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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

THE SCO GROUP, INC.
a Delaware Corporation
 	
    Plaintiff,
 	
v.
 	
AUTOZONE, INC.
a Nevada Corporation
 	
    Defendant.
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	)
	)
	)
	) **Civil Action File No.**
	)
	) **CV-S-04-0237-RCJ-LRL**
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DEFENDANT AUTOZONE, INC.'S MOTION TO STAY OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT

Defendant AutoZone, Inc. ("AutoZone") moves this Court for an Order staying all

proceedings or, in the alternative, directing Plaintiff The SCO Group, Inc. ("SCO") to amend its

FILED SEPARATELY

1 Complaint to provide a more definite statement. The grounds in support of AutoZone's Motion are

2 set forth in detail in the attached Memorandum of Law.[1]

3   This 23rd day of April, 2004.

4   SCHRECK BRIGNONE

By: _____

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[1]   As the record in this matter reflects, AutoZone has filed concurrently with the present Motion a Motion to Transfer Venue. AutoZone respectfully requests the Court to initially consider AutoZone's Motion to Transfer Venue and then, if the Court deems it appropriate, consider the present Motion. In the event the Court grants AutoZone's Motion to Transfer Venue, the Court may defer the present Motion to the United States District Court for the Western District of Tennessee.

MEMORANDUM OF LAW

Plaintiff The SCO Group, Inc. ("SCO") alleges in its Complaint that Defendant AutoZone, Inc. ("AutoZone") has infringed copyrights that SCO purports to own in a computer operating system known as UNIX through AutoZone's use of a competing operating system known as Linux. To prevail on its claim, SCO must establish two elements: (1) that it owns valid and enforceable copyrights in UNIX; and (2) that the Linux operating system infringes those rights.

Both of these elements are already at issue in three prior filed federal court lawsuits. Whether SCO owns copyrights in the UNIX operating system is the sole issue in an action SCO filed against Novell, Inc. ("Novell") in Utah last January. Whether Linux infringes any copyrights SCO purports to own in UNIX is a central issue in a lawsuit SCO filed against IBM in Utah last year, and it is the central issue to be decided in a declaratory judgment action that Linux distributor Red Hat, Inc. ("Red Hat") filed against SCO in Delaware last August.

The resolution of each of these prior filed actions will significantly clarify, if not resolve, SCO's claims against AutoZone. Staying SCO's claims will thereby avoid duplicative litigation and save the parties and the court significant time and expense that may ultimately prove to be unnecessary. Recognizing the same, Judge Robinson, to whom Red Hat's case was assigned in Delaware, recently stayed that case *sua sponte* pending resolution of the *IBM* case. *Red Hat v. SCO*, Mem. Order (attached to Appendix of Exhibits to Motion to Stay or, in the Alternative, for a More Definite Statement ("Appendix") as Ex. A), at 4. In reaching this conclusion, she wrote: "It is a waste of judicial resources to have two district courts resolving the same issue, especially when the first filed suit in Utah [i.e., IBM] involves the primary parties to the dispute." *Id.* at 5. Judge Robinson's conclusion applies with even greater force in the present case because AutoZone operates Red Hat Linux. AutoZone therefore submits that this case should be stayed pending resolution of the *Red Hat* litigation.

In the event this Court determines that the case should move forward on a parallel track with the prior filed cases, AutoZone requests, in the alternative, that the Court order SCO to amend its Complaint to provide AutoZone with a more definite statement of SCO's claim. SCO's Complaint broadly alleges that AutoZone's distribution and copying of Linux infringes SCO's alleged rights in UNIX; however, it is impossible to tell from the face of the Complaint how AutoZone's actions infringe any rights in UNIX or what portions of Linux or UNIX are at issue. Without a more definite statement of the factual basis for SCO's claims, AutoZone cannot legitimately evaluate or answer the claims. AutoZone also cannot determine whether affirmative defenses are available that, if submitted to the Court in the form of Rule 12 or Rule 56 motions, could dispose of the litigation before the need to engage in costly and time consuming discovery. For these reasons and the reasons set forth more fully below, AutoZone respectfully requests that the Court grant this Motion.

FACTUAL BACKGROUND

A.   UNIX and Linux Operating Systems

1.   UNIX

"UNIX" is a name used to identify a number of related computer operating systems that meet a publicized UNIX standard. *See SCO v. IBM*, Counterclaim-Plaintiff IBM's Second Am Counterclaims Against SCO (attached to Appendix as Ex. B) ¶ 8. Bell Laboratories, then the research arm of AT&T, created the first version of UNIX. *See SCO v. IBM*, Compl. (attached to Appendix as Ex. C) ¶ 8; *Unix Sys. Labs., Inc. v. Berkeley Software Design, Inc.*, No. 92-1667, 1993 WL 414724, at *1 (D.N.J. Mar. 3, 1993). Over the years, AT&T licensed various versions of the UNIX operating system to third parties, including a proprietary version AT&T created that is known as UNIX System V. *See* Appendix Ex. C ¶¶ 8-9. Today, UNIX operating systems are some of the most prominent operating systems for servers used by Fortune 500 companies and other large enterprises in the United States. In 1993, AT&T assigned its copyrights in UNIX to Novell. As discussed in further detail below, Novell transferred certain rights related to the UNIX operating system to SCO in 1995.

2. Linux

"Linux" is the name given to a computer operating system that stems from the collaborative development of thousands of computer programmers worldwide. Conceived in 1991 by Linus Torvalds, then a graduate student at the University of Helsinki, the idea behind Linux was to create a robust computer operating system that would be available free of charge for anyone to use, change and further distribute.

Using the Internet to facilitate contributions and collaboration, the first version of the "Linux kernel" – the core of the operating system – was released in 1994. Red Hat released the first commercial distribution of Linux later that same year. In the years that followed, programmers from around the world contributed to the continued development and improvement of the Linux kernel, resulting in the release of Linux kernel versions 2.4 in 2001 and 2.6 in 2003.

Linux is referred to as "open source" software because Linux users are provided not only the object code for the software, but also the source code. Source code is programming code that a programmer experienced in the language in which the program is written can read and change. Object code is source code that has been translated into a series of 1s and 0s that can be read by a computer but not by humans. *Unix Sys. Labs.*, 1993 WL 414724, at *2. The owners of most proprietary operating systems (such as Microsoft Windows), do not provide their users with access to the source code. Accordingly, if a user wants to make a change to the functionality of the software, the user must pay the owner to make the change, or live without it. Linux licensees, on the other hand, are permitted to modify and enhance the source code.

Over the past several years, Linux has become a viable alternative to UNIX based operating systems. Because of the vast difference in pricing between UNIX and Linux and the competitive functionality of the systems, a substantial number of companies are now switching from UNIX to Linux. These companies include AutoZone, which, as discussed below, switched its domestic in-store servers from UNIX to Linux in 2002.

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B.   Current Litigation Involving UNIX and Linux

Linux's widespread displacement of UNIX has led to the filing of a number of lawsuits that are relevant to this Court's consideration of SCO's claims against AutoZone. These lawsuits are addressed in turn below.

