

39

COPY

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

Robert Silver, Esq. (admitted pro hac vice)
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504
Telephone: (914) 749-8200
Facsimile: (914) 749-8300

Stephen N. Zack (admitted pro hac vice)
Mark J. Heise (admitted pro hac vice)
David K. Markarian (admitted pro hac vice)
BOIES, SCHILLER & FLEXNER LLP
Bank of America Tower – Suite 2800
100 Southeast Second Street
Miami, Florida 33131
Telephone: (305) 539-8400
Facsimile: (305) 539-1307

Frederick S. Frei (admitted pro hac vice)
Aldo Noto (admitted pro hac vice)
John K. Harrop (admitted pro hac vice)
ANDREWS KURTH LLP
1701 Pennsylvania Avenue, Ste. 300
Washington, DC 20006
Telephone: (202) 662-2700
Facsimile: (202) 662-2739

*Attorneys for Plaintiff/Counterclaim Defendant
The SCO Group, Inc.*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

THE SCO GROUP,	)	PLAINTIFF/COUNTERCLAIM
	)	DEFENDANT SCO'S RESPONSES TO
Plaintiff/Counterclaim-Defendant,	)	DEFENDANT/COUNTERCLAIM
	)	PLAINTIFF IBM'S FIFTH SET
	)	OF INTERROGATORIES
v.)	
)	
INTERNATIONAL BUSINESS	)	Case No. 2:03-CV-0294 DAK
MACHINES CORPORATION,)	
	)	Judge: Dale A. Kimball
Defendant/Counterclaim-Plaintiff.	)	Magistrate Brooke C. Wells

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, and to the Local Rules for the United States District Court for the District of Utah, Plaintiff/Counterclaim Defendant, The

SCO Group, Inc, ("SCO), hereby responds and objects to Defendant/Counterclaim Plaintiff, International Business Machine Corporation's ("IBM") Fifth Set of Interrogatories, as follows:

GENERAL OBJECTIONS

SCO hereby incorporates by reference all of the General Objections set forth in SCO's Response to IBM's First Set of Interrogatories and First Request for the Production of Documents (the "General Objections"). Each of the General Objections is incorporated by reference into each of the responses set forth below, which responses SCO makes without waiver of the General Objections.

SCO also objects generally to the supplemental instruction in IBM's Fifth Set of Interrogatories which seeks to define a relevant time period as "from six years prior to the March 6, 2003, date that SCO initiated the instant action." The proper time period as to IBM's counterclaims is six years prior to the date on which IBM raised the patent issues by filing its counterclaims in the instant action. SCO also objects to each Interrogatory to the extent it seeks information beyond the disclosure of the claims and specification of each of the patents in issue.

SCO also objects generally that these Interrogatories are premature to the extent that IBM has failed to provide SCO information relevant to SCO's responses. SCO reserves the right to supplement these responses and objections because contention interrogatories at this stage of the litigation are premature in that they precede any depositions by SCO and precede IBM providing SCO with meaningful claim charts to explain IBM's theories of how SCO products would need to operate in order to infringe the asserted claims of IBM's patents in suit.

Finally, and as noted herein with regard to each Interrogatory, SCO objects because IBM has exceeded the number of Interrogatories authorized under Federal Rule 33. By one count, IBM has served upon SCO, "including all discrete subparts" per Rule 33, as many as 74 interrogatories.

**SPECIFIC OBJECTIONS AND RESPONSES TO
INTERROGATORIES**

INTERROGATORY NO. 17:

Identify, with specificity, each file, routine or module (by name) within each and every SCO Product that includes, embodies or implements at least one of the following:

- (a) a compressing technique referred to as “modified Lempel-Ziv”, “adaptive Lempel-Ziv”, “Lempel-Ziv-Welch” or “LZW” coding;
- (b) a capability to either compress or decompress a file using a technique referred to as “modified Lempel-Ziv”, “adaptive Lempel-Ziv”, “Lempel-Ziv-Welch” or “LZW” coding, or to support or convert a graphic to or from, a file format commonly referred to within the computer industry as “Graphics Interchange Format” or “GIF” format or a file format commonly referred to within the computer industry as “compressed Tagged Image File Format” or “compressed TIFF”, or to process any of the UNIX commands or utilities entitled “compress”, “uncompress”, “decompress”, “gzip” or “gifclip”;
- (c) one or more files compressed by, or that must be decompressed using, a technique referred to as “modified Lempel-Ziv”, “adaptive Lempel-Ziv”, “Lempel-Ziv-Welch” or “LZW” coding; or
- (d) one or more compressed files bearing a “Z” or “.lzw” file extension;

and, for each, the specific SCO Product(s) (by name, version or release, and date(s) of availability) containing such file, routine or module, the person at SCO most knowledgeable about the history of SCO’s inclusion therein, and the two persons at SCO most knowledgeable about how each such embodiment or implementation of the subject matter of (a), (b) and/or (c) in each SCO product operates to achieve (a), (b) and/or (c) and the particular command or program code used to compress each such file in the SCO Products bearing the “.z” or “.gz” extension identified in response to (d).

