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Brent O. Hatch (5715)
Mark F. James (5295)
HATCH, JAMES & DODGE, P.C.
10 West Broadway, Suite 400
Salt Lake City, Utah 84101
Telephone: (801) 363-6363
Facsimile: (801) 363-6666

Stephen N. Zack
Mark J. Heise
BOIES, SCHILLER & FLEXNER LLP
100 Southeast Second Street
Suite 2800
Miami, Florida 33131
Telephone: (305) 539-8400
Facsimile: (305) 539-1307

Attorneys for Plaintiff The SCO Group, Inc.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

THE SCO GROUP, INC., a Delaware corporation, Plaintiff, vs. INTERNATIONAL BUSINESS MACHINES CORPORATION, a New York corporation, Defendant.	**PLAINTIFF SCO'S RESPONSE TO IBM'S THIRD SET OF INTERROGATORIES** Case No. 2:03-CV-0294 DAK Hon. Dale A. Kimball Magistrate Judge Brooke C. Wells

Pursuant to Federal Rules of Civil Procedure 26 and 33(b), Plaintiff The SCO Group, Inc. ("SCO") hereby submits its objections and responses to Defendant International Business Machines Corporation's ("IBM") Third Set of Interrogatories (the "Interrogatory"), dated October 29, 2003. The objections to interrogatories set forth herein are made by and through the

undersigned attorneys. SCO reserves the right to supplement these responses and objections because, among many reasons, contention interrogatories at this early stage of the litigation are clearly premature--before even a single deposition of either party has been conducted and before critical discovery has been provided by IBM.

GENERAL OBJECTIONS TO INTERROGATORY 14

1. SCO objects to the Interrogatory on the ground that it is premature and should not be answered until the close of discovery. SCO's objections and responses are based on information now known to SCO. Discovery is in the initial stages in this case, especially for IBM's newly asserted counterclaims. For many of IBM's counterclaims, such as those asserting patent infringement, IBM has relied on notice pleading and has provided no identification of the claims which are allegedly infringed, an open-ended identification of allegedly infringing products, and no claim charts to show infringement. The few allegedly infringing products which IBM has identified to date are complex, software products. As discovery progresses in this proceeding, SCO will obtain a greater understanding of IBM's causes of action. It is expected that additional information underlying SCO's defenses will be obtained in the discovery process. Accordingly, for these reasons and others, SCO reserves the right to supplement this interrogatory answer at the appropriate time.

The premature nature of the Interrogatory is further highlighted by the fact that IBM has filed a Second Amended Counterclaim since the filing of the Interrogatory, which SCO is not yet required to answer. As a result, there are no longer any affirmative defenses pending as a technical matter. SCO nonetheless has answered below based on the previously filed affirmative defenses it expects it will file again. To the extent SCO files any different or additional

affirmative defenses in response to the Second Amended Counterclaim, SCO reserves the right to amend, modify or supplement its objections and responses.

2. SCO objects to the Interrogatory on the ground that it seeks "all facts concerning each affirmative defense asserted" and is therefore overly broad and unduly burdensome.

3. SCO objects to the Interrogatory insofar as the information requested is already provided in SCO's Second Amended Complaint and SCO's Reply to IBM's Amended Counterclaims, the allegations of which are incorporated by reference herein.

4. SCO objects to the Interrogatory insofar as it imposes obligations on SCO beyond those contemplated in the Federal Rules of Civil Procedure and/or the Local Rules of the District of Utah.

5. SCO objects to the Interrogatory to the extent that it purports to seek information protected by the attorney-client privilege or any other applicable privilege or immunity from discovery.

6. SCO objects to the Interrogatory to the extent that it seeks production of work product, mental impressions, conclusions, opinions, or legal theories of SCO's counsel, experts, and/or consultants developed in connection with or in anticipation of this or other litigation or other business transactions not related to this litigation.

7. To the extent the answer to this interrogatory is not contained in the text of this answer, it is contained in the documents referred to herein. The burden of deriving or ascertaining the answer from these documents is substantially the same for SCO as it is for IBM. For the most part, the documents are publicly available, have already been produced or the documents originated with IBM. Nevertheless, SCO will provide IBM with a reasonable opportunity to inspect and make copies of such documents.

SPECIFIC OBJECTIONS AND RESPONSES TO INTERROGATORY 14

Interrogatory No. 14

Please describe, with specificity and in detail, all facts concerning each affirmative defense asserted in SCO's Answer to IBM's Amended Counterclaims.

Response to Interrogatory No. 14

SCO's responses regarding the affirmative defenses are as follows:

1. **IBM fails to state a claim upon which relief may be granted.**

Without waiving the foregoing objections, SCO objects to providing "all facts" concerning this affirmative defense because this Affirmative Defense involves pure questions of law. Accordingly, the interrogatory is improper and beyond the scope of permissible discovery pursuant to Fed. R. Civ. P. 33 inasmuch as it is directed at this defense. To the extent a response is required, SCO incorporates by reference its answer to each of its other affirmative defenses set forth below.

2. **IBM's claims are barred by the doctrines of waiver, estoppel, acquiescence, and/or laches.**

Without waiving the foregoing objections, Plaintiff refers to its answer below regarding Item 3. In addition, 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 1980's. 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. 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.

3. IBM's contractual right to license, distribute or use AIX or Dynix/ptx has been properly and validly terminated, and any claim based thereon is barred.

Without waiving the foregoing objections, Plaintiff offers the following facts concerning this Affirmative Defense: As fully set forth in SCO's Second Amended Complaint, SCO is the

successor to AT&T under the Software Agreement originally executed by and between AT&T and IBM on February 1, 1985, and designated a Software Agreement Number Soft-0015 ("AT&T / IBM Software Agreement"). The AT&T / IBM Software Agreement specifies the terms and conditions for use of UNIX System V source code, documentation and methods related thereto, together with modifications and derivative works created by IBM based on UNIX System V (collectively, the "Software Products"). With respect to the rights granted for use of the Software Products under Section 2.01 of the Software Agreement, IBM received the following:

> [A] personal, ***nontransferable*** and nonexclusive right to ***use*** in the United States each Software Product identified in the one or more Supplements hereto, ***solely for Licensee's own internal business purposes*** and solely on or in conjunction with Designated CPUs for such Software Product and to ***prepare derivative works based on*** such Software Product, provided the resulting materials are ***treated hereunder as part of the original Software Product.*** [Emphasis added.]

IBM violated § 2.01 of the AT&T / IBM Software Agreement by, *inter alia*, using, and assisting others to use, the Software Products and IBM's modifications and derivative works based on the Software Product (i.e., the "resulting materials") for external purposes different from, and broader than, IBM's own internal business purposes. By publicly transferring IBM's modifications and derivative works based on the Software Products (i.e. AIX) to Linux, IBM has failed to treat these resulting materials as part of the original Software Product. These contributions include, but are not limited to, those items previously identified in SCO's supplemental answer to Interrogatory 1 served on January 12, 2004.

Further, IBM agreed in § 2.05 of the AT&T / IBM Software Agreement to the following additional restrictions on the use of the Software Products:

> No right is granted by this Agreement for the use of Software Products directly ***for others, or for any use of Software Products by others.*** [Emphasis added].

IBM breached § 2.05 of the AT&T / IBM Software Agreement by, *inter alia*, publicly transferring IBM's modifications and derivative works based on the Software Products (i.e. AIX) to Linux. The contribution of these modifications or derivative works based on the Software Products has made them available for use for others and by others. By way of example and not limitation, IBM has made available for use for others and by others those items previously identified in SCO's supplemental answer to Interrogatory 1 served on January 12, 2004.

Further, IBM agreed in § 7.10 of the AT&T / IBM Software Agreement to the following restrictions on transfer of the Software Product, including AIX, the modification or derivative work based on UNIX System V:

> [N]othing in this Agreement grants to Licensee the right to sell, lease or otherwise transfer or dispose of a Software Product ***in whole or in part.*** [Emphasis added].