1.   *SCO Group, Inc. v. Novell, Inc.*, No. 2:04CV00139 (D. Utah filed Jan. 20, 2004)

On September 19, 1995, Novell entered into an Asset Purchase Agreement (the "APA") with a predecessor of SCO. *SCO v. Novell*, Compl. (attached to Appendix as Ex. D) ¶ 1. Pursuant to the APA, SCO alleges that Novell assigned to SCO certain UNIX copyrights. *Id.* ¶¶ 1, 17. Novell contends that it specifically excluded from the scope of this transfer any of its copyrights in UNIX. *SCO v. Novell*, Mem. in Supp. of Mot. to Dismiss (attached to Appendix as Ex. E), at 2.

On October 16, 1996, Novell and SCO executed an amendment to the APA (the "Amendment"). *Id.* SCO has publicly stated that the Amendment transferred to SCO's predecessor all of Novell's copyrights in the UNIX code. Appendix Ex. D ¶¶ 1, 17. Novell has publicly challenged SCO's assertions and has stated that it still owns the copyrights in the UNIX code that it owned when the APA and the Amendment were executed. *See* Appendix Ex. E.

On January 20, 2004, SCO filed a slander of title action against Novell in state court in Utah. Appendix Ex. D ¶ 1. Novell removed the case to federal court and then filed a motion to dismiss SCO's claims on the grounds, *inter alia*, that neither the APA nor the Amendment transferred any copyrights in the UNIX source code to SCO. *SCO v. Novell*, Notice of Removal (attached to Appendix as Ex. F); Appendix Ex. E at 4-10. SCO has filed a motion to remand the case to state court and has opposed Novell's motion to dismiss. *SCO v. Novell*, Mot. to Remand (attached to Appendix as Ex. G); Pl.'s Memo. in Opp'n to Def.'s Mot. to Dismiss (attached to Appendix as Ex. H). The motions are scheduled for oral argument on May 11, 2004. *SCO v. Novell*, Am. Notice of Hearing (attached to Appendix as Ex. I), at 1.

2. **SCO Group, Inc. v. Int'l Bus. Mach. Inc.**, No. 2:03CV294 (D. Utah, filed Mar. 25, 2003)

SCO filed suit against IBM in state court in Utah on March 6, 2003, and IBM removed the case to federal court on March 23, 2003. SCO's original claims were for, *inter alia*, misappropriation of trade secrets SCO purported to own in certain UNIX source code and breach of contract based on alleged violations of IBM's licenses with AT&T for the UNIX System V source code. Appendix Ex. C. According to SCO, which claims to be the successor in interest to AT&T's rights under the licenses, IBM breached the licenses by improperly contributing rights SCO claims to own in UNIX System V source code to Linux.

SCO did not identify in its Complaint either the UNIX or the Linux code allegedly at issue, so IBM served SCO with discovery requests in June 2003 aimed at eliciting this information. *See SCO v. IBM*, Order Granting Intern'l Bus. Mach.'s Mots. to Compel Disc. and Reqs. to Prod. of Docs. (entered December 12, 2003) (attached to Appendix as Ex. K). SCO failed to fully identify the code in response to IBM's requests. *Id.* at 2. Accordingly, IBM filed two motions to compel SCO to identify the code. *Id.* at 1. The court granted IBM's motions in an Order dated December 12, 2003. *Id.* As part of its Order, the court ordered SCO to provide IBM with an identification of "the source code(s) that SCO is claiming form the basis of their [sic] action against IBM." *Id.* at 2. The court also scheduled a hearing on February 6, 2004, to evaluate the sufficiency of SCO's responses. *Id.* at 3.

SCO served IBM with additional documents and information prior to the hearing, but IBM disputed that SCO had produced everything the court ordered it to produce. *SCO v. IBM*, Order Re. SCO's Mot. to Compel Disc. and IBM's Mot. to Compel Disc. (entered March 3, 2004) (attached to Appendix as Ex. L), at 2. Two days before the hearing, SCO dropped its trade secrets claims, but maintained its claims that IBM had contributed code to Linux in violation of the UNIX System V source code licenses for which SCO claims to be the successor in interest and added a claim for copyright infringement. *See SCO v. IBM*, Second Am. Compl. (attached to Appendix as Ex. J). In

1 an Order dated March 3, 2004, the Court found that SCO had not complied in full with the court's

2 December 12 Order and ordered SCO "[t]o fully comply within 45 days of the entry of this order

3 with Court's previous order dated December 12, 2003." Appendix Ex. L at 2.[2]

4   On March 29, 2004, IBM filed a Second Amended Counterclaim in which IBM requests a

5 declaration from the court that "IBM does not infringe, induce the infringement of, or contribute to

6 the infringement of any SCO copyright through its Linux activities, including its use, reproduction

7 and improvement of Linux, and that some or all of SCO's purported copyrights in UNIX are invalid

8 and unenforceable." Appendix Ex. B ¶ 173. SCO's claims of copyright ownership in the UNIX

9 System V operating system and its allegations that one or more versions of Linux infringe those

10 rights are therefore now directly at issue in *IBM*.

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12   **3.**   ***Red Hat, Inc. v. SCO Group, Inc.*, No. 1:03CV772 (D. Del. Filed Aug. 4, 2003)**

13   Red Hat is the country's best-known independent distributor of Linux software. On August

14 4, 2003, Red Hat sued SCO in the United States District Court for the District of Delaware seeking a

15 declaratory judgment that SCO's purported UNIX copyrights are unenforceable and that Red Hat's

16 use or distribution of Linux does not infringe any purported UNIX copyrights owned by SCO. *Red*

17 *Hat v. SCO*, Compl. (attached to Appendix as Ex. M) ¶¶ 71 - 74.

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19   SCO moved to dismiss Red Hat's claims on ripeness grounds. *Red Hat v. SCO*, Opening Br.

20 in Supp. of its Mot. to Dismiss (attached to Appendix as Ex. N), at 1. In support of its motion, SCO

21 contended that "[t]he previously filed SCO v. IBM Case addresses most, if not all, of the issues of

22 copyright infringement and misappropriation." *Id.* at 15. SCO therefore argued: "[i]f these issues

23 are decided against SCO in that case, then Red Hat's lawsuit becomes unnecessary." *Id.*

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27   [2]   The 45 day time period for SCO to comply with the court's order expired on April 19, 2004.
AutoZone does not know what, if any, additional documents or information SCO produced to IBM.
28 However, if SCO's production mirrored its prior productions, IBM still does not have an
identification from SCO of the specific lines of UNIX System V code that SCO claims to be at issue
in that case.

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The Court recently denied SCO's motion to dismiss. Appendix Ex. A at 1. However, in apparent agreement with SCO's admission that the IBM case involves substantially similar issues, the Court *sua sponte* stayed the *Red Hat* case pending resolution of *IBM*.[3] *Id.* at 4.

C.   SCO's Claims Against AutoZone

1.   AutoZone's Business and Computer Systems

AutoZone is the nation's leading retailer of automotive parts and accessories, operating approximately 3,300 stores nationwide. AutoZone has servers in its corporate headquarters in Memphis and in each of its retail store locations.

