve. This rapid re-design was not feasible or even possible at the enterprise level without (a) a high degree of design coordination, (b) access to expensive and sophisticated design and testing equipment; (c) access to UNIX code and development methods; (d) UNIX architectural experience; and (e) a very significant financial investment. The contributions of IBM, which had access to UNIX System V Protected Materials and years of enterprise level experience, made possible this rapid redesign of Linux for enterprise use. As a result of the foregoing, Linux is a clone of UNIX, including protected UNIX System V Technology, including modifications and derivatives thereof.

As market awareness of Linux evolved, IBM initiated a course of conduct with the purpose and effect of using Linux to unfairly compete in the enterprise market. At that point in time, four important events were occurring simultaneously in the enterprise software computing marketplace:

- a) Intel chips were becoming widely demanded by enterprise customers since Intel's processing power had increased and its cost had remained low;
- b) SCO's market power in the enterprise marketplace was increasing based on combined capabilities of SCO OpenServer, SCO UnixWare and SCO's unique position as UNIX on Intel;
- c) Sun and Microsoft's market share in the enterprise market continued to grow; and
- d) IBM was in the process of evolving its business model from software technology to services.

In the process of moving from product offering to services offerings, IBM dramatically increased its staff of systems integrators to 120,000 strong under the marketing brand "IBM

Global Services." By contrast, IBM's largest historic competitor as a seller of UNIX software, Sun Microsystems, has a staff of approximately 12,000 systems integrators. With ten times more services-related personnel than its largest competitor, IBM sought to move the corporate enterprise computing market to a services model based on free software on Intel processors. By making the Linux operating system free to end users, IBM could undermine and destroy the ability of any of its competitors to charge a fee for distribution of UNIX software in the enterprise market. Thus, IBM, with its army of Global Services integrators who earn money by selling services, would gain a tremendous advantage over all its competitors who earn money by selling UNIX licenses. To accomplish the end of transforming the enterprise software market to a services-driven market, IBM set about to deliberately and improperly destroy the economic value of UNIX and particularly the economic value of UNIX on Intel-based processors

On or about August 17, 2000, IBM and Red Hat, Inc., the leading Linux distributor, issued a joint press release through M2 Presswire announcing, *inter alia*, as follows:

IBM today announced a global agreement that enables Red Hat, Inc. to bundle IBM's Linux-based software.

IBM said it would contribute more than 100 printer drivers to the open source community. With these announcements, IBM is making it easier for customers to deploy e-business applications on Linux using a growing selection of hardware and software to meet their needs. *The announcements are the latest initiative in IBM's continuing strategy to embrace Linux across its entire product and services portfolio.*

Helping build the open standard, IBM has been working closely with the open source community, contributing technologies and resources.

Thereafter, on December 20, 2000, IBM Vice President Robert LeBlanc disclosed IBM's improper use of confidential and proprietary information learned from Project Monterey to bolster Linux as part of IBM's long term vision, stating:

Project Monterey was actually started before Linux did. When we started the push to Monterey, the notion was to have one common OS for several architectures. The notion actually came through with Linux, which was open source and supported all hardware. We continued with Monterey as an extension of AIX [IBM UNIX] to support high-end hardware. AIX 5 has the best of Monterey. Linux cannot fill that need today, but over time we believe it will. To help out we're making contributions to the open source movement like the journal file system. We can't tell our customers to wait for Linux to grow up.

If Linux had all of the capabilities of AIX, where we could put the AIX code at runtime on top of Linux, then we would.

Right now the Linux kernel does not support all the capabilities of AIX. We've been working on AIX for 20 years. Linux is still young. We're helping Linux kernel up to that level. We understand where the kernel is. We have a lot of people working now as part of the kernel team. At the end of the day, the customer makes the choice, whether we write for AIX or for Linux.

We're willing to open source any part of AIX that the Linux community considers valuable. We have open-sourced the journal file system, print driver for the Omniprint. AIX is 1.5 million lines of code. If we dump that on the open source community then are people going to understand it? You're better off taking bits and pieces and the expertise that we bring along with it. We have made a conscious decision to keep contributing.

IBM, however, was not and is not in a position legally to "open source any part of AIX that the Linux community considers valuable." Rather, IBM is obligated not to open source AIX because it contains SCO's confidential and proprietary UNIX source code, derivative works, modifications and methods.

Over time, IBM made a very substantial financial commitment to improperly put SCO's confidential and proprietary information into Linux, the free operating system. On or about May 21, 2001 IBM Vice President Richard Michos, stated in an interview to Independent Newspapers, New Zealand, *inter alia*:

IBM will put US \$1 billion this year into Linux, the free operating system.