IBM breached § 7.10 of the AT&T / IBM Software Agreement by, *inter alia*, transferring portions of the Software Products or modifications or derivative works based thereon (i.e., AIX), including but not limited to the AIX Journaling File System and all other UNIX-based source code publicly announced by IBM, to Linus Torvalds for open distribution to the general public under a software license that destroys the proprietary and confidential nature of the Software Products. Other contributions made "in whole or in part" in violation of this paragraph include, but are not limited to, those items previously identified in SCO's supplemental answer to Interrogatory 1 served on January 12, 2004. IBM has further stated its intention to transfer the entirety of AIX into open source in anticipatory violation of its obligations under § 7.10 of the AT&T / IBM Software Agreement.

Further, IBM agreed in Side Letter ¶ 9, a substitute provision to § 7.06(a) of the AT&T / IBM Software Agreement, to the following restrictions on confidentiality of the Software Product, including AIX as a modification or derivative work based on UNIX System V:

> Licensee agrees that it shall hold Software Products subject to this Agreement ***in confidence for AT&T.*** Licensee further agrees that it ***shall not make any disclosure*** of such Software Products to anyone, except to employees of Licensee to whom such disclosure is necessary to the use for which rights are granted hereunder. Licensee shall appropriately notify each employee to whom any such disclosure is made that such disclosure is made in confidence and shall be kept in confidence by such employee. [Emphasis added].

In recognition of SCO's right of confidentiality of the Software Products and the modifications and derivative works based thereon (i.e., AIX) IBM directs all customers who need to view AIX source code to first obtain a source code license from SCO as a condition to viewing any part of AIX. For example, SCO received a letter on or about March 4, 2003 from Lockheed Martin Corporation requesting verification of the existence of a Software Agreement by and between Lockheed and SCO as a condition to Lockheed obtaining access to view AIX source code.

The letter stated, in part, as follows:

> LMATM is in the process of licensing [AIX] from IBM to be used for integration purposes only. Per the attached supplement to the subject to document, contained within the AIX source code is third party IP which must be licensed from the owner prior to IBM providing the AIX source code to any licensee (see Prerequisite Source License, Para. 2.2).
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> * * *
>
> 2.2 Prerequisite Source License. ***IBM cannot disclose*** (includes viewing) certain Third-Party Source Code ***to any party who does not have a license that permits access to the Code.*** Prior to receiving or accessing the Source Code described above in this Supplement, LMATM must obtain the following Source Code Licenses:
>
> a) ***AT&T Technologies, Inc. AT&T Information Systems, Inc., or UNIX™ Systems Laboratory Software Agreement*** No. SOFT-

> -- and AT&T Information Systems, Inc. Software Agreement Supplement for Software Product AT&T UNIX System V. Release 4.0, or AT&T Information Systems, Inc. Schedule for Upgrades (from UNIX Systems V. Release 3.1 to UNIX System V. Release 3.2 or from UNIX System V. Release 3.1 International Edition to UNIX System V. Release 3.2 International Edition) to ***equivalent SCO Group License.*** [Emphasis added].

Despite being well aware of the need to preserve the confidentiality of the Software product and the modifications and derivative works based thereon (i.e., AIX) IBM breached its obligation of confidentiality, and has failed to otherwise hold the Software Products in confidence for SCO by contributing portions of the Software Product to open source development of Linux , including, but not limited to, those items previously identified in SCO's supplemental answer to Interrogatory 1 served on January 12, 2004.

Further, IBM agreed in §4.01 of the AT&T / IBM Software Agreement to restrictions on export of the Software Product, as follows:

> Licensee agrees that it will not, without the prior written consent of AT&T, export, ***directly or indirectly,*** Software Products covered by this Agreement to any country outside of the United States. [Emphasis added].

This provision was later modified to allow export rights to several countries outside the United States. However, SCO or its predecessors have not given IBM permission to allow it to indirectly make available 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 Product or modifications or derivative works based on the Software Products (i.e. AIX) 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 / IBM Software Agreement. By such contribution of the Software Products and modifications or derivative works based thereon (i.e., AIX) to Linux, IBM has directly or indirectly exported such resulting materials to anyone in the world with a computer.

IBM is aware of the importance of these restrictions and the need to protect the confidentiality of UNIX System V, including modifications and derivatives such as AIX and Dynix/ptx. Indeed, years after signing the original license agreements, IBM executed Amendment X. Paragraph 3.7 of Amendment X provides examples under which IBM is entitled to disclose UNIX and AIX source code to its development partners – and examples under which IBM is not entitled to make such disclosures. Paragraph 3.7 of Amendment X provides as follows:

> The following illustrations are intended to clarify and illustrate the relief provided in Subsection 2.1 of this Agreement [relating to disclosure of source code to contractors].
>
> Company A, sublicensee of the Sublicensed Product [AIX] is a general computing system manufacturing firm. IBM may distribute Source Copies to Company A for Authorized Purposes.
>
> ***However, IBM may not distribute Source Copies to Company A for purposes of making modifications to adapt the Sublicensed Products [AIX] as a general operating system for Company A's general computer hardware system.*** [Emphasis added].

Paragraph 3.7 of Amendment X states that IBM may not use any Sublicensed Product from SCO, including AIX, for the purposes of making modifications to adapt AIX as a competing general operating system. IBM nonetheless has chosen to adapt UNIX and AIX for use in a competing operating system (i.e. Linux) in violation of its obligations to SCO.

IBM collaborated with third parties in releasing source code to the general public, including but not limited to those items previously identified in SCO's supplemental answer to Interrogatory 1 served on January 12, 2004. Such actions have resulted in IBM thereby breaching its contracts. Contractors who worked on the Open Source Development Laboratory assisted IBM employees in transferring information technology to Linux. Examples of such transfer of information include emails written to and from IBM employees, including Kevin Corry, Mike Spreitzer, A. Prasad, Ian Romanick, Ben Rafanello, Niels Christiansen, and Juan Gomez, which imparted AIX information technology during at least the period from September 2000 through November 2002.

Based on the forgoing 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 Licensee 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 / IBM Software Agreement, §6.03]
>
> Regarding Section 6.03 of the Software Agreement and Sections 2.07 and 3.03 of the Sublicensing Agreement, we will not terminate your rights for breach, nor will we give notice of termination under such Sections, for breaches we consider to be immaterial. We agree to lengthen the notice period referenced in such Sections from two (2) months to one hundred (100) days. If a breach occurs that causes us to give notice of termination, you may remedy the breach to avoid termination if you are willing and able to do so. In the

> event that a notice of termination is given to you under either of such Sections and you are making reasonable efforts to remedy the breach but you are unable to complete the remedy in the specified notice period, we will not unreasonably withhold our approval of a request by you for reasonable extension of such period. We will also consider a reasonable extension under Section 2.07 of the Sublicensing Agreement in the case of a Distributor who is making reasonable efforts to remedy a breach.
>
> In any event our respective representatives will exert their mutual good faith best efforts to resolve any alleged breach short of termination. [Side Letter, ¶5]

In light of IBM's unlawful actions, and consistent with its rights under the Software Agreement, SCO delivered a notice of termination to Sam Palmisano, Chief Executive Officer of IBM (the "AIX Termination Notice") for IBM's breaches of the Software (and Sublicensing) Agreement by IBM. Following delivery of the AIX Termination Notice, SCO took every reasonable step to meet and confer with IBM regarding IBM's breach of the AT&T / IBM Software Agreement and Related Agreements. For instance, on June 2, 2003 SCO met with IBM representatives, including Bob Anderegg, Don Rosenberg, Ron Lauderdale, Alfred Spector, and Alec Berman, at IBM's headquarters and identified various breaches of the license agreement by IBM. Neither at that meeting nor thereafter in meetings with senior IBM executives did IBM indicate it would make any effort to correct its past breaches or state that it would discontinue breaching the agreement.

IBM disregarded SCO's rights under the IBM Related Agreements by failing to undertake any efforts to cure its numerous and flagrant violations thereunder. As a result, effective June 13, 2003, SCO properly terminated the IBM Related Agreements and, accordingly, IBM has no further rights thereunder. Despite SCO's valid termination, IBM nonetheless continues to operate under the IBM Related Agreements, and use the Software Products and Source Code thereunder as

though its rights under the Agreement 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 AIX has been properly and validly terminated, and any claim based thereon is barred.