AutoZone formerly used SCO's proprietary "OpenServer" version of UNIX as the operating system for its servers. In 2001, SCO told AutoZone that it would no longer be offering support for its OpenServer product. AutoZone was therefore forced to switch to a new operating system, either one offered by SCO (UnixWare) or an alternative system.[4] AutoZone elected to switch to Linux. AutoZone completed the transition of its domestic in-store servers to Linux in the second half of 2002.

2.   SCO's Complaint Against AutoZone

Throughout most of 2003 and early 2004, SCO issued open threats to the Linux end user community that it would be supplementing its lawsuit against IBM with a lawsuit against an end user – presumably in hopes that such threats would coerce Linux users into signing unnecessary license agreements with SCO. *See* Appendix Ex. M ¶ 42. Based upon publicly available information, SCO's threats do not appear to have generated any meaningful licensing activity. SCO thus carried through on its threat and filed the present action against AutoZone.

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[3]   On April 20, 2004, Red Hat moved the Court to reconsider its decision to stay the case. Whether Red Hat's motion is granted or not is inconsequential as it relates the present case. For the reasons set forth below, the key issues in *Red Hat* are the same as the key issues in this case. Accordingly, this case should be stayed even if the *Red Hat* case moves forward. This case should also be stayed pending resolution of the *IBM* and *Novell* cases.

[4]   SCO apparently changed its mind later because, according to its website, it is continuing to sell the OpenServer product. *See* http://www.thescogroup.com/products/openserver507/.

Broadly described, SCO's Complaint asserts that AutoZone's internal use, distribution, and copying of the Linux operating system infringes copyrights that SCO purports to own in the UNIX operating system. However, the precise nature of SCO's copyright claims cannot be ascertained with any reasonable degree of certainty from the allegations of the Complaint itself.

ARGUMENT AND CITATION OF AUTHORITIES

A.   The Court Should Stay this Case Pending Resolution of Previously Filed Actions

This Court possesses the inherent discretion to stay this case. *Clinton v. Jones*, 520 U.S. 681, 706 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket."). As this Court has previously explained, "[e]very court has the inherent power to stay causes on its docket with a view to avoiding duplicative litigation, inconsistent results, and waste of time and effort by itself, the litigants and counsel." *Stern v. United States*, 563 F. Supp. 484, 489 (D. Nev. 1983).

The Ninth Circuit recognizes that a district court's discretion to stay proceedings has particular application where another action is pending that addresses specific issues raised in the current action.

> [A] trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case. This rule . . . does not require that the issues in such proceedings are necessarily controlling of the action before the court.

Mediterranean Enters., Inc. v. Ssangyong Corp., 708 F.2d 1458, 1465 (9th Cir. 1983) (quoting *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979)). The interests to consider in the determination of whether to stay the proceedings under such circumstances include:

> [T]he possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.

Filtrol Corp. v. Kelleher, 467 F.2d 242, 244 (9th Cir. 1972); *see also Cohen v. Carreon*, 94 F. Supp. 2d 1112, 1115 (D. Or. 2000) (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)).

Here, consideration of the relevant issues demonstrates that the Court should stay the present case pending resolution of the *Novell*, *IBM* and *Red Hat* cases because those cases will address, and may resolve, the seminal elements of SCO's copyright infringement claim against AutoZone.[5]

1.   The Court Should Stay this Case Pending Resolution of *SCO v. Novell*

The first element necessary to establish a claim for copyright infringement is ownership of a valid copyright. *Miracle Blade, LLC v. Ebrands Commerce Group, LLC*, 207 F. Supp. 2d 1136, 1148-49 (D. Nev. 2002); *see also Unix Sys. Labs.*, 1993 WL 414724, at *12 ("In order to prevail [on claims of copyright infringement], Plaintiff must prove that it has a valid copyright in the UNIX [source] code."); *Johnson Controls, Inc. v. Phoenix Control Sys., Inc.*, 886 F.2d 1173, 1175 (9th Cir. 1989). In the analogous context of patent infringement litigation, federal courts have recognized that a stay of proceedings is appropriate when issues of the ownership or validity of a patent are at issue in a previously filed, pending action.[6] For example, in *Gen-Probe, Inc. v. Amoco Corp.*, CNS sued Gen-Probe claiming ownership rights in certain Gen-Probe patents. 926 F. Supp. 948, 951 (S.D. Cal. 1996). Subsequently, Gen-Probe sued Amoco, CNS, and the Regents of the University of California for allegedly infringing, or inducing the infringement of, the same patents purportedly owned by Gen-Probe that were the subject of the previously filed CNS/Gen-Probe case. *Id.*

In the later case, Amoco filed a motion to stay the proceedings pending the resolution of the CNS/Gen-Probe case because the issue of ownership asserted in the previous case was an essential

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5   Under the doctrine of defensive collateral estoppel, SCO will be estopped from litigating against AutoZone issues that were decided against SCO in the previously filed cases. However, because AutoZone is not a party to the previously filed cases, AutoZone may challenge issues decided in SCO's favor in the other cases. *See Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313 (1971) (setting forth rule that once a patent has been declared invalid via judicial inquiry, collateral estoppel prevents the patentee from further litigation involving the patent against other defendants, unless the patentee can demonstrate that it did not have a full and fair chance to litigate the validity of its patent in the earlier case).

6   The analysis regarding patents is equally applicable to copyrights because the plaintiff must establish ownership or validity in both patent infringement and copyright infringement cases. *See Miracle Blade*, 207 F. Supp. 2d at 1148-49; *Viskase Corp. v. Am. Nat'l Can Co.*, 261 F.3d 1316, 1323 (Fed. Cir. 2001) ("[A]n invalid claim can not be infringed."); *Ryobi N. Am., Inc. v. Emerson Elec. Co.*, 22 F. Supp. 2d 1025, 1027 (E.D. Mo. 1998) ("A patent can only be infringed if it is valid.").

1   element of Gen-Probe's claim against Amoco. *Id.* at 963. Amoco argued that "if CNS were to

2   succeed in its claims against Gen-Probe, Gen-Probe would be deprived of any ownership interest in

3   the patents in suit, and would lack standing to complain even of Amoco's current acts of

4   infringement." *Id.* After citing the factors in *Filtrol*, 467 F.2d at 244, governing whether to grant a

5   stay, the district court agreed with Amoco and stayed the case until the conclusion of the CNS/Gen-

6   Probe litigation and the resolution of whether Gen-Probe owned the patents at issue in the

7   infringement claim. *Gen-Probe*, 926 F. Supp. at 963-64.

8   The same situation exists in the present case. As set forth above, the UNIX copyrights that

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10 are the subject of SCO's claims against AutoZone are squarely at issue in SCO's lawsuit against

11 Novell.[7] If Novell succeeds in establishing that SCO has no ownership interest in the UNIX

12 copyrights, SCO would lack standing to assert any claims of copyright infringement against

13 AutoZone related to the UNIX copyrights. *See id.* Allowing the *Novell* case to mature to judgment

14 before the same issue is considered in this case will save this Court and the parties substantial time,

15 money and effort, and will reduce the risk of inconsistent judgments. *Stern*, 563 F. Supp. at 489;

16 *Filtrol*, 467 F.2d at 244.