IBM wants to be part of the community that makes Linux successful. It has a development team that works on improvements to the Linux kernel, or source code. This includes programmers who work in the company's Linux technology center, working on making the company's technology Linux-compatible.

That team of IBM programmers is improperly extracting and using SCO's UNIX technology from the same building that was previously the UNIX Technology Center.

In a news article issued by e-Business Developer on or about August 10, 2001, the following conduct was attributed to IBM regarding participation in the open source software movement:

Another example is when IBM realized that the open-source operating system (OS) Linux provided an economical and reliable OS for its various hardware platforms. However, IBM needed to make changes to the source to use it on its full range of product offerings.

IBM received help from the open-source community with these changes and in return, released parts of its AIX OS to open source. IBM then sold its mainframes running Linux to Banco Mercantile and Telia Telecommunications, replacing 30 Windows NT boxes and 70 Sun boxes respectively – obviously a win for IBM, which reduced its cost of maintaining a proprietary OS while increasing its developer base. IBM's AIX contributions were integrated into the standard Linux source tree, a win for open source.

Again, "IBM's AIX contributions" consisted of the improper extraction, use, and dissemination of SCO's UNIX source code, derivative works, modifications and methods.

In a news article issued by IDC on or about August 14, 2001, the following was reported:

IBM continued its vocal support of the Linux operating system Tuesday, saying the company will gladly drop its own version of UNIX from servers and replace it with Linux if the software matures so that it can handle the most demanding tasks.

IBM executives speaking here at the company's solutions developer conference outlined reasons for the company's Linux support, pointing to

features in the operating system that could push it past UNIX for back-end computing. While they admit that Linux still has a way to go before it can compete with the functions available on many flavors of UNIX, IBM officials said that Linux could prove more cost-effective and be a more user-friendly way to manage servers.

'We are happy and comfortable with the idea that Linux can become the successor, not just for AIX, but for all UNIX operating systems,' said Steve Mills, senior vice president and group executive of the IBM Software Group, during a news conference.

Thereafter, on or about January 23, 2003, IBM executive Steve Mills gave a keynote speech at LinuxWorld, a trade show, which was reported by Computer Reseller News, *IBM's*

Mills: Linux Will be on Par with UNIX in No Time, January 23, 2003, *inter alia*, as follows:

IBM will exploit its expertise in AIX to bring Linux up to par with UNIX, an IBM executive said Thursday.

During his keynote at LinuxWorld here, IBM Senior Vice President and group executive Steve Mills acknowledged that Linux lags behind UNIX in scalability, SMP support, fail-over capabilities and reliability--but not for long.

'The pathway to get there is an eight-lane highway,' Mills said, noting that IBM's deep experience with AIX and its 250-member open-source development team will be applied to make the Linux kernel as strong as that of UNIX. 'The road to get there is well understood.'

* * *

Mills hinted that the company's full development capabilities will be brought to bear in engineering the Linux kernel to offer vastly improved scalability, reliability and support for mixed workloads--and to obliterate UNIX.

The only way that Mills' pathway becomes an "eight-lane highway" for Linux to achieve the scalability, SMP support, fail-over capabilities and reliability of UNIX is by the improper extraction, use, and dissemination of the proprietary and confidential UNIX source code, derivative works and methods. Indeed, UNIX was able to achieve its status as the premiere

operating system only after decades of hard work, beginning with the finest computer scientists at AT&T Bell Laboratories, plaintiff's predecessor in interest.

Based on other published statements, IBM currently has over 7,000 employees involved in the transfer of UNIX knowledge into the Linux business of IBM, Red Hat, Inc. and SuSE Linux AG (the largest European Linux distributor). On information and belief, a large number of the said IBM employees currently working in the transfer of UNIX to Linux have, or have had, access to the UNIX Software Code.

Consistent with these public pronouncements, IBM made significant contributions of the Protected Materials, including AIX and Dynix/ptx, in an effort to make Linux enterprise hardened. In violation of the IBM Related Agreements and Sequent Agreements and legal obligations regarding UNIX System V, including maintaining System V source code and any modifications or derivative works in confidence, IBM contributed key technology to Linux for enterprise use, including but not limited to the contributions identified in SCO's supplemental answer to Interrogatory 1 served on January 12, 2004.