Additionally, SCO is the successor to AT&T under that certain Sublicensing Agreement originally executed by and between AT&T and IBM designated as SUB-00015A (the "AT&T / IBM Sublicensing Agreement"). The AT&T / IBM Sublicensing Agreement grants the right to distribute object-based code of UNIX System V and modifications thereto and derivative works based thereon. SCO terminated IBM's right to use and distribute the Software Product, including derivative works and methods based thereon as of the AIX Termination Date, i.e., June 13, 2003. From and after the AIX Termination Date, any and all distributions of AIX by IBM are in violation of the AT&T / IBM Sublicensing Agreement.

As also fully set forth in SCO's Second Amended Complaint, SCO is the successor to AT&T under that certain Software Agreement originally executed by and between AT&T and Sequent designated as Software Agreement Number SOFT-000321 ("AT&T / Sequent Software Agreement"). The AT&T / Sequent Software Agreement specifies the terms and conditions for use of UNIX System V source code, documentation and methods relating thereto, together with modifications and derivative works created by IBM/Sequent based on UNIX System V (collectively, the "Software Products"). With respect to the rights granted for use of the System V source code under Section 2.01 of the AT&T / Sequent Software Agreement, Sequent received the following:

> [A] personal, ***nontransferable*** and nonexclusive right to ***use*** in the United States each Software Product identified in the one or more Supplements hereto, ***solely for Licensee's own internal business purposes*** and solely on or in conjunction with Designated CPU's for such Software Product. Such right to use includes the right to ***modify*** such Software Product and to ***prepare derivative works based on*** such Software product, provided the resulting materials are ***treated hereunder as part of the original Software Product.*** [Emphasis added.]

IBM violated §2.01 of the AT&T / Sequent Software Agreement by, *inter alia*, using, and assisting others to use the Software Products and IBM's modifications and derivative works based thereon (i.e., the "resulting materials") for external business purposes different from , and broader than, IBM's own internal business purpose. By publicly transferring IBM's modifications and derivative works based on the Software Products (i.e., Dynix/ptx) to Linux, IBM has failed to treat these resulting materials as part of the original Software Product as limited by other provisions in the agreement detailed below. These contributions include, but are not limited to, those items previously identified in SCO's supplemental answer to Interrogatory 1 served on January 12, 2004.

Further, Sequent agreed in §2.05 of the AT&T / Sequent Software Agreement to the following restrictions on the use of the Software Products:

> No right is granted by this Agreement for the use of Software Products directly ***for others, or for any use of Software Products by others.*** [Emphasis added].

IBM breached Sequent's obligations under § 2.05 of the AT&T / Sequent Software Agreement by, *inter alia*, publicly transferring IBM's modifications and derivative works based on the Software Products (i.e. Dynix/ptx) to Linux. The contribution of these modifications or derivative works based on the Software Products has made them available for use for others and by others. These contributions include, but are not limited to, those items previously identified in SCO's supplemental answer to Interrogatory 1 served on January 12, 2004. IBM has even gone

so far as to publish the Dynix/ptx copyright as part of the source code and documentation contribution of UNIX-derived RCU technology it has improperly made available to the open source community. The following copyright attribution is found in Linux kernel 2.4x:

> Copyright (c) International Business Machines Corp., 2001 This program is free software; you can redistribute it and/or modify it under the terms of the GNU General Public License as published by the Free Software Foundation; either version 2 of the License, or (at your option) any later version. This program is distributed in the hope that it is useful, but WITHOUT ANY WARRANTY; without even the implied warranty of MERCHANTABILITY or FITNESS FOR A PARTICULAR PURPOSE. See the GNU General Public License for more details. You should have received a copy of the GNU General Public License along with this program; if not, write to the Free Software Foundation, Inc., 59 Temple Place – Suite 330, Boston, MA 02111-1307, USA. Author: Dipankar Sarma ***(Based on a Dynix/ptx implementation by Paul McKenney).*** [Emphasis added].

This publication of the RCU copyright is an example of IBM's blatant disregard of SCO's rights to control the use of the Software Product, including derivative works and modifications thereof, pursuant to § 2.05 of the AT&T / Sequent Software Agreement.

Further, Sequent agreed under § 7.06(a) of the AT&T / Sequent Software Agreement, to the following restrictions on confidentiality of the Software Product, including Dynix/ptx as a modification or derivative work based upon UNIX System V:

> Licensee agrees that it shall hold all parts of the Software Products subject to this Agreement ***in confidence*** for AT&T. Licensee further agrees that it ***shall not make any disclosure*** of any or all of such Software Products (including methods or concepts utilized therein) to anyone, except to employees of Licensee to whom such disclosure is necessary to the use for which rights are granted hereunder. Licensee shall appropriately notify each employee to whom any such disclosure is made that such disclosure is made in confidence and shall be kept in confidence by such employee. [Emphasis added].

IBM has breached Sequent's obligation of confidentiality by contributing portions of the Software Products and the modifications and derivative works based thereon (i.e., Dynix/ptx) to open source development of Linux, including but not limited to, those items previously identified in SCO's supplemental answer to Interrogatory 1 served on January 12, 2004.

Further, Sequent agreed in § 7.10 of the AT&T / Sequent Software Agreement to the following restrictions on ***transfer*** of the Software Product, including Dynix/ptx, the modification or derivative work based on UNIX System V:

> [N]othing in this Agreement grants to Licensee the right to sell, lease or otherwise transfer or dispose of a Software Product in whole or in part.

IBM breached Sequent's obligations under § 7.10 of the AT&T / Sequent Software Agreement by, *inter alia*, transferring portions of the Software Products or modifications or derivative works based thereon (i.e., Dynix/ptx), including Dynix/ptx source code, documentation and methods to the OSDL and/or Linus Torvalds for open distribution to the general public under a software license that destroys the proprietary and confidential nature of the Software Products. Other contributions made "in whole or in part" in violation of this paragraph include, but are not limited to, those items previously identified in SCO's supplemental answer to Interrogatory 1 served on January 12, 2004.

Further, export of UNIX technology is controlled by the United States government. Thus, SCO, Sequent, IBM and all other UNIX vendors are subject to strict export control regulations with respect to any UNIX-based customer distribution. To this end, Sequent agreed in § 4.01 of the AT&T / Sequent Software Agreement to restrictions on export of the Software Product, as follows:

> Licensee agrees that it will not, without the prior written consent of AT&T, export, ***directly or indirectly***, Software Products covered by this Agreement to any country outside of the United States.

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 breached 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

patent application. The dissertation describes a system of resource management that does not require a centralized coordinator. Sites cooperate in transmitting important state information to each other. Decisions made at one site are then factored by other sites into subsequent decisions. Because this dissertation was material to the patentability of the '785 patent application, the dissertation should have been disclosed to the PTO during prosecution of the '785 patent application. IBM withheld this reference with the intent to deceive the PTO.

Inventor Daniel M. Dias appears as joint author on three papers that relate directly to the subject matter claimed in the '785 patent. These three papers appear to have been published at about the same time as the '785 patent filing date of February 27, 1996. All three papers list joint authors, none of whom, other that Mr. Dias, appears as an inventor on the '785 patent. "A Scalable and Highly Available Web Server," published in Proceedings of COMPCON '96, lists as authors, in addition to Mr. Dias, William Kish, Rajat Mukherjee, and Renu Tewari. "High Availability in Clustered Multimedia Servers," published in Proceedings – International Conference on Data Engineering 1996, lists as authors, in addition to Mr. Dias, Renu Tewari, Rajat Mukherjee, and Harrick Vin. "Design and Performance Tradeoffs in Clustered Video Servers," published in Proceedings – International Conference on Multimedia Computing and Systems 1996, lists as authors, in addition to Mr. Dias, Renu Tewari, Rajat Mukherjee, and Harrick Vin. All three of these papers describe concepts that can be found in the '785 patent claims, and thus Messrs. Kish, Mukherjee, Tewari, and Vin should have been listed as inventors on the '785 patent. IBM's decision not to list Messrs. Kish, Mukherjee, Tewari, and Vin as inventors on the '785 patent was with the intent to deceive the PTO.

U.S. Patent 5,129,080 ('the '080 patent"), entitled "Method and System Increasing the Operational Availability of a System of Computer Programs Operating in a Distributed System of

Computers," filed October 17, 1990, issued July 7, 1992, and assigned to IBM, is material to patentability of the '785 patent, and should have been disclosed by IBM to the PTO. In particular, the '080 patent discloses high availability architectures, cooperative processing among nodes of a computer network, and fault recovery techniques. The '080 patent also discloses sharing of state information among the computer network nodes and global and local management. Because the '080 patent is material to patentability of the '785 patent application, the '080 patent should have been disclosed to the PTO during prosecution of the '785 patent application. IBM withheld this reference with the intent to deceive the PTO.