17   Stay of SCO's lawsuit against AutoZone pending resolution of the *Novell* litigation would

18 cause no prejudice to SCO because SCO already has full opportunity to litigate the ownership issue

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20 in *Novell* – a case SCO filed for the very purpose of resolving this issue. SCO's claims against

21 AutoZone are therefore properly stayed pending resolution of the *Novell* case.

22   **2.   The Court Should Stay this Case Pending Resolution of *SCO v. IBM* and *Red
               Hat v. SCO***

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24   The second element necessary to establish a claim for copyright infringement is infringement

25 of the copyright "by invasion of one of the exclusive ownership rights." *Miracle Blade*, 207 F.

26 Supp. 2d at 1148-49; *see also Johnson Controls*, 886 F.2d at 1175. In the present case, SCO alleges

27 that AutoZone has infringed SCO's copyrights in connection with AutoZone's implementation of

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[7]   The issue of SCO's ownership of the UNIX copyrights is also being contested in *Red Hat v. SCO* and *SCO v. IBM. See* Appendix Ex. M ¶¶ 71 – 74; Appendix Ex. B ¶ 173.

1 "one or more versions of the Linux operating system." Compl. ¶ 21. As set forth above, the issue of

2 whether Linux infringes copyrights SCO purports to own in UNIX is already directly at issue in both

3 the *IBM* and *Red Hat* cases. Accordingly, it would be "a waste of judicial resources" for this Court

4 to consider SCO's claims while the *IBM* and *Red Hat* cases are pending. Appendix Ex. A at 5.

5 AutoZone therefore submits that this Court should stay the present action pending resolution of the

6 *IBM* and *Red Hat* cases.

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8 **B.   In the Alternative, the Court Should Direct SCO to Amend its Complaint to Provide
       AutoZone with a More Definite Statement of SCO's Claims**

9   Federal Rule of Civil Procedure 8(a) requires each pleading to contain "a short and plain

10 statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Rule 8

11 "requires that a complaint must give the opposing party 'fair notice of what the plaintiff's claim is

12 and the grounds upon which it rests.'" *Underwood v. Archer Mgmt. Servs., Inc.*, 857 F. Supp. 96, 97

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14 (D.D.C. 1994) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)). "If the complaint is 'too

15 general,' then it will not provide fair notice to the defendant." *Davis v. Olin*, 886 F. Supp. 804, 808

16 (D. Kan. 1995).

17   To state a claim for copyright infringement, a plaintiff must plead ownership of a valid

18 copyright and infringement of that copyright by the defendant. *See Miracle Blade*, 207 F. Supp. 2d

19 at 1148-49; *see also Johnson Controls*, 886 F.2d at 1175. Therefore, a plaintiff must allege the

20 copyright at issue and the acts of alleged infringement to plead a claim for copyright infringement.

21   Prior to filing an answer, a defendant can move for a more definite statement of the claim if

22 the complaint fails to specify the allegations in a manner that provides sufficient notice of the

23 plaintiff's claims. Fed. R. Civ. P. 12(e). In copyright cases involving computer programs, a plaintiff

24 must plead more than simply the name of the infringing program or system. *See Shepard's*

25 *McGraw-Hill, Inc. v. Legalsoft Corp.*, 769 F. Supp. 1161, 1162 (D. Colo. 1991) (granting motion for

26 more definite statement regarding complaint that identified only the name of allegedly infringing

27 software program).

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In the present case, SCO has done little more in its Complaint than claim that it owns the copyright in UNIX and broadly plead that unidentified sections of Linux infringe those rights in unidentified ways. SCO has failed to provide even a modicum of information that would allow AutoZone to determine which of the myriad "Copyright Materials" identified in the Complaint have been infringed and how they might have been infringed.

SCO begins its Complaint by listing copyright registrations it purports to own for thirty reference manuals, programmer's guides, and other written documentation related to UNIX. Compl. ¶ 15. The Complaint therefore appears to be headed in the direction of alleging that AutoZone has somehow infringed these written materials. However, after listing the materials, SCO does not specifically mention the materials again in the Complaint. Moreover, based upon the allegations of the first paragraph of the Complaint, SCO's claims appear to be about the infringement of computer code and not reference manuals. Compl. ¶ 1 ("Defendant uses one or more versions of the Linux operating system that infringe on SCO's exclusive rights in its proprietary UNIX System V operating system technology"). Why these written materials are referenced at all is a mystery that cannot be unraveled from reviewing the allegations of the Complaint itself. AutoZone is entitled to an identification of whether SCO is alleging that AutoZone has infringed the copyrights in these materials, and, if so, how.[8]

After discussing the foregoing printed materials, SCO's Complaint changes course and begins discussion of copyrights SCO purports to own in the source code, or the structure, sequence

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[8] SCO defines these written materials as part of the "Copyrighted Materials" that includes various versions of the UNIX code. Compl. ¶ 15. SCO broadly alleges that "parts or all of the Copyrighted Material has been copied or otherwise improperly used as the basis for creation of derivative work software code...." Id. ¶ 20. It is impossible to tell from the Complaint whether SCO is alleging that AutoZone has made physical copies of some or all of the thirty written manuals and other materials, whether SCO is alleging that the written materials were used by some third party as the inspiration for the creation of Linux, or whether SCO is alleging some other infringement of these materials. If SCO is alleging that AutoZone has made physical copies of the written materials, SCO's Complaint is indefinite because it does not allege which written materials AutoZone has allegedly copied. If SCO is alleging that the written materials served as the inspiration for Linux, SCO's claims would be subject to dismissal under the Copyright Act because the copying of ideas is not actionable under the Copyright Act. 17 U.S.C. § 102(b).

1   and organization of the source code, for "many categories of UNIX System V functionality."

2   Compl. ¶¶ 17-19. SCO alleges that Linux infringes all or parts of this code or organization of code,

3   but SCO does not say where or how. Compl. ¶ 20. The closest SCO comes to addressing these

4   issues is in Paragraph 19, in which SCO states that the UNIX code at issue relates to functionality in

5   UNIX that includes – *but is not limited to* – the following areas:

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7   System V static shared libraries; System V dynamic shared libraries;
             System V inter-process communication mechanisms including
             semaphores, message queues, and shared memory; enhanced reliable
8   signal processing; System V file system switch interface; virtual file
             system capabilities; process scheduling classes, including real time
9   support; asynchronous input/output; file system quotas; support for
10   Lightweight Processes (kernel threads); user level threads; and
             loadable kernel modules.

11
     Compl. ¶ 19.
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13   Although this list of functionality appears at first glance to provide valuable information

14   regarding the basis for SCO's claims, closer review reveals that this information does nothing to

15   apprise AutoZone of the nature or basis of SCO's claims. For the sake of brevity, AutoZone will not

16   attempt to address each of these areas of functionality herein. AutoZone will address only SCO's

17   references to the System V static and dynamic libraries, which serve as useful examples of

18   AutoZone's point.

19   Static and dynamic shared libraries are repositories of software functions and routines that

20   can be used by application developers to perform common tasks. *See SCO v. IBM*, Am. Compl.