RESPONSE TO INTERROGATORY NO. 17:

In addition to its General Objections, SCO specifically objects to this Interrogatory because it is vague and ambiguous. It is vague in its use of “modified” and “adaptive” to describe Lempel-Ziv coding, and it is ambiguous in posing questions such as “identify ... each file, routine or module ... that includes, embodies or implements ... a capability ... to process ...

commands or utilities ... or to either compress or decompress a file using a technique referred to as [various] coding.” SCO also objects because the phrase “the history of SCO’s inclusion therein” in the Interrogatory is cryptic and confusing. SCO further objects to this Interrogatory because it is too convoluted in asking for a SCO person knowledgeable about how an “embodiment or implementation of [X] operates to achieve [X].” SCO also objects to this Interrogatory to the extent it seeks disclosure of information subject to a claim of attorney-client privilege or work-product privilege, or if it seeks disclosure of the identity of SCO trial witnesses prior to the time by which such disclosures must be made under the Federal Rules.

SCO further objects to this Interrogatory because it is compound and its discrete subparts constitute an evasion of the limitation on the number of interrogatories available to IBM in the absence of court order or agreement between the parties. SCO further objects to this Interrogatory to the extent the burden of deriving or ascertaining the answer is substantially the same for IBM as it is for SCO, based on documents which SCO has produced to IBM or is soon to produce in response to IBM’s Fifth Request for Production of Documents. Finally, SCO notes that it may need to amend or supplement its answer and that more than thirty (30) days will be required for SCO to respond in the first instance to certain subparts of this Interrogatory.

Subject to and without waiving the foregoing objections, SCO provides the following partial information. The UNIX “compress” command has the capability to compress files and is bundled into versions of UNIX. All code and source trees for UNIX products have previously been provided to IBM. OpenServer also has an implementation of the UNIX “compress” command. All code and source trees for OpenServer products have previously been provided to

IBM. Also bundled with UNIX products have been third-party browser products, such as Netscape and Mozilla, which can read graphic files in gif and tiff.

INTERROGATORY NO. 18:

Identify, with specificity, each and every SCO Product (including name, version, release and date(s) of availability thereof) having any tool, feature or function that, as part of the installation process requires either (a) acknowledgment of receipt of the SCO Product, or (b) consent to terms authorizing use of the SCO Product before either changing such SCO Product from a non-executable form to an executable form or installing such SCO Product in a run-able form on the host computer, the specific files, utilities or modules (by name) implementing such tool, feature or function, the history of SCO's incorporation of each such tool, feature or function into each identified SCO Product, and the person at SCO most knowledgeable about the function and operation of each such tool, feature or function.

RESPONSE TO INTERROGATORY NO. 18:

In addition to its General Objections, SCO specifically objects to this Interrogatory because it is vague in its use of the terms "acknowledgment of receipt," "non-executable," "executable," and "run-able." SCO objects to this Interrogatory to the extent it seeks disclosure of information subject to a claim of attorney-client privilege or work-product privilege, or if it seeks disclosure of the identity of SCO trial witnesses prior to the time by which such disclosures must be made under the Federal Rules. SCO further objects to this Interrogatory because it is compound and its discrete subparts constitute an evasion of the limitation on the number of interrogatories available to IBM in the absence of court order or agreement between the parties. SCO further objects to this Interrogatory to the extent the burden of deriving or ascertaining the answer is substantially the same for IBM as it is for SCO, based on documents which SCO has produced to IBM or is soon to produce in response to IBM's Fifth Request for Production of Documents. Finally, SCO notes that it may need to amend or supplement its answer and that

more than thirty (30) days will be required for SCO to respond in the first instance to certain subparts of this Interrogatory.

Subject to and without waiving the foregoing objections, SCO provides the following partial information. The UnixWare operating system installation is done by a program that first collects and processes user input. The operating system installation for OpenServer uses a different program. That program first collects and processes user input.

The source code for the foregoing items was previously provided to IBM in CD Nos. 142 and 147 of SCO's document production.

On a Windows system, SCO's WebFace product is installed with a commercial installer called "InstallAnywhere" from a company called Zero G.