The '209 patent, entitled "Self-verifying Receipt and Acceptance System for Electronically Delivered Data Objects," was filed on October 31, 1988. The '209 patent, in the section entitled "Background of the Invention," describes only two prior art references: U.S. Patent No. 4,757,533 to Allen et al. and U.S. Patent No. 4,757,534 ("the '534 patent") to Stephen M. Matyas et al.

The '534 patent is assigned to IBM. Stephen M. Matyas, co-inventor of the '534 patent, is listed as an author of more than 100 IBM publications related to cryptography or data encryption. Mr. Matyas is also listed as an inventor on more than 70 issued patents in this field. Mr. Matyas is well known in the field of cryptography and data encryption at IBM. When the '209 patent application was filed, IBM knew that some of Mr. Matyas' activities were material to the patentability of the '209 patent. However, as noted above, only the '534 patent was listed. IBM failed to cite other material prior art references associated with Mr. Matyas, including, for example, U.S. Patent 4,203,166 ("the '166 patent") in which Mr. Matyas is listed as an inventor. The '166 patent, entitled "Cryptographic File Security for Multiple Domain Networks," filed December 5, 1977, issued May 13, 1980, and assigned to IBM, is material to patentability of the '209 patent, and should have been disclosed by IBM to the PTO.

The '166 patent discloses a file security system for data files created at a first host system in one domain and recovered at a second host system in another domain of a multiple domain network. Specifically, the '166 patent discloses, a first host system that provides a file recovery key for subsequent recovery of a data file at a second host system. The first host system enciphers (modifies) the first host system plaintext to obtain first host system ciphertext as the data file. The file recovery key is used as header information for the data file. When the data file is to be recovered at the second host system, the file recovery key is provided at the second host system and the second host system transforms the file recovery key into a form, which is usable to decipher the data file. The second host system uses the transformed file recovery key to perform a cryptographic operation to obtain the first host system ciphertext in clear form (unmodified) at the second host system. Thus, the '166 patent is material to the patentability to the claims of the '209 patent. Because the '166 patent is material to the patentability of the '209 patent, the '166 patent should have been disclosed to the PTO during prosecution of the '209 patent. IBM withheld this reference with the intention to deceive the PTO.

IBM also failed to cite U.S. Patent 4,238,854 ("the '854 patent") in which Mr. Matyas is again listed as an inventor. The '854 patent, entitled "Cryptographic File Security for Single Domain Networks," filed December 5, 1977, issued December 9, 1980, and assigned to IBM, is material to patentability of the '209 patent, and should have been disclosed by IBM to the PTO. The '854 patent was filed concurrently with the '166 patent described above.

The '854 patent discloses that an operational key enciphered under the file key of the designated storage media, as header information, together with the host data enciphered under the operational key is written on the storage media as an enciphered data file. When the data file is recovered, the host data security device transforms the enciphered operational key header

information under control of a host master key into a form which permits the operational key to be used for deciphering the enciphered data file to obtain the file data in clear form. Thus, the '854 patent is material to the patentability to the claims of the '209 patent. Because the '854 patent is material to the patentability of the '209 patent, the '854 patent should have been disclosed to the PTO during prosecution of the '209 patent. IBM withheld this reference with the intention to deceive the PTO.

Matyas is also one of the authors of an article entitled "Cryptographic Key Authentication in Communication System" published by IBM in March, 1978. The article was published as an IBM Technical Disclosure Bulletin, March 1978, pages 3990-92. This publication discloses that message communication protection is obtained by enciphering a clear data message X at a host under control of a working key KS to yield a ciphered data message Y. At the receiving terminal, the enciphered data message Y is deciphered under control of the working key KS to yield the clear data message X.

Another article in which Matyas is an author is entitled "Terminal Control of Encipher and Decipher Data Operations" published by IBM in August, 1981. The article was published as an IBM Technical Disclosure Bulletin, August, 1981, pages 1334-1339.. This publication discloses that in communication security applications where data is to be transmitted in a cryptographic session, between a host unit and a remote terminal controller unit, a data encrypting session key (KS) is required to be established in a form suitable for use at each unit. Data may then be enciphered under KS at one unit and transmitted to the other unit where it is deciphered under KS.

Thus, the above publications, published as IBM Technical Disclosure Bulletins, are material to the patentability of the claims of the '209 patent. Because these publications are material to the patentability of the '209 patent, these articles should have been disclosed to the

PTO during prosecution of the '209 patent. IBM withheld these references with the intention to deceive the PTO.

The foregoing actions constitute inequitable conduct and unclean hands and render the claims of the '746, '785, and '209 patents unenforceable. Discovery in this proceeding is ongoing, and additional acts of inequitable conduct and unclean hands will be added to this defense at the appropriate time.

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.

6. The General Public License ("GPL") is unenforceable, void and/or voidable, and IBM's claims based thereon, or related thereto, are barred.

Without waiving the foregoing objections, Plaintiff notes that enforcement of the General Public License ("GPL") through state law causes of action is precluded by the Copyright Act and by the Supremacy Clause of the U.S. Constitution. The Copyright Act and the Supremacy Clause both preempt IBM's counterclaims alleging "breach" of the GPL and "promissory estoppel."

The text of the GPL itself makes clear that the activities governed by the GPL are also explicitly governed by federal copyright law. Under the terms of the GPL, upon a violation of the GPL, violators' rights under the GPL are terminated and their permissions revert to rights set out in federal copyright law. The remedy for alleged breaches of the GPL is a copyright infringement claim brought by the copyright holder. Section 301 of the Copyright Act preempts IBM's GPL claims in this case.

Because the GPL purports to govern and regulate the same rights as federal copyright law, and because of the uncertainty and difficulty accompanying administration and enforcement of the GPL, the GPL regime stands as an obstacle to the accomplishment and execution of the full

purposes and objectives of Congress in enacting the federal copyright system. The GPL is therefore also preempted under the doctrine of "conflict preemption."

Moreover, even if the GPL were not preempted by federal law, it would be unenforceable under state law for numerous reasons. Among these is the fact that the GPL is not a contractual relationship predicated on mutual assent to obligations, and lacks other qualities required for enforcement under state law contract principles. Moreover, the GPL allows the unrestricted flow of technology to countries that are specifically barred from having such technology and thus is an illegal contract.

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.

7. The GPL is selectively enforced by the Free Software Foundation such that enforcement of the GPL by IBM or others is waived, estopped or otherwise barred as a matter of equity.

Without waiving the foregoing objections, Plaintiff responds regarding this Affirmative Defense by incorporating herein its response to the Affirmative Defense listed in Item 6 above. SCO also observes that statements and conduct of the Free Software Foundation regarding the nature and enforcement of the GPL – which speak for themselves, and which IBM is in at least as good a position as SCO to know and/or learn – corroborate SCO's response regarding its Affirmative Defense in Item 6 above.

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.

8. **IBM's claims are barred, in whole or in part, by the First Amendment to the U.S. Constitution, by the doctrine of judicial immunity and by privilege.**

Without waiving the foregoing objections, the statements attributable to SCO in IBM's Second Amended Counterclaims are not strictly commercial speech but rather are statements entitled to first amendment protection. The public statements by SCO related to, among other things, SCO's rights under its various agreements with IBM and Sequent, and the litigation surrounding the termination of those agreements. Such topics and the other public statements identified by IBM in its Second Amended Counterclaims concern important social issues regarding proprietary rights and are not misleading, misrepresentative, false, or disparaging. Additionally, SCO's public statements were made preliminary to, or in the context of, litigation and/or were made in good faith.

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.

9. **IBM's claims are barred or preempted, in whole or in part, by the laws of the United States.**

Without waiving the foregoing objections, regarding this Affirmative Defense, SCO incorporates herein its response regarding the Affirmative Defense listed in Items 6 and 8 above.