21   (attached to Appendix as Ex. O) at ¶¶ 44-45. Functions provided by shared libraries range from

22   simple tasks, such as converting a letter from lower case to upper case, to more complex tasks such

23   as opening a new window inside UNIX's graphical user interface. *Id.* UNIX System V's shared

24   libraries include code that accomplishes these tasks as well as thousands of additional tasks. SCO

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26   cannot legitimately claim copyright protection in the code that accomplishes all of these functions

27   because much of this code is plainly not copyrightable. For example, the code in UNIX shared

28   libraries that converts a letter from lower case to upper case is simple code whose expression is

1   dictated entirely by function. Such code is not copyrightable as a matter of law. 17 U.S.C. § 102(b);

2   *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 704-05 (2d Cir. 1992) ("[W]e conclude that

3   those elements of a computer program that are necessarily incidental to its function are similarly

4   unprotectable.") Thus, SCO's broad references to the functionality of UNIX's shared libraries does

5   nothing to reasonably apprise AutoZone of the copyrights SCO claims to own in UNIX.

6   SCO's reference to Linux Versions 2.4 and 2.6 in the next paragraph of its Complaint adds

7   even greater uncertainty regarding the nature and basis of SCO's claims related to static and

8   dynamic shared libraries. Version numbers 2.4 and 2.6 refer to particular versions of the Linux

9   kernel, the core software that is central to the overall Linux operating system. Most of the

10   functionality contained within the UNIX shared libraries is not included in these versions of the

11   Linux kernel. For example, code that opens a window inside UNIX's graphical user interface is not

12   part of either of the Linux kernels SCO references in its Complaint. Since most of the functionality

13   of the UNIX shared libraries is not included in (and cannot be performed by) these versions of the

14   Linux kernel, the code for these functions could not have been infringed by the Linux kernel. SCO's

15   references to UNIX's shared libraries therefore adds greater confusion, not greater clarity, regarding

16   the nature and basis of SCO's claims of copyright protection and infringement.

17   There is no reason for SCO to have been so obtuse in its pleading, unless SCO is

18   intentionally trying to avoid identifying the nature and basis of its purported claims. The Linux code

19   is freely available to anyone to examine, and SCO has been in possession of the code for years.

20   Indeed, SCO was a distributor and developer of Linux code until *after* it filed its lawsuit against

21   IBM last year. SCO therefore has substantial familiarity with, and can readily identify, the lines,

22   files, or organization of Linux code that it claims infringes UNIX, and SCO can likewise readily

23   identify the corresponding lines, files, or organization of UNIX that SCO claims to be infringed.

24   With such identification, AutoZone can research and determine whether the identified

25   materials are the subject of SCO's UNIX copyrights, were copied from UNIX, or were properly and

26   independently developed by the open source software community. Such identification is further

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ORIGINAL

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

THE SCO GROUP, INC. a Delaware Corporation	)))	
Plaintiff,	))	Civil Action File No.
v.	))	CV-S-04-0237-RCJ-LRL
AUTOZONE, INC. a Nevada Corporation	)))	
Defendant.	))	

APPENDIX OF EXHIBITS TO MOTION TO STAY OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT

-1-

Defendant AutoZone, Inc. ("AutoZone") attaches, as set forth in the schedule below,

Exhibits "A" through "O" hereto in support of its Motion to Stay Or, in the Alternative, For A More

Definite Statement filed concurrently herewith.

This 23rd day of April, 2004.

SCHRECK BRIGNONE

By: _____

James J. Pisanelli, Esq., #4027
Nikki L. Wilmer, Esq., #6562
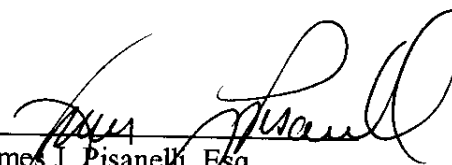300 South Fourth Street, Suite 1200
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-2-

EXHIBIT	DOCUMENT
A	*Red Hat v. SCO*, Memorandum Order
B	*SCO v. IBM*, Counterclaim-Plaintiff IBM's Second Amended Counterclaims Against SCO
C	*SCO v. IBM*, Complaint
D	*SCO v. Novell*, Complaint
E	*SCO v. Novell*, Memorandum in Support of Motion to Dismiss
F	*SCO v. Novell*, Notice of Removal of Civil Action Under 28 U.S.C. §§ 1441 and 1446
G	*SCO v. Novell*, Motion to Remand
H	*SCO v. Novell*, Plaintiffs Memorandum in Opposition to Defendant's Motion to Dismiss
I	*SCO v. Novell*, Am. Notice of Hearing
J	*SCO v. IBM*, Second Amended Complaint
K	*SCO v. IBM*, Order Granting International Business Machine's Motions to Compel Discovery and Requests for Production of Documents (entered December 12, 2003)
L	*SCO v. IBM*, Order Regarding SCO's Motion to Compel Discovery and IBM's Motion to Compel Discovery (entered March 3, 2004)
M	*Red Hat v. SCO*, Complaint
N	*Red Hat v. SCO*, Opening Brief in Support of its Motion to Dismiss
O	*SCO v. IBM*, Amended Complaint

This 23rd day of April, 2004.

James J. Pisanelli, Esq.
Nicki L. Wilmer, Esq.
SCHRECK BRIGNONE

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing **DEFENDANT AUTOZONE, INC.'S APPENDIX OF EXHIBITS TO MOTION TO STAY OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT** upon all counsel of record by depositing copies of the same in the United States mail with adequate postage affixed thereon, or hand-delivered, addressed as follows:

Stanley W. Parry, Esq.
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CURRAN & PARRY
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Stephen N. Zack, Esq.
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BOIES, SCHILLER & FLEXNER, LLP
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(Via United States Mail)

This 23rd day of April, 2004.