INTERROGATORY NO. 19:

Identify with specificity each and every SCO Product (by name, version, release and file, routine or module name, and dates(s) of availability thereof) that, in whole or part, provides the functionality set forth in any of (a) through (d) herein and the person at SCO most knowledgeable about such functionality:

(a) provides for high availability in a clustered arrangement of computers having at least one distributed program running within the cluster through the use of configurable monitors;

(b) provides a program, process, procedure, module, tool, feature or function for automated recovery from a failure of a program running within a clustered arrangement of computers involving one or more configurable monitors;

(c) supports or allows a user to specify an automated procedure for recovery from a failure in a clustered arrangement of computers; or

(d) provides or supports user-defined automated detection and/or recovery from failure events occurring on one or more computers in a computer network.

RESPONSE TO INTERROGATORY NO. 19:

In addition to its General Objections, SCO specifically objects to this Interrogatory because it is compound, ambiguous, and confusing. SCO also objects to this Interrogatory because it uses several different phrasings to refer to what may or may not be intended to be the same computer environment, and therefore the Interrogatory may or may not relate to the '785 patent in suit. SCO further objects to this Interrogatory to the extent it seeks disclosure of information subject to a claim of attorney-client privilege or work-product privilege, or if it seeks disclosure of the identity of SCO trial witnesses prior to the time by which such disclosures must be made under the Federal Rules. SCO further objects to this Interrogatory because it is compound and its discrete subparts constitute an evasion of the limitation on the number of interrogatories available to IBM in the absence of court order or agreement between the parties. SCO further objects to this Interrogatory to the extent the burden of deriving or ascertaining the answer is substantially the same for IBM as it is for SCO, based on documents which SCO has produced to IBM or is soon to produce in response to IBM's Fifth Request for Production of Documents. Finally, SCO notes that it may need to amend or supplement its answer and that more than thirty (30) days will be required for SCO to respond in the first instance to certain subparts of this Interrogatory.

Subject to and without waiving the foregoing objections, SCO provides the following partial information. There are two clustering products which SCO has sold, Reliant HA and Non-Stop Clusters ("NSC"). SCO began shipping Reliant HA after it licensed the product from Veritas in October 1996. Upon information and belief, NSC was developed by Tandem Computer (Tandem was purchased by Compaq) and licensed to SCO. Upon information and

belief, UnixWare NSC was first shipped in 2000 and discontinued in 2003. The NSC product and its functionality are described in documents SCO is providing to IBM in response to IBM's Fifth Request for Production of Documents. The Reliant HA source code has been provided to IBM on CD #118 since January 2004, and the NSC source code tree has been provided to IBM on CD #155 since January 2004.

INTERROGATORY NO. 20:

Identify whether SCO intends to rely upon any opinion of counsel as a defense to an IBM charge of willful infringement of United States Patent Nos. 4,814,746, 4,953,209 or 5,805,785 (individually and collectively "the Patents-in-Suit") and, if so, identify each opinion, whether formal, informal or drafts thereof (an "Opinion"), prepared by, for, or on behalf of SCO or a predecessor in interest thereto, concerning, relating or referring to any Patent-in-Suit, particularly including identification of:

- (a) the date each such Opinion was first requested;**
- (b) the name, title and employer (at the time of request) of each such person who requested each such Opinion;**
- (c) the name, title, and employer of each such person who substantively contributed to any portion of each such Opinion;**
- (d) the name, title and employer of each such person to whom, in whole or part, the substance of each such Opinion has been rendered since the date identified in response to (a);**
- (e) the date and form (i.e. written or oral) in which each such Opinion was rendered to each person identified in response to (d); and**
- (f) all Patent-in-Suit to which each such Opinion pertains.**

RESPONSE TO INTERROGATORY NO. 20:

In addition to its General Objections, SCO specifically objects to this Interrogatory because it is premature at this time for SCO to respond to this contention Interrogatory. SCO further objects to this Interrogatory to the extent it seeks disclosure of information subject to a

claim of attorney-client privilege or work-product privilege (which SCO may or may not waive), or seeks disclosure of the identity of SCO trial witnesses prior to the time by which such disclosures must be made under the Federal Rules. SCO further objects to this Interrogatory because it is compound and its discrete subparts constitute an evasion of the limitation on the number of interrogatories available to IBM in the absence of court order or agreement between the parties. Finally, SCO notes that it may need to amend or supplement its answer and that more than thirty (30) days will be required for SCO to respond in the first instance to this Interrogatory.

Without waiving the foregoing objections, SCO states that it has not yet determined whether it will rely on any opinion of counsel.