10. **IBM's own conduct, including that of its agents, contractors and partners, and/or conduct of third parties constitute superseding or intervening causes with respect to IBM's claims of damage or injury.**

Any damages IBM claims to have suffered is a result of its own conduct and/or conduct of third parties unrelated to SCO. IBM freely entered into the agreements described in SCO's

Second Amended Complaint and in SCO's Response to the Interrogatory relating to SCO's Affirmative Defense in Items 3 and 4 above. These contracts provided rights to AT&T (which have come to belong to SCO) and placed clear restrictions on the conduct of IBM. Despite the restrictions described in Items 3 and 4 above, IBM materially breached the contracts as set forth in SCO's Second Amended Complaint and in Items 3 and 4 above.

IBM collaborated with third parties in releasing source code to the general public and thereby breached IBM's contracts. Contractors who worked on the Open Source Development Laboratory assisted IBM employees in transferring information technology to Linux. Examples of such transfer of restricted technology include emails written to and from IBM employees, including Kevin Corry, Mike Spreitzer, A. Prasad, Ian Romanick, Ben Rafanello, Niels Christiansen, and Juan Gomez, which imparted AIX information technology during at least the period from September 2000 through November 2002.

Insofar as IBM claims any damages arising out of works it has copyrighted, IBM freely contributed source code to Linux for the free use of all licensees under the GPL. (IBM's Second Amended Counterclaims ¶ 45). Thus, it was IBM's own conduct that caused any damages. In addition, third parties involved with Linux may have contributed to any IBM injury.

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.

11. **SCO has acted legally and properly at all relevant times and IBM is therefore barred from any relief whatsoever.**

Without waiving the foregoing objections, SCO refers to its answers above regarding the facts concerning the Affirmative Defenses identified in Items 3, 4 and 5 above.

12. IBM is not, or may not be, the owner of the '746, '211, '209 or '785 Patents at issue.

IBM is not the proper owner of the '746 patent. Terry Welch is generally regarded as the inventor of LZW compression, and his patent was licensed to the industry by Unisys. IBM is not the proper owner of the '785 patent. Renu Tewari, William Kish, Rajat Mukherjee, and Harrick Vin should have been named as inventors of the '785 patent and are therefore actual owners of the '785 patent. SCO also incorporates its response to the Affirmative Defense identified in Item 15 below. 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.

13. The patents at issue, and particularly the claims of those patents alleged to be infringed, are invalid and of no effect for failure to comply with one or more requirements set forth in Title 35 of the United States Code, including, but not limited to Sections 101, 102, 103, 112, 116 and/or 256.

The claims of the '746 patent alleged to be infringed are invalid for failure to comply with 35 U.S.C. §102, §103, and §112. For example, the claims of the '746 patent are invalid under 35 U.S.C. §102 and/or §103 at least over one or more of the following references:

U.S. Patent No. 3,694,813
U.S. Patent No. 3,980,809
U.S. Patent No. 4,087,788
U.S. Patent No. 4,121,259
U.S. Patent No. 4,192,010
U.S. Patent No. 4,319,225
U.S. Patent No. 4,410,916
U.S. Patent No. 4,499,499
U.S. Patent No. 4,636,946
U.S. Patent No. 3,717,851
U.S. Patent No. 4,021,782

U.S. Patent No. 4,099,257
U.S. Patent No. 4,145,686
U.S. Patent No. 4,288,782
U.S. Patent No. 4,355,306
U.S. Patent No. 4,558,302
U.S. Patent No. 4,366,551
U.S. Patent No. 4,491,934
U.S. Patent No. 4,506,325
U.S. Patent No. 4,560,976
U.S. Patent No. 3,976,844
U.S. Patent No. 4,059,850
U.S. Patent No. 4,107,457
U.S. Patent No. 4,168,513
U.S. Patent No. 4,295,124
U.S. Patent No. 4,382,286
U.S. Patent No. 4,494,150
U.S. Patent No. 4,545,032
U.S. Patent No. 4,597,057
U.S. Patent No. 4,467,411
U.S. Patent No. 4,349,875

Frank Rubin, "Experiments in Text File Compression", Communications of the ACM, Vol. 19, No. 11, November 1976, pp. 617-623.

Edward M. McCreight, "A Space Economical Suffix To Reconstruction Algorithm", Journal of the Association for Computing Machinery, Vol. 23, No. 2, April 1976, pp. 262-267.

"A Universal Algorithm For Sequential Data Compression," IEEE Transactions on Information Theory, Vol. IT-23, No. 3, May 1977, pp. 337-343.

"Message Compression Method," published as an IBM Technical Disclosure Bulletin, Volume 23, No. 9, pages 4197-98.

Bruce Hahn "A New Technique for Compression and Storage of Data", Communication of the ACM, August 1974, Vol. 17, No. 8, pp. 434-436.

Michael Rodeh, "Linear Algorithm for Data Compression via String Matching", Journal of the Association for Computing Machinery, Vol. 28, No. 1, January 1981, pp. 16-24.

Robert S. Boyer, "A Fast String Searching Algorithm", Communication of the ACM, October 1977, Vol. 20, No. 10, pp. 762-771.

H.K. Reghbati, "An Overview of Data Compression Techniques", IEEE 1981, April 1981, pp. 71-74.

Jorma Rissanen, et al., "Universal Modeling and Coding", IEEE Transactions of Information, Vol. IT27, No. 1, January 1991, pp. 12-23.

Further, the claims of the '746 patent are invalid under 35 U.S.C. §112. The specification fails to contain an enabling disclosure as to teach any person skilled in the art to which it pertains to make and use the invention. The '746 patent fails to provide written description support for various terms in the claims, including various means-plus-function terms and a utilization device. The claims of the '746 patent are indefinite because the various means-plus-functions and the utilization device appear to be one structure.

The claims of the '209 patent alleged to be infringed are invalid for failure to comply with 35 U.S.C. §102, §103, and §112.

Claims of the '209 patent are anticipated under 35 U.S.C. § 102 by one or more, or are unpatentable under 35 U.S.C. § 103 over one or more, of the following references:

U.S. Patent 4,740,890	U.S. Patent 4,791,661
U.S. Patent 4,685,055	U.S. Patent 4,238,854
U.S. Patent 4,959,861	U.S. Patent 4,796,181
U.S. Patent 4,203,166	U.S. Patent 4,649,510
U.S. Patent 5,014,234	U.S. Patent 4,658,093
U.S. Patent 4,683,553	U.S. Patent 4,446,519
U.S. Patent 3,609,697	U.S. Patent 4,323,921
U.S. Patent 4,326,098	U.S. Patent 4,442,486
U.S. Patent 4,458,109	U.S. Patent 4,458,315
U.S. Patent 4,462,078	U.S. Patent 4,465,901
U.S. Patent 4,467,139	U.S. Patent 4,471,163
U.S. Patent 4,484,217	U.S. Patent 4,525,599
U.S. Patent 4,577,289	U.S. Patent 4,625,076

U.S. Patent 4,796,220
U.S. Patent 4,999,806
U.S. Patent 4,757,534
U.S. Patent 4,864,494
EP0137075
U.S. Patent 4,757,533

Matyas et al., "Cryptographic Key Authentication in Communication System", IBM Technical Disclosure Bulletin, pages 3990-3992 (March, 1978).

Matyas et al., "Terminal Control of Encipher and Decipher Data Operations", IBM Technical Disclosure Bulletin, pages 1334-1339 (August, 1981).

Konheim, Cryptography – A Primer, pp. 65-66 (1983).

The disclosure of the '209 patent does not meet one or more of the following requirements of 35 U.S.C. § 112. As required by 35 U.S.C. § 112, the specification of the '209 patent does not contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to make and use the invention. The '209 patent contains one or more claims that do not particularly point out and distinctly claim the subject matter regarded as the invention, as further required by 35 U.S.C. § 112. The '209 specification lacks corresponding structure for means-plus-function terms as required by 35 U.S.C. § 112, sixth paragraph.

The claims of the '785 patent alleged to be infringed are invalid for failure to comply with 35 U.S.C. §102, §103, §112, §116 and § 256.

For example, the claims of the '785 patent are invalid under one of 35 U.S.C. §102 and §103 at least over one or more of the following references:

U.S. Patent No. 5,129,080
U.S. Patent No. 5,423,000

A dissertation, entitled "A Dynamic and Decentralized Approach to Management of CPU and Memory," by Avraham Leff, published at Columbia University in 1992.