_____
An employee of SCHRECK BRIGNONE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

RED HAT, INC.,   )
)
          Plaintiff,   )
)
     v.   ) Civ. No. 03-772-SLR
)
THE SCO GROUP, INC.,   )
)
          Defendant.   )

MEMORANDUM ORDER

At Wilmington this 6th day of April, 2004, having
reviewed the pending motions and the papers filed in connection
therewith;

IT IS ORDERED that:

1. The motion to dismiss filed by defendant The SCO
Group, Inc. ("SCO") (D.I. 8) is denied.

          a. The Declaratory Judgment Act limits the use of
declaratory judgments to cases of "actual controversy." 28
U.S.C. § 2201; Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-
40 (1937). Generally, the presence of an "actual controversy"
within the Act depends on "whether the facts alleged, under all
circumstances, show that there is a substantial controversy
between the parties having adverse legal interests, of sufficient
immediacy and reality to warrant the issuance of a declaratory

judgment." Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941). Plaintiff, as the party seeking to invoke the court's jurisdiction, bears the burden of proving by a preponderance of the evidence that an "actual controversy" exists at the time of the complaint's filing, and continues to exist throughout the pendency of the action. See International Med. Prosthetics Research Assoc. v. Gore Entrp. Holdings, 787 F.2d 572, 575 (Fed. Cir. 1986). Even when it is determined that an actual controversy exists, federal courts may decline to exercise that discretionary jurisdiction. See Public Affair Assoc. v. Rickover, 369 U.S. 111, 112 (1962) ("The Declaratory Judgment Act was an authorization, not a command. It gave federal courts competence to make a declaration of rights; it did not impose a duty to do so.").

b. In deciding whether to allow a claim for declaratory relief to proceed in patent and copyright cases, federal courts use a two-step analysis in determining whether an "actual controversy" exists. First, defendant's conduct must have created a reasonable apprehension on plaintiff's part that it will face a suit for infringement. This test is an objective one, focusing on whether the defendant's conduct rose to a level sufficient to indicate an intent to enforce its patent or copyright. Goodyear Tire & Rubber Co. v. Releasomers, Inc., 824 F.2d 953, 955 (Fed. Cir. 1987). Courts have not required an

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express infringement charge. Id. at 956. Absent an express charge, courts must consider under the totality of the circumstances whether the defendant's conduct meets the first prong. Id. at 955. Second, plaintiff must have engaged in allegedly infringing acts or possessed the capability and definite intention to engage immediately in such acts. Id. This second prong, in essence, prohibits declaratory judgment plaintiffs from seeking advisory opinions on their potential liability for initiating some future activities. Arrowhead Indus. Water v. Ecolochem, Inc., 846 F.2d 731, 736 (Fed. Cir. 1988)(citations omitted). Declaratory judgment plaintiffs must be engaged in an actual making, selling, or using activity subject to an infringement charge or must have made meaningful preparation for such activity. Id. (citations omitted).

c.   Plaintiff Red Hat, Inc. ("Red Hat") has alleged that defendant SCO is engaged in a campaign to create fear, uncertainty, and doubt about the LINUX operating system, with resulting direct harm to Red Hat. Moreover, Red Hat has submitted multiple press releases which indicate that SCO, in fact, has embarked on a campaign to protect its proprietary interests in its UNIX OS, particularly as against the LINUX industry which, SCO claims, is illegally appropriating its UNIX source code. (See, e.g., D.I. 10, exs. E, F, G) Although SCO chose as its first adversary International Business Machines

Corporation ("IBM") (the "Utah litigation") (see D.I. 10, exs. A, B), nevertheless, SCO has publicly stated that it has issues with Red Hat, that it will "likely file a new suit or amend its controversial lawsuit against IBM to target other companies" like Red Hat in the LINUX industry, that "[t]here will be a day of reckoning for Red Hat," and that "chances for negotiating with such companies [as Red Hat] appear to be slim." (D.I. 10, exs. E - G)

d. Under these circumstances, the court concludes that SCO's conduct has created a reasonable apprehension of suit. Moreover, there is no question that Red Hat is a LINUX software developer who is engaging in the allegedly infringing activities.

e. Given the court's conclusion, SCO's motion to stay discovery pending resolution of the motion to dismiss (D.I. 21) is denied as moot.

2. Despite the above ruling, the court has concluded that the instant action should be stayed pending a resolution of the Utah litigation between SCO and IBM.

a. From the materials of record, SCO has accused IBM of engaging in a scheme to "deliberately and improperly destroy the economic value of UNIX and particularly the economic value of UNIX on Intel-based processors" by, inter alia, "misappropriat[ing] the confidential and proprietary information

from SCO in Project Monterey."[1] Furthermore, SCO claims in its

suit against IBM that "IBM . . . misused its access to the UNIX

source code" by, _inter alia_, "working closely with the open

source community [and] contributing technologies and resources"

to the LINUX system, thus benefitting Red Hat, among others.

(D.I. 10, ex. A)

    b. From the allegations found in the complaint,

the core issue of whether the LINUX system contains any

misappropriated UNIX system source code must be decided. It is a

waste of judicial resources to have two district courts resolving

the same issue, especially when the first filed suit in Utah

involves the primary parties to the dispute.

    c. Therefore, this case is stayed pending further

order of the court. The parties shall each submit a letter every

90 days as to the status of the Utah litigation. If, for any

reason, that litigation is not progressing in an orderly and

efficient fashion, the court may reconsider the stay.

           _____
           United States District Court

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   [1]Project Monterey is a 64-bit UNIX-based operating system
for a new 64-bit Intel platform jointly developed by SCO, Intel,
and IBM. (D.I. 10, ex. A)

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

THE SCO GROUP, INC., a Delaware corporation, Plaintiff/Counterclaim-Defendant, -against- INTERNATIONAL BUSINESS MACHINES CORPORATION, a New York corporation, Defendant/Counterclaim-Plaintiff.	**COUNTERCLAIM-PLAINTIFF IBM'S SECOND AMENDED COUNTERCLAIMS AGAINST SCO** **JURY TRIAL DEMANDED** Civil No. 2:03CV-0294 DAK Honorable Dale A. Kimball Magistrate Judge Brooke C. Wells

291696.1

For its counterclaims herein, counterclaim-plaintiff International Business Machines Corporation ("IBM"), by and through its attorneys, upon personal knowledge as to its own actions and upon information and belief as to the actions of counterclaim-defendant The SCO Group, Inc. ("SCO"), avers as follows:

NATURE OF COUNTERCLAIMS

1. These counterclaims arise from SCO's efforts wrongly to assert proprietary rights over important, widely-used technology and to impede the use of that technology by the open-source community. SCO has misused, and is misusing, its purported rights to UNIX operating systems developed originally by Bell Laboratories, then a research and development arm of AT&T Corp., to threaten destruction of the competing operating systems known as AIX, Dynix and Linux, and to extract windfall profits for its unjust enrichment.

2. IBM's counterclaims also arise from SCO's infringement of IBM copyrights and patents. Although SCO purports to respect the intellectual property rights of others—and has instituted litigation against IBM for alleged failures with respect to SCO's purported rights—SCO has infringed and is infringing a number of IBM copyrights and patents.

JURISDICTION AND VENUE

3. This Court has jurisdiction over IBM's counterclaims pursuant to 28 U.S.C. §§ 1331, 1332(a)(1), 1338(a) and (b), 1367, 2201(a) and 2202 and 15 U.S.C. § 1125(a)(1).

4. The Court has diversity and supplemental jurisdiction over IBM's state law claims. The parties have complete diversity of citizenship, and the amount in controversy

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exceeds $75,000, exclusive of interest and costs. IBM's Lanham Act, copyright and patent claims arise under federal law.

5. Venue is proper in this district, with respect to IBM's counterclaims, pursuant to 28 U.S.C. §§ 1391(b), 1391(c), and 1400(a) and (b).