Further, through an Asset Purchase Agreement dated September 19, 1995, as amended, Novell received 6.1 million shares of SCO common stock, valued at the time at over \$100 million in consideration, and SCO, through its predecessor in interest, acquired from Novell all right, title, and interest in and to the UNIX and UnixWare business, operating system, source code, and all copyrights related thereto, as well as all claims arising after the closing date against any parties relating to any right, property, or asset included in the business.

Schedule 1.1(a) to the Asset Purchase Agreement provides that SCO, through its predecessor in interest, acquired from Novell:

- I. All rights and ownership of UNIX and UnixWare, including but not limited to all versions of UNIX and UnixWare and copies of UNIX and UnixWare (including revisions and updates in process), and all technical, design, development, installation, operation and maintenance information concerning UNIX and UnixWare, including source code, source documentation, source listings and annotations, appropriate engineering notebooks, test data and results, as well as all referenced manuals and support materials normally distributed of UNIX and UnixWare ...
- II. All of [Novell's] claims arising after the Closing Date against any parties relating to any right, property or asset included in the Business.

In Amendment No. 2 to the Asset Purchase Agreement, Novell and SCO made clear that SCO owned all "copyrights and trademarks owned by Novell as of the date of the [Asset Purchase Agreement] required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies," and that Novell would no longer be liable should any third party bring a claim against SCO "pertaining to said copyrights and trademarks." IBM is well aware of the terms of the Asset Purchase Agreement and the obligations Novell owes to SCO pursuant to the Asset Purchase Agreement. Indeed, IBM expressly acknowledged the existence of the Asset Purchase Agreement when it executed Amendment X.

After suit against IBM was filed, and more than seven years after the Asset Purchase Agreement was executed by Novell, IBM intentionally and improperly interfered with the Asset Purchase Agreement. Specifically, commencing on or about May 2003, Novell began falsely claiming that Novell, not SCO, owned the copyrights relating to UNIX System V. On information and belief, IBM had induced or otherwise caused Novell to take the position that Novell owned the copyrights -- a position that is flatly contradicted by the Asset Purchase Agreement. Since that time, Novell has improperly registered the same copyrights that it sold to SCO and that SCO had previously registered. In addition, IBM intentionally and improperly interfered with the Asset

Purchase Agreement by inducing or otherwise causing Novell to violate the Asset Purchase Agreement by claiming Novell could waive and was waiving breaches of license agreements by various licensees, including IBM. Specifically, with the IBM Termination Date looming only days away, Novell wrote to SCO claiming that either SCO must waive its right to terminate IBM's license based upon IBM's numerous breaches thereof or else Novell would purportedly waive SCO's right to terminate the license and otherwise excuse IBM's numerous breaches of the license agreements. Additionally, it is reported that IBM recently invested \$50 million in Novell. On information and belief this investment by IBM was made to support Novell in its improper actions regarding SCO.

Again, Novell's position, improperly encouraged and induced by IBM, is flatly contrary to the terms of the Asset Purchase Agreement. Under the Asset Purchase Agreement, Novell merely retained an interest in receiving future royalties from certain binary System V licensees. SCO, conversely, obtained "all of Seller's right, title and interest in and to the assets and properties of the seller relating to the Business (collectively the "Assets") identified on Schedule 1.1(a) hereto." The Assets identified on Schedule 1.1(a) include "all rights and ownership of Unix and UnixWare," including source code, software and sublicensing agreements and "all claims against any parties relating to any right or asset included in the business." Thus, SCO acquired all of Novell's right, title and interest: (a) to the AT&T software and sublicensing agreements, including the IBM Related Agreements and Sequent Agreements, and (b) to all claims against any parties.

As a beneficiary of the royalties, Novell arguably can modify or waive the royalty amounts due under the binary license agreements. However, at IBM's improper urging and inducement, Novell now claims that it can amend, modify or waive any and all terms of the source code software and sublicensing agreements. Thus, according to Novell's position prompted by IBM, if a licensee

such as IBM is egregiously breaching its source code agreement and thereby destroying the value of System V, Novell claims that it can waive any such breach of the agreement. Such position, of course, is unfounded and preposterous; otherwise, the approximately \$100 million dollars paid for the software and sublicensing agreements was for naught if Novell retained all rights to waive *any* breach by a licensee. Of course, Novell could not sell all right, title and interest to the AT&T software and sublicensing agreements and the rights to all claims against third parties, only to have Novell also claim it can waive those rights. While Novell may be able to modify or waive certain rights relative to the royalties to which Novell was entitled, Novell cannot waive rights it clearly sold to SCO (*i.e.* the source code and attendant software and sublicensing agreements, including all the restrictive covenants, and all claims against any parties relating to those agreements.) Novell nonetheless has attempted to do so at IBM's improper direction.