"Software Implemented Fault Tolerance: Technologies and Experience," Yennun Haung and Chandra Kintala, published by IEEE in 1993.

"Intelligent & Integrated Management of an Electronic Messaging Services Network," Raj Ananthanpillai, published by IEEE in 1992.

The claims of the '785 patent are invalid under 35 U.S.C. §112 because the specification fails to contain an enabling disclosure as to teach any person skilled in the art to which it pertains to make and use the invention and fails to comply with the written description requirement for terms in the claims, including means-plus-function terms.

The claims of the '785 patent are invalid under 35 U.S.C. §116 and §256 for failure to name all required inventors. See also the response to the Affirmative Defense in Item 15 below.

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.

14. On information and belief, IBM's claims under the patents at issue are precluded by the doctrine of prosecution history estoppel based on the admissions and representations made by IBM in proceedings before the United States Patent and Trademark Office during the prosecution of the applications of the patents at issue.

The claims of the '746 patent at issue are precluded based by prosecution history estoppel based on admissions and representations made by IBM during the prosecution of the application of the '746 patent. IBM's admissions, representations, and amendments bar the application of the doctrine of equivalents. IBM's admissions, representations, and amendments limit the claims of the patent to an IBM 370 Model 3081 series mainframe computing system and PLI programming language.

The claims of the '209 patent at issue are precluded because of prosecution history estoppel based on admissions and representations made by IBM during the prosecution of the application of the '209 patent. IBM's admissions, representations, and amendments bar the application of the doctrine of equivalents. IBM's admissions, representations, and amendments limit the claims of the '209 patent to methods and/or systems that require no special keys, no separate unscrambling routines or the like.

The claims under the '785 patent at issue are precluded based on prosecution history estoppel based on admissions and representations made by IBM during the prosecution of the application of the '785 patent. IBM's admissions, representations, and amendments before the U.S. Patent and Trademark Office bar the application of the doctrine of equivalents. IBM's admissions, representations, and amendments limit the claims of the patent to a high availability architecture that incorporates subsystems built without high availability without modifying the core functions of the high availability architecture. Further, the claims are limited to recovery of distributed systems that require coordination across nodes over which the systems are distributed.

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.

15. On information and belief, U.S. Patent 4,814,746 ("the '746 patent") is unenforceable by reason of IBM's inequitable conduct, acts or omissions before the U.S. Patent and Trademark Office ("PTO"). 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.

On information and belief, U.S. Patent 5,805,785 ("the '785 patent") is unenforceable by reason of IBM's inequitable conduct, acts or omissions before the PTO. 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 patent application. The dissertation describes a system of resource management that does not require a centralized coordinator. Sites cooperate in transmitting important state information to each other. Decisions made at one site are then factored by other sites into subsequent decisions. Because this dissertation was material to the patentability of the '785 patent application, the dissertation should have been disclosed to the PTO during prosecution of the '785 patent application. IBM withheld this reference with the intent to deceive the PTO. Inventor Daniel M. Dias appears as joint author on three papers that relate directly to the subject matter claimed in the '785 patent. These

three papers appear to have been published at about the same time as the '785 patent filing date of February 27, 1996. All three papers list joint authors, none of whom, other that Mr. Dias, appears as an inventor on the '785 patent. "A Scalable and Highly Available Web Server," published in Proceedings of COMPCON '96, lists as authors, in addition to Mr. Dias, William Kish, Rajat Mukherjee, and Renu Tewari. "High Availability in Clustered Multimedia Servers," published in Proceedings – International Conference on Data Engineering 1996, lists as authors, in addition to Mr. Dias, Renu Tewari, Rajat Mukherjee, and Harrick Vin. "Design and Performance Tradeoffs in Clustered Video Servers," published in Proceedings – International Conference on Multimedia Computing and Systems 1996, lists as authors, in addition to Mr. Dias, Renu Tewari, Rajat Mukherjee, and Harrick Vin. All three of these papers describe concepts that can be found in the '785 patent claims, and thus Messrs. Kish, Mukherjee, Tewari, and Vin should have been listed as inventors on the '785 patent. IBM's decision not to list Messrs. Kish, Mukherjee, Tewari, and Vin as inventors on the '785 patent was with the intent to deceive the PTO.

U.S. Patent 5,129,080 ('the '080 patent"), entitled "Method and System Increasing the Operational Availability of a System of Computer Programs Operating in a Distributed System of Computers," filed October 17, 1990, issued July 7, 1992, and assigned to IBM, is material to patentability of the '785 patent, and should have been disclosed by IBM to the PTO. In particular, the '080 patent discloses high availability architectures, cooperative processing among nodes of a computer network, and fault recovery techniques. The '080 patent also discloses sharing of state information among the computer network nodes and global and local management. Because the '080 patent is material to patentability of the '785 patent application, the '080 patent should have been disclosed to the PTO during prosecution of the '785 patent application. IBM withheld this reference with the intent to deceive the PTO.

On information and belief, U.S. Patent 4,821,211 ("the '211 patent") is unenforceable by reason of IBM's inequitable conduct, acts or omissions before the PTO. The '211 patent was filed on November 19, 1987 and issued on April 11, 1989. During prosecution of the '211 patent application, Applicants did not disclose any prior art references to the PTO through filing an IDS. On information and belief, Applicants were aware of prior art

references that were material to patentability of the '211 patent, and which, therefore, were required to be disclosed to the U.S. Patent and Trademark Office.

More specifically, U.S. Patent 4,688,181 to Cottrell et al. ("the '181 patent"), filed April 30, 1986 and issued August 18, 1987, and assigned to IBM was material to the patentability of the '211 patent, but was not disclosed to the PTO. The '181 patent was cited by the patent examiner during prosecution of the '211 patent. Further, the '181 patent listed a number of prior art references that were themselves material to patentability of the '211 patent. These additional prior art references were not disclosed to the PTO during prosecution of the '211 patent. One of the prior art references cited during the Cottrell patent application prosecution is U.S. Patent 4,613,946 to Forman ("the '946 patent"). That patent was also material to the patentability of the '211 patent. Thus, the '946 patent, and the other references cited during prosecution of the Cottrell patent application should have been disclosed to the PTO by IBM. IBM withheld these material references with the intention to deceive the PTO.

On information and belief, IBM was aware of other references that were material to the patentability of the '211 patent, and with deceptive intent, IBM did not disclose these references to the PTO. For example, U.S. Defensive Publication T980,008 ('the '008 publication"), entitled "Interactive Design of Character-Recognition Logics," filed July 19, 1976, published March 6, 1979, and assigned to IBM, is material to the patentability of the '211 patent, and should have been disclosed by IBM to the PTO. The '008 publication discloses generating graphic display of pattern locations and a menu of operations. The '008 publication also discloses using auxiliary operations in the menu to modify the sequence of input patterns. Because the '008 publication is material to the patentability of the '211 patent, the '008 publication should have been disclosed to the PTO during prosecution of the '211 patent. IBM withheld this reference with intent to deceive the PTO.

Other references of which IBM was aware and that were required to be disclosed to the PTO include U.S. Patent 4,731,606 to Bantz et al. ("the '606 patent), filed August 2, 1985 and issued March 15, 1988 and U.S. Patent 4,719,571 to Rissanen et al. ("the 571 patent"), filed March 5, 1986 and issued January 12, 1988, both assigned to IBM. Both the '606 patent and the '571 patent are material to patentability of the '211 patent, and both should

have been disclosed to the PTO during prosecution of the '211 patent. IBM withheld these references with the intent to deceive the U.S. Patent and Trademark Office.

On information and belief, U.S. Patent 4,953,209 ("the '209 patent") is unenforceable by reason of IBM's inequitable conduct, acts or omissions before the PTO. The '209 patent, entitled "Self-verifying Receipt and Acceptance System for Electronically Delivered Data Objects," was filed on October 31, 1988. The '209 patent, in the section entitled "Background of the Invention," describes only two prior art references: U.S. Patent No. 4,757,533 to Allen et al. and U.S. Patent No. 4,757,534 ("the '534 patent") to Stephen M. Matyas et al.