PARTIES

6. Counterclaim-plaintiff IBM is a New York corporation with its principal place of business in the state of New York.

7. Counterclaim-defendant SCO is a Delaware corporation with its principal place of business in the state of Utah.

BACKGROUND

A. <u>UNIX</u>

8. UNIX is a name used to characterize a family of operating systems that share common characteristics and meet certain well-publicized "UNIX" standards. The earliest UNIX operating system was built by software engineers at Bell Laboratories, the research division of AT&T.

9. Over the years, AT&T Technologies, Inc., a wholly owned subsidiary of AT&T, and its related companies licensed various UNIX operating systems, such as the version known as "UNIX System V", for widespread enterprise use. AT&T's UNIX software has been licensed to many thousands of persons or entities.

10. In 1993, AT&T sold its UNIX assets—then held by its subsidiary, UNIX System Laboratories, Inc. ("USL")—to Novell, Inc. ("Novell"). In 1995, Novell sold some, but

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not all, of its UNIX assets to The Santa Cruz Operation, Inc., now known as Tarantella, Inc. ("Original SCO"), which is not affiliated with counterclaim-defendant SCO.

11.   Counterclaim-defendant SCO played no role in the development of UNIX. But it purports to have acquired Original SCO's rights to UNIX in 2001. Based upon the rights it purports to have acquired from Original SCO, SCO has undertaken the scheme described herein.

B.   IBM and UNIX

12.   In the mid-1980s, IBM acquired broad rights to use AT&T's UNIX System V software pursuant to a series of agreements with AT&T Technologies. These agreements, referred to as the "IBM Agreements", include the Software Agreement (Agreement Number SOFT-00015) dated February 1, 1985, the Sublicensing Agreement (Agreement Number SUB-00015A) dated February 1, 1985, the Substitution Agreement (Agreement Number XFER-00015B) dated February 1, 1985, the letter agreement dated February 1, 1985, and the Software Agreement Supplement 170, as amended by a letter agreement dated on or about January 25, 1989. Copies of these agreements are attached hereto as Exhibits A - F, respectively.

13.   In connection with the proper exercise of these and other rights previously obtained by IBM with respect to UNIX System V, IBM began development of its own version of a UNIX operating system, called AIX. Over the last two decades, IBM has expended tremendous resources on developing AIX, creating millions of lines of original code, incorporating it into its product lines and licensing the technology to thousands of customers worldwide. IBM continues to do so today.

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14. On October 17, 1996, after Novell and Original SCO acquired AT&T's rights to UNIX, IBM obtained additional rights with respect to UNIX System V software. Pursuant to an agreement known as Amendment X, entered into by IBM, Novell and Original SCO, IBM acquired, for example, the "irrevocable, fully paid-up, perpetual right to exercise all of its rights" under the IBM Agreements. A copy of this agreement is attached hereto as Exhibit G.

15. Like IBM, Sequent Computer Systems, Inc. ("Sequent") acquired broad rights to use AT&T's UNIX System V software pursuant to a series of agreements with AT&T Technologies in the mid-1980s. These agreements, referred to as the "Sequent Agreements", include the Software Agreement (Agreement Number SOFT-000321) dated April 18, 1985, the Sublicensing Agreement (Agreement Number SUB-000321A) dated January 28, 1986, and the Substitution Agreement (Agreement Number XFER-000321B) dated January 28, 1986. Copies of these agreements are attached hereto as Exhibits H - J, respectively.

16. Sequent also developed a version of a UNIX operating system known as Dynix in connection with the proper exercise of its rights under these and other agreements with respect to UNIX System V. IBM acquired Sequent, and its Dynix software, by merger in 1999.

C. Linux

17. Linux is an operating system that stems from a rich history of collaborative development. Linux is a dynamic and versatile operating system and is, for many, the operating system of choice.

18. The development of Linux began when an undergraduate student at the University of Helsinki, by the name of Linus Torvalds, set out to create a new, free operating

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system. In 1991, Linus Torvalds began developing the Linux kernel, the core of the operating system, and posting news of his project to internet newsgroups, along with a call for volunteers to assist in his efforts.

19. With the internet providing for a distributed collaboration, other programmers joined to create code making up the kernel. Linus Torvalds directed the collaboration to a version 1.0 release of the Linux kernel in 1994.

20. In the years that followed, thousands of developers, including developers at IBM, contributed to the further development of Linux. Version 2.4 of the Linux kernel was released in 2001. IBM owns valid copyrights in its contributions to Linux, as illustrated below.

21. The first commercial distribution of Linux was introduced in 1994 by Red Hat. Thereafter, other distributors, including SCO, introduced a number of commercial Linux products, which typically comprise the Linux kernel, the applications that the kernel runs (which, with the kernel, comprise a complete operating system) and whatever else the distributor chooses to combine into an easily installable product.

D.   Open-Source Software and the GPL

22. Linux is open-source software. Open-source software is free in the sense that it is publicly available, royalty-free, and users have the freedom to run, copy, distribute, study, adapt, and improve the software.

23. Whereas traditional software licenses often reflect legal limitations restricting the use and reproduction of original works, the open-source community has taken a different approach to licensing. The open-source community, including SCO, resolved to license Linux so as to keep the source code publicly available. Due to the open-source nature of Linux,

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anyone can freely download Linux and many Linux applications and modify and re-distribute them with few restrictions.

24. There are a variety of open-source licenses, but the most popular is the GNU General Public License (the "GPL"), a copy of which is attached hereto as Exhibit K. The Linux kernel, and significant portions of the larger Linux operating system, are distributed under the GPL.

25. In fact, one of the most important decisions Linus Torvalds made was to develop the Linux kernel under the GPL and keep the source code freely distributable so others could build upon, modify, and develop programs for the operating system.

26. Whereas the licenses for most software are programs designed to limit or restrict a licensee's freedom to share and modify it, the GPL is intended to guarantee a licensee's freedom to share and modify open-source software. The GPL applies to any program whose authors commit to using it.

27. The GPL is designed to make sure that a licensee has the freedom to distribute copies of open-source software, to receive source code or to get it if the licensee so desires, to modify the software or use pieces of it in new free programs, and to know the licensee can do these things.

28. The Linux kernel is subject to the GPL as it is comprised of programs and other works that contain notices placed by contributing copyright holders permitting distribution under the terms of the GPL. The Linux developers' public agreement to apply GPL terms expresses in a binding legal form the conscious public covenant that defines the open-source community—a covenant that SCO itself supported as a Linux company for many years.

29.   SCO accepted the terms of the GPL by modifying and distributing Linux products. By distributing Linux products under the GPL, SCO agreed, among other things, not to assert—indeed, it is prohibited from asserting—certain proprietary rights over any programs distributed by SCO under the terms of the GPL. SCO also agreed not to restrict further distribution of any programs distributed by SCO under the terms of the GPL.

E.   SCO's Business

30.   SCO was founded as Caldera, Inc. in 1994, approximately 25 years after the beginning of the development of UNIX and three years after Linus Torvalds began the development of Linux, to develop Linux-based business solutions. In 1998, Caldera, Inc. sold its assets relating to its business of developing and marketing Linux to Caldera Systems, Inc., a newly formed corporation.