INTERROGATORY NO. 21:

Separately identify, on an element by element basis, each asserted claim of each Patent-in-Suit that SCO contends is not infringed, is invalid and/or provides any basis for holding a Patent-in-Suit unenforceable and provide, for each such claim a claim chart setting forth SCO's construction of all elements of each such claim and, to the extent SCO contends that:

(a) any element of an asserted claim is to be construed pursuant to 35 U.S.C. § 112 ¶6, identify every basis in the patent and prosecution history for each such contention along with SCO's contention as to the alleged corresponding structure for such element;

(b) any claim is not infringed, further identify each and every specific claim element SCO contends is not satisfied by the accused SCO Product literally and under the doctrine of equivalents and every basis for such contention, including, if SCO contends the SCO Product is structurally or operationally different from that of a claim element, the specific differences in-structure or operation between the SCO Product and the claim element and the specific program code component (by module or file name), responsible for implementing each such difference;

(c) it is immune from suit on any asserted claim based upon license to SCO, identify each such license, each specific SCO Product, Patent-in-Suit and claim therein to which the license purportedly applied, whether such license is, in whole or part, asserted to be express or implied along with all specific Agreements or other evidence establishing that such license applies to SCO from IBM;

(d) any claim is invalid, the specific grounds and basis for each invalidity allegation including all known facts and documents SCO relies upon to support those grounds including,

i) if a claim is alleged to be invalid for a failure to comply with any provision of 35 U.S.C. § 112, the specific provision allegedly not complied with,

ii) if a claim is alleged to be invalid as anticipated or obvious in view of prior art, all prior art references that SCO contends anticipates or renders that claim obvious and a claim chart correlating, on an element by element basis, each passage in each such prior art reference where such element is allegedly found,

iii) if SCO contends any claim is specifically invalid for obviousness, all passages in each such prior art reference SCO relies upon as providing a motivation to modify or combine such prior art references in a manner that would achieve the claimed invention, and

iv) if SCO contends any claim is invalid based upon offer, sale, derivation, or public knowledge or use, describe in detail all facts and circumstances upon which SCO relies and all documents SCO relies upon as corroboration thereof;

(e) a Patent-in-Suit is unenforceable based upon alleged inequitable conduct, if such allegation is based upon an alleged failure to disclose a prior art reference, separately identify:

i) each specific piece of evidence SCO relies upon to demonstrate knowledge of such prior art reference by a person substantively involved with the preparation or prosecution of an application for the Patent-in-Suit prior to issuance of the Patent-in-Suit to which the allegation pertains,

ii) each passage of each such prior art reference that SCO contends is more material than what was considered by the Patent Office in allowing that Patent-in-Suit,

iii) the factual basis for SCO's contention that each such passage is more material than what was considered by the Patent Office during prosecution of the pertinent patent-in-suit, and

iv) how each such prior art reference alone or in combination with some other prior art reference establishes a *prima facie* case of unpatentability of the asserted claim of the Patent-in-Suit to which the allegation pertains by way of a claim chart correlating the pertinent passage(s) of each such reference to each such claim; and

(f) IBM is not the owner of one or more of the Patent-in-Suit, identify each Patent-in-Suit to which the contention pertains, each entity whom SCO contends is the owner of such Patent-in-Suit, the specific legal basis for each such contention (in terms of specific statute, case, or otherwise), and all facts and documentary evidence upon which SCO relies in support of its contention of non-ownership.

RESPONSE TO INTERROGATORY NO. 21:

In addition to its General Objections, SCO specifically objects to this Interrogatory because it is compound and in fact contains at least fourteen separate Interrogatories. Thus, SCO objects to this Interrogatory because its numerous subparts each constitute an evasion of the limitation on the number of interrogatories available to IBM in the absence of court order or agreement between the parties. SCO further objects to this Interrogatory to the extent it seeks disclosure of information subject to a claim of attorney-client privilege or work-product privilege, or seeks disclosure of trial preparation materials or of the identity of SCO trial witnesses prior to the time by which such disclosures must be made under the Federal Rules. SCO further objects to this Interrogatory because it requests extensive and specific claim charts regarding SCO's defenses when IBM has thus far failed, in response to SCO Interrogatory No. 12, to provide adequate claim charts outlining IBM's claims of patent infringement. SCO further objects to this Interrogatory to the extent that it requests a repetition of information SCO has already provided IBM regarding IBM's alleged inequitable conduct. *See* SCO's Response to IBM's Interrogatory No. 14, served on April 19, 2004. Finally, SCO objects to this Interrogatory because it requests prematurely what is essentially an outline of SCO's entire defense at trial to IBM's claims of patent infringement.