The '534 patent is assigned to IBM. Stephen M. Matyas, co-inventor of the '534 patent, is listed as an author of more than 100 IBM publications related to cryptography or data encryption. Mr. Matyas is also listed as an inventor on more than 70 issued patents in this field. Mr. Matyas is well known in the field of cryptography and data encryption at IBM. When the '209 patent application was filed, IBM knew that some of Mr. Matyas' activities were material to the patentability of the '209 patent. However, as noted above, only the '534 patent was listed. IBM failed to cite other material prior art references associated with Mr. Matyas, including, for example, U.S. Patent 4,203,166 ("the '166 patent") in which Mr. Matyas is listed as an inventor. The '166 patent, entitled "Cryptographic File Security for Multiple Domain Networks," filed December 5, 1977, issued May 13, 1980, and assigned to IBM, is material to patentability of the '209 patent, and should have been disclosed by IBM to the PTO.

The '166 patent discloses a file security system for data files created at a first host system in one domain and recovered at a second host system in another domain of a multiple domain network. Specifically, the '166 patent discloses, a first host system that provides a file recovery key for subsequent recovery of a data file at a second host system. The first host system enciphers (modifies) the first host system plaintext to obtain first host system ciphertext as the data file. The file recovery key is used as header information for the data file. When the data file is to be recovered at the second host system, the file recovery key is provided at the second host system and the second host system transforms the file recovery key into a form, which is usable to decipher the data file. The second host system uses the

transformed file recovery key to perform a cryptographic operation to obtain the first host system ciphertext in clear form (unmodified) at the second host system. Thus, the '166 patent is material to the patentability to the claims of the '209 patent. Because the '166 patent is material to the patentability of the '209 patent, the '166 patent should have been disclosed to the PTO during prosecution of the '209 patent. IBM withheld this reference with the intention to deceive the PTO.

IBM also failed to cite U.S. Patent 4,238,854 ("the '854 patent") in which Mr. Matyas is again listed as an inventor. The '854 patent, entitled "Cryptographic File Security for Single Domain Networks," filed December 5, 1977, issued December 9, 1980, and assigned to IBM, is material to patentability of the '209 patent, and should have been disclosed by IBM to the PTO. The '854 patent was filed concurrently with the '166 patent described above.

The '854 patent discloses that an operational key enciphered under the file key of the designated storage media, as header information, together with the host data enciphered under the operational key is written on the storage media as an enciphered data file. When the data file is recovered, the host data security device transforms the enciphered operational key header information under control of a host master key into a form which permits the operational key to be used for deciphering the enciphered data file to obtain the file data in clear form. Thus, the '854 patent is material to the patentability to the claims of the '209 patent. Because the '854 patent is material to the patentability of the '209 patent, the '854 patent should have been disclosed to the PTO during prosecution of the '209 patent. IBM withheld this reference with the intention to deceive the PTO.

Matyas is also one of the authors of an article entitled "Cryptographic Key Authentication in Communication System" published by IBM in March, 1978. The article was published as an IBM Technical Disclosure Bulletin, March 1978, pages 3990-92. This publication discloses that message communication protection is obtained by enciphering a clear data message X at a host under control of a working key KS to yield a ciphered data message Y. At the receiving terminal, the enciphered data message Y is deciphered under control of the working key KS to yield the clear data message X.

Another article in which Matyas is an author is entitled "Terminal Control of Encipher and Decipher Data Operations" published by IBM in August, 1981. The article

was published as an IBM Technical Disclosure Bulletin, August, 1981, pages 1334-1339. This publication discloses that in communication security applications where data is to be transmitted in a cryptographic session, between a host unit and a remote terminal controller unit, a data encrypting session key (KS) is required to be established in a form suitable for use at each unit. Data may then be enciphered under KS at one unit and transmitted to the other unit where it is deciphered under KS.

Thus, the above publications, published as IBM Technical Disclosure Bulletins, are material to the patentability to the claims of the '209 patent. Because these publications are material to the patentability of the '209 patent, these articles should have been disclosed to the PTO during prosecution of the '209 patent. IBM withheld these references with the intention to deceive the PTO.

The foregoing actions constitute inequitable conduct and render the claims of the '746, '785, '211 and '209 patents unenforceable. Discovery in this proceeding is ongoing, and additional acts of inequitable conduct will be added to this defense at the appropriate time.

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 patent application. The dissertation describes a system of resource management that does not require a centralized coordinator. Sites cooperate in transmitting important state information to each other. Decisions made at one site are then factored by other sites into subsequent decisions. Because this dissertation was material to the patentability of the '785 patent application, the

dissertation should have been disclosed to the PTO during prosecution of the '785 patent application. IBM withheld this reference with the intent to deceive the PTO.

Inventor Daniel M. Dias appears as joint author on three papers that relate directly to the subject matter claimed in the '785 patent. These three papers appear to have been published at about the same time as the '785 patent filing date of February 27, 1996. All three papers list joint authors, none of whom, other that Mr. Dias, appears as an inventor on the '785 patent. "A Scalable and Highly Available Web Server," published in Proceedings of COMPCON '96, lists as authors, in addition to Mr. Dias, William Kish, Rajat Mukherjee, and Renu Tewari. "High Availability in Clustered Multimedia Servers," published in Proceedings – International Conference on Data Engineering 1996, lists as authors, in addition to Mr. Dias, Renu Tewari, Rajat Mukherjee, and Harrick Vin. "Design and Performance Tradeoffs in Clustered Video Servers," published in Proceedings – International Conference on Multimedia Computing and Systems 1996, lists as authors, in addition to Mr. Dias, Renu Tewari, Rajat Mukherjee, and Harrick Vin. All three of these papers describe concepts that can be found in the '785 patent claims, and thus Messrs. Kish, Mukherjee, Tewari, and Vin should have been listed as inventors on the '785 patent. IBM's decision not to list Messrs. Kish, Mukherjee, Tewari, and Vin as inventors on the '785 patent was with the intent to deceive the PTO.

U.S. Patent 5,129,080 ('the '080 patent"), entitled "Method and System Increasing the Operational Availability of a System of Computer Programs Operating in a Distributed System of Computers," filed October 17, 1990, issued July 7, 1992, and assigned to IBM, is material to patentability of the '785 patent, and should have been disclosed by IBM to the PTO. In particular, the '080 patent discloses high availability architectures, cooperative processing among nodes of a computer network, and fault recovery techniques. The '080 patent also discloses sharing of state

information among the computer network nodes and global and local management. Because the '080 patent is material to patentability of the '785 patent application, the '080 patent should have been disclosed to the PTO during prosecution of the '785 patent application. IBM withheld this reference with the intent to deceive the PTO.

The '209 patent, entitled "Self-verifying Receipt and Acceptance System for Electronically Delivered Data Objects," was filed on October 31, 1988. The '209 patent, in the section entitled "Background of the Invention," describes only two prior art references: U.S. Patent No. 4,757,533 to Allen et al. and U.S. Patent No. 4,757,534 ("the '534 patent") to Stephen M. Matyas et al.

The '534 patent is assigned to IBM. Stephen M. Matyas, co-inventor of the '534 patent, is listed as an author of more than 100 IBM publications related to cryptography or data encryption. Mr. Matyas is also listed as an inventor on more than 70 issued patents in this field. Mr. Matyas is well known in the field of cryptography and data encryption at IBM. When the '209 patent application was filed, IBM knew that some of Mr. Matyas' activities were material to the patentability of the '209 patent. However, as noted above, only the '534 patent was listed. IBM failed to cite other material prior art references associated with Mr. Matyas, including, for example, U.S. Patent 4,203,166 ("the '166 patent") in which Mr. Matyas is listed as an inventor. The '166 patent, entitled "Cryptographic File Security for Multiple Domain Networks," filed December 5, 1977, issued May 13, 1980, and assigned to IBM, is material to patentability of the '209 patent, and should have been disclosed by IBM to the PTO.

The '166 patent discloses a file security system for data files created at a first host system in one domain and recovered at a second host system in another domain of a multiple domain network. Specifically, the '166 patent discloses, a first host system that provides a file recovery key for subsequent recovery of a data file at a second host system. The first host system enciphers

(modifies) the first host system plaintext to obtain first host system ciphertext as the data file. The file recovery key is used as header information for the data file. When the data file is to be recovered at the second host system, the file recovery key is provided at the second host system and the second host system transforms the file recovery key into a form, which is usable to decipher the data file. The second host system uses the transformed file recovery key to perform a cryptographic operation to obtain the first host system ciphertext in clear form (unmodified) at the second host system. Thus, the '166 patent is material to the patentability to the claims of the '209 patent. Because the '166 patent is material to the patentability of the '209 patent, the '166 patent should have been disclosed to the PTO during prosecution of the '209 patent. IBM withheld this reference with the intention to deceive the PTO.