Since improperly inducing Novell to breach the Asset Purchase Agreement by falsely claiming copyright ownership of System V (and subsequently registering those copyrights after SCO had registered them) and since improperly inducing Novell to attempt to breach the Asset Purchase Agreement by purporting to waive SCO's rights under the Asset Purchase Agreement, IBM has contributed \$50 million dollars to Novell, as mentioned above, so that Novell can complete the purchase of SuSE, one of the largest Linux distributors in order to compete more directly with SCO, contrary to the terms of the Asset Purchase Agreement.

In addition, as to the patents, the '746 patent, in the section entitled "Background of the Invention," cites one article directed to LZ78 data compression and indicates that it is representative of the prior art. U.S. Patent No. 4,814,746, column 1, lines 13-27. That statement is material, false and misleading and was known by IBM to be material, false and misleading. In fact, the single article cited in the '746 patent is not representative of the prior art. There are

numerous other techniques such as LZ77, described in an article entitled "A Universal Algorithm for Sequential Data Compression," IEEE Transactions on Information Theory, Vol. IT-23, No. 3, May 1977, pp. 337-343. Other types of prior art data compression methods include run length encoding, arithmetic encoding and Huffman encoding. The falsity of IBM's statement is also reflected by the fact that in the period from December 9, 1975 to March 1, 1983, IBM itself obtained the issuance of at least 31 patents directed to data compression.

On September 22, 1988, during prosecution of the continuation patent application which led to issuance of the '746 patent, IBM filed an Information Disclosure Statement ("IDS") with the PTO. That IDS discloses European Patent Office ("EPO") patent publication 129439. The inventor of that patent publication was Terry Welch. The patent publication was published on December 27, 1984. Inexplicably, while IBM mentioned the United States counterpart of the EPO publication, it did not cite that counterpart in the citation of prior art. Thus, the face of the '746 patent does not contain any reference to the U.S. counterpart. That counterpart was U.S. Patent No. 4,558,302. That patent contains claims which overlap with the '746 patent. The Welch U.S. Patent No. 4,558,302 was filed 19 days after the '746 patent application was filed in the PTO. The closeness of these dates implicates 35 U.S.C. § 102(g) and raises a serious question as to who was the first inventor of the claimed subject matter and who is entitled to the patent. The failure to cite the U.S. counterpart, the fact that IBM waited almost three years after the U.S. counterpart issued as a patent to even inform the PTO of the EPO publication, and the additional fact that IBM waited until after the claims of the '746 patent were allowed to file an IDS, were intended to deter the Patent Examiner from comparing the claims of the U.S. counterpart to the allowed claims of the '746 patent. These actions were material to the examination of the '746 patent.

IBM's IDS states that the U.S. counterpart patent "apparently is an improvement on the teaching of [another reference] and offers nothing more that would affect the patentability of the allowed claims in this case." These statements were material, false and misleading and were known by IBM to be material, false and misleading. These statements and the fact that IBM cited the EPO publication and not the U.S. patent counterpart had the effects of not only mischaracterizing the disclosure of the Welch patent application, but also of concealing from the PTO the overlap between the claimed subject matter of the '746 patent and the counterpart U.S. patent.

IBM withheld additional prior art from the PTO. In February, 1981, IBM published an article entitled "Message Compression Method." The article was published as an IBM Technical Disclosure Bulletin, Volume 23, No. 9, pages 4197-98. That publication was material to the patentability of the '746 patent. IBM withheld this prior art with intent to deceive the PTO.

On information and belief, IBM was aware prior to the issuance of the '746 patent, of U.S. Patent No. 4,366,551, issued December 28, 1982, to Klaus E. Holtz. This patent is material to the patentability of the claims of the '746 patent. On information and belief, IBM's intentional failure to disclose this prior art to the PTO was part of IBM's scheme to withhold material prior art.

The '785 patent, entitled "Method for Monitoring and Recovery of Subsystems in a Distributed/Clustered System," was filed on February 27, 1996, listing as joint inventors Daniel Manuel Dias, Richard Pervin King, and Avraham Leff. Applicants also filed an IDS on this date. The IDS listed 12 references that are all U.S. patents. No other references, including technical papers authored by one or more of the joint inventors were listed. A review of papers authored by the three inventors reveals several that are material to patentability. In particular, Avraham Leff's Ph.D dissertation, entitled "A Dynamic and Decentralized Approach to Management of CPU and Memory," published at Columbia University in 1992, is material to the patentability of the '785