INTERROGATORY NO. 22:

For each of the Webface, UnixWare, OpenServer, and ReliantHA SCO Products and each further SCO Product identified in response to any of Interrogatories 17 through 21, individually quantify on a yearly, quarterly or monthly basis, the distribution and financial figures in terms of:

- (a) number of units created or distributed;**
- (b) highest and lowest per unit selling price, license or fee received;**
- (c) average per-unit selling price, license or fee;**
- (d) total revenues received;**
- (e) gross profit; and**
- (f) incremental, marginal and net pretax or operating profit;**

and, presuming infringement by each such SCO product, identify what SCO would contend to be the applicable reasonable royalty rate and royalty base for each instance of infringement and all known documents supporting each such contention.

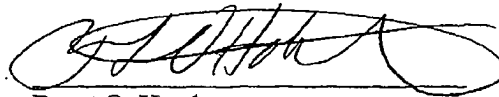
RESPONSE TO INTERROGATORY NO. 22:

In addition to its General Objections, SCO specifically objects to this Interrogatory on the ground of burden unless the word "or" is limited to its disjunctive meaning. SCO further objects to this Interrogatory to the extent it seeks disclosure of information subject to a claim of attorney-client privilege or work-product privilege. SCO further objects to this Interrogatory because its discrete subparts constitute an evasion of the limitation on the number of interrogatories available to IBM in the absence of court order or agreement between the parties. SCO further objects to this Interrogatory to the extent the burden of deriving or ascertaining the answer is substantially the same for IBM as it is for SCO, based on documents which SCO has produced to IBM or is soon to produce in response to IBM's Fifth Request for Production of Documents. Finally, SCO notes that it may need to amend or supplement its responses.

Subject to and without waiving any of the foregoing objections, SCO provides the following partial information. SCO's gross revenue from sales of Reliant HA since first quarter 1996 is approximately \$1.2 million. SCO's gross revenue from sales of NSC for the years 2000 through 2002 was approximately \$271,000. SCO's gross revenue from sales of UnixWare and OpenServer has been provided to IBM on CD #342 since January 2004.

DATED this 8th day of September, 2004.

As to Objections:



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

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

Frederick S. Frei
Aldo Noto
John K. Harrop
ANDREWS KURTH LLP

As to Responses:

Jay Petersen
SCO

COPY

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

Robert Silver, Esq. (admitted pro hac vice)
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504
Telephone: (914) 749-8200
Facsimile: (914) 749-8300

Stephen N. Zack (admitted pro hac vice)
Mark J. Heise (admitted pro hac vice)
David K. Markarian (admitted pro hac vice)
BOIES, SCHILLER & FLEXNER LLP
Bank of America Tower – Suite 2800
100 Southeast Second Street
Miami, Florida 33131
Telephone: (305) 539-8400
Facsimile: (305) 539-1307

Frederick S. Frei (admitted pro hac vice)
Aldo Noto (admitted pro hac vice)
John K. Harrop (admitted pro hac vice)
ANDREWS KURTH LLP
1701 Pennsylvania Avenue, Ste. 300
Washington, DC 20006
Telephone: (202) 662-2700
Facsimile: (202) 662-2739

*Attorneys for Plaintiff/Counterclaim Defendant
The SCO Group, Inc.*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

THE SCO GROUP,	)	CERTIFICATE OF SERVICE
)	
Plaintiff/Counterclaim-Defendant,)	
)	
v.)	
)	
INTERNATIONAL BUSINESS	)	Case No. 2:03-CV-0294 DAK
MACHINES CORPORATION,)	
	)	Judge: Dale A. Kimball
Defendant/Counterclaim-Plaintiff.	)	Magistrate Brooke C. Wells

I hereby certify that I caused a true and correct copy of Plaintiff/Counterclaim Defendant SCO's Responses To Defendant/Counterclaim Plaintiff IBM's Fifth Set Of Interrogatories to be served on International Business Machines Corporation on this 8th day of September, 2004, by placing it in U.S. mail, postage prepaid, to the following:

Evan R. Chesler, Esq.
Cravath, Swaine & Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019

Donald J. Rosenberg, Esq.
1133 Westchester Avenue
White Plains, New York 10604

Alan L. Sullivan, Esq.
Snell & Wilmer L.L.P.
15 West South Temple, Ste. 1200
Gateway Tower West
Salt Lake City, Utah 84101-1004

Attorneys for Defendant/Counterclaim Plaintiff IBM Corp.

By: 

Mark F. James