IBM also failed to cite U.S. Patent 4,238,854 ("the '854 patent") in which Mr. Matyas is again listed as an inventor. The '854 patent, entitled "Cryptographic File Security for Single Domain Networks," filed December 5, 1977, issued December 9, 1980, and assigned to IBM, is material to patentability of the '209 patent, and should have been disclosed by IBM to the PTO. The '854 patent was filed concurrently with the '166 patent described above.

The '854 patent discloses that an operational key enciphered under the file key of the designated storage media, as header information, together with the host data enciphered under the operational key is written on the storage media as an enciphered data file. When the data file is recovered, the host data security device transforms the enciphered operational key header information under control of a host master key into a form which permits the operational key to be used for deciphering the enciphered data file to obtain the file data in clear form. Thus, the '854 patent is material to the patentability to the claims of the '209 patent. Because the '854 patent is material to the patentability of the '209 patent, the '854 patent should have been disclosed to the

PTO during prosecution of the '209 patent. IBM withheld this reference with the intention to deceive the PTO.

Matyas is also one of the authors of an article entitled "Cryptographic Key Authentication in Communication System" published by IBM in March, 1978. The article was published as an IBM Technical Disclosure Bulletin, March 1978, pages 3990-92. This publication discloses that message communication protection is obtained by enciphering a clear data message X at a host under control of a working key KS to yield a ciphered data message Y. At the receiving terminal, the enciphered data message Y is deciphered under control of the working key KS to yield the clear data message X.

Another article in which Matyas is an author is entitled "Terminal Control of Encipher and Decipher Data Operations" published by IBM in August, 1981. The article was published as an IBM Technical Disclosure Bulletin, August, 1981, pages 1334-1339.. This publication discloses that in communication security applications where data is to be transmitted in a cryptographic session, between a host unit and a remote terminal controller unit, a data encrypting session key (KS) is required to be established in a form suitable for use at each unit. Data may then be enciphered under KS at one unit and transmitted to the other unit where it is deciphered under KS.

Thus, the above publications, published as IBM Technical Disclosure Bulletins, are material to the patentability of the claims of the '209 patent. Because these publications are material to the patentability of the '209 patent, these articles should have been disclosed to the PTO during prosecution of the '209 patent. IBM withheld these references with the intention to deceive the PTO.

The foregoing actions constitute inequitable conduct and unclean hands and render the claims of the '746, '785, and '209 patents unenforceable. Discovery in this proceeding is ongoing,

and additional acts of inequitable conduct and unclean hands will be added to this defense at the appropriate time.

16. SCO has not infringed, literally or under the doctrine of equivalents, any valid or enforceable claim of the '746, '211, '209 and '785 Patents.

SCO has not infringed, literally or under the doctrine of equivalents, any valid or enforceable claim of the '746 patent because at least the following claim elements are not present in the alleged product: the step of initializing in claims 1, 2, 4, and 5; the step of deleting in claims 3, 4, 5, and 9; the step of adding in claims 2, 5, and 6; means for initializing in claims 10, 15, 17, and 18; means for deleting in claims 14, 16, 17, and 18; and means for adding in claims 11, 15, and 18.

SCO has not infringed, literally or under the doctrine of equivalents, any valid or enforceable claim of the '209 patent because one or more claim elements are not present in the alleged product. For example, the alleged infringing product does not include one or more of the following: an "enabling means," a "means conditioned by said examination...," a "means...for inserting a verification indicia," a "means...for modifying said verification indicia," a "means responsive to said enabling means and...for erasing said enabling means," a "means for replacing original component names," and/or a "recordkeeping means" as described in the specification or equivalents thereof.

Similarly, one or more of the following claim elements are not present in the alleged infringing product: "inserting an enabling means into said data object," "employing only said enabling means...," "employing of said enabling means modifies said verification indicia," "substituting new names for existing file component names ...and recording the correspondence between said new names and said existing names...," and/or "accessing said recording of names

correspondence and restoring said original names as file component names, erasing said record of names correspondence and said enabling means" as described in the specification.

SCO has not infringed, literally or under the doctrine of equivalents, any valid or enforceable claims of the '785 patent because at least the following claim element is not present in the alleged product: monitors using a membership protocol.

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.

17. **On information and belief, IBM failed to mark patent articles covered by the '746, '211, '209 and/or '785 Patents at issue in the counterclaims. Any claim for damages is therefore limited by 35 U.S.C. §287.**

To the best of SCO's knowledge, IBM did not make any products marked with any of the patent numbers of the patents in suit or otherwise communicate allegations of infringement to SCO prior to the filing of the patent counterclaims, and SCO did not have knowledge of such patents. Further, as previously set forth in this interrogatory answer, SCO's business relationship with IBM and IBM's failure to assert infringement over a prolonged period of time were consistent with SCO's good faith.

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.

18. **On information and belief, IBM failed to provide SCO with actual notice of IBM's allegations of infringement of the patents at issue, and therefore IBM cannot recover any damages for SCO's actions before the filing of IBM's counterclaims.**

To the best of SCO's knowledge, IBM did not make any products marked with any of the patent numbers of the patents in suit or otherwise communicate allegations of infringement to SCO prior to the filing of the patent counterclaims, and SCO did not have knowledge of such patents. Further, as previously set forth in this interrogatory answer, SCO's business relationship with IBM and IBM's failure to assert infringement over a prolonged period of time were consistent with SCO's good faith.

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.

19. IBM has not and cannot plead and meet the requirements for an award of enhanced damages or attorneys' fees.

To the best of SCO's knowledge, IBM did not make any products marked with any of the patent numbers of the patents in suit or otherwise communicate allegations of infringement to SCO prior to the filing of the patent counterclaims, and SCO did not have knowledge of such patents. Further, as previously set forth in this interrogatory answer, SCO's business relationship with IBM and IBM's failure to assert infringement over a prolonged period of time were consistent with SCO's good faith.

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.

20. SCO has an express or implied license to practice some or all of the claims embodied in the patents at issue.

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.

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.

21. Upon information and belief, IBM lacks standing to assert that SCO infringed some or all of the patents at issue.

IBM lacks standing to assert that SCO infringed the '746 and '785 patents because it is not the proper owner of those patents (see also the response regarding the Affirmative Defense in Items 12 and 15). 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.

22. SCO states that IBM's request for treble damages and attorneys fees is barred because SCO acted in good faith, and this is not an exceptional case within the meaning of the Patent Code.

To the best of SCO's knowledge, IBM did not make any products marked with any of the patent numbers of the patents in suit or otherwise communicate allegations of infringement to SCO prior to the filing of the patent counterclaims, and SCO did not have knowledge of such patents. Further, as previously set forth in this interrogatory answer, SCO's business relationship with IBM and IBM's failure to assert infringement over a prolonged period of time were consistent with SCO's good faith.

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.

DATED this19th day of April, 2004.

As to responses:

Christopher Sontag
Sr. Vice President/General Manager
SCOsource Division
The SCO Group, Inc.

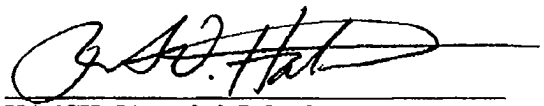
STATE OF UTAH)
: ss
County of ~~Utah~~ Salt Lake)

The above signed Christopher S. Sontag, being duly sworn upon oath, deposes and says that he has read the above and that the information contained therein is true to the best of his knowledge, information and belief.

Toni Jones Smith 4-19-2004
Notary Public

TONI JONES SMITH
Notary Public
State of Utah
My Commission Expires JULY 7, 2007
10625 S 1300 East, Sandy, UT 84094

As to objections:



HATCH, JAMES & DODGE
Brent O. Hatch
Mark F. James

BOIES, SCHILLER & FLEXNER
Stephen N. Zack
Mark J. Heise

Attorneys for The SCO Group, Inc.