31.   SCO began its business as a developer and distributor of the Linux operating system. By 2001, according to SCO, it led the world's largest Linux channel with more than 15,000 resellers worldwide.

32.   SCO has developed and marketed software based on the Linux operating system and provided related services that enable the development, deployment and management of Linux-specialized servers and internet access devices that simplify computing. According to SCO, it was one of the first companies to tailor Linux open-source code from various sources into discrete commercial products.

33.   Specifically, SCO has distributed and/or redistributed a number of Linux products, including SCO Linux Server, SCO OpenLinux Server, and SCO OpenLinux Workstation. SCO has also distributed SCO Volution Manager, a web-based management

solution system for managing and maintaining established versions of Linux (as well as UNIX operating systems). Although SCO purported to suspend its Linux distribution after the commencement of this action, SCO has continued to make Linux source code available for download through its website.

34.   The viability of SCO's product offerings has depended in large measure upon the efforts of the open-source community in enhancing products and making them compatible for use across multiple software and hardware platforms. Indeed, SCO incorporated certain code licensed pursuant to the GPL into its proprietary UNIX products. SCO has also relied on independent developers in the open-source community, such as Linus Torvalds, in order to release upgrades of SCO's Linux-based products.

35.   In addition to distributing Linux products, SCO facilitated the adoption of Linux by providing education programs designed to help its customers to develop, deploy and administer Linux systems. Furthermore, SCO joined with other Linux vendors in UnitedLinux, an initiative to streamline Linux development and certification around a global, uniform distribution of Linux for business.

36.   On May 7, 2001, Caldera Systems was merged into Caldera International, Inc. (described below), which changed its name to The SCO Group, Inc. in May 2003.

F.   SCO's Open-Source Activities

37.   Until it undertook the scheme described herein, SCO supported the open-source community. According to SCO, it fully embraced the open-source model.

38.   SCO Linux products encompass a range of software that uses a number of different licensing schemes, including open-source licenses and, in particular, the GPL.

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Components of SCO's Linux products (such as OpenLinux), including the Linux kernel, have been developed and made available for licensing under the GPL and similar licenses, which generally allow any person or organization to copy, modify and distribute the software, without royalty, in any form, including source code.

39.   Due to the open-source nature of many of SCO's software products and the licenses under which it has developed and distributed them, SCO's collection of trademarks constitutes its most important intellectual property.

40.   At least until it undertook the scheme described herein, SCO contributed tools and technology to the open-source community. For instance, SCO incorporated open-source components in its product offerings to the betterment of its products, and gave away CD-ROMs containing its Linux operating system at trade shows and allowed it to be freely downloaded over the internet to encourage interest.

41.   In addition, SCO fostered, and regularly contributed to, multiple open-source development projects in order to enhance the capability of SCO's products and services. In fact, SCO's business model depended upon incorporating contributions from the open-source community into products that it open-sourced.

42.   SCO also fostered and supported the development of additional open-source and Linux enhancements through the Open Source Development Lab and through participation as a key member of many industry standard and open-source initiatives.

G.   IBM and Linux

43.   IBM is a participant in the open-source movement and has made a substantial investment in Linux business efforts over the last five years. IBM participates in a

broad range of Linux projects that are important to the company and contribute to the open-source community.

44.   Today, IBM has many Linux-related offerings: mainframes and servers that run Linux; memory solutions for Linux environments; a broad range of software offerings; services that include deployment of Linux-based e-business environments, migration of database applications and data to Linux systems, support for Linux-based cluster computing, server consolidation, and a 24-hour technical engineering support line. IBM has created a Linux Center of Competency that offers Linux training and support, applications testing, technical advice and a hands-on environment in which to evaluate Linux and Linux-based applications.

45.   Like thousands of other developers, IBM has properly contributed source code to Linux under the GPL. In fact, SCO has included IBM contributions to Linux in Linux products that SCO has distributed under the GPL. IBM is entitled to the protections of the GPL with respect to the IBM contributions, as well as any other contributions included in SCO's Linux distribution, of which IBM is a recipient.

46.   IBM also uses and reproduces Linux itself, both in developing and providing hardware, software and services, and for other, internal business purposes.

47.   IBM's employees use and reproduce Linux in designing, testing and implementing hardware, software and consulting products for the company's internal use, for sale to its customers and for contribution to the open source community. IBM's engineers, developers, and consultants are trained to design, operate and implement products and systems that work with Linux. IBM personnel use and reproduce Linux in the course of this training.

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48.   Many IBM employees already use and reproduce Linux as their platform

for day-to-day business computing, such as word processing, spreadsheets and e-mail.

H.   Failure of SCO's Business

49.   Although it completed an initial public offering, SCO has failed to

establish a successful business around Linux. SCO's Linux business has never generated a

profit. In fact, the company as a whole did not experience a profitable quarter until after it

abandoned its Linux business and undertook its present scheme to extract windfall profits from

UNIX technology that SCO played no role in developing.

50.   In an attempt to revive its faltering Linux business, SCO acquired rights to

UNIX operating systems originally developed by Bell Laboratories and undertook the unification

of UNIX and Linux operating systems. On May 7, 2001, Caldera Systems was merged into

Caldera International, Inc., a holding company formed to acquire the Server Software and

Professional Services divisions of Original SCO, including Original SCO's rights to the UNIX

assets it acquired from Novell and the UNIX variant developed by Original SCO.

51.   Following its acquisition of Original SCO's UNIX assets, SCO described

its business plan as being to integrate its Linux-based products and services with its UNIX-based

products and services as a way of encouraging businesses to adopt the open-source, Linux-based

operating systems.

52.   In pursuit of this strategy, SCO designed SCO Linux to permit existing

UNIX-based users to migrate to Linux. In addition, SCO marketed and sold a number of UNIX

products, including UnixWare, SCO OpenServer, Reliant HA, and Merge, and SCO's Global

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Professional Services assisted customers in developing and deploying unified UNIX and Linux solutions through consulting and custom engineering services.

53.   Like SCO's original Linux business, however, this enterprise failed. SCO has not been able to operate a successful, legitimate business concerning Linux and/or UNIX. With apparently no other prospects, SCO shifted its business model yet again—this time to litigation and threats of litigation, as is described below.

I.   SCO's Scheme

54.   SCO devised a scheme to profit from the UNIX assets that it acquired from Original SCO, though those assets were in no way developed by SCO. Although most, if not all, of the AT&T UNIX technology that SCO purports to own is generally known, available without restriction to the general public or readily ascertainable by proper means, SCO undertook to create fear, uncertainty and doubt in the marketplace in regard to SCO's rights in and to that technology.

55.   Recognizing that there is little value in its UNIX rights, SCO did not limit its scheme to that technology. Rather, SCO devised and executed a plan to create the false perception that SCO holds rights to UNIX that permit it to control not only all UNIX technology, but also Linux—including those aspects generated through the independent hard work and creativity of thousands of other developers and long distributed under the GPL by SCO itself.

56.   SCO undertook to carry out its scheme by, among other things, (a) bringing baseless legal claims against IBM and threatening to sue other companies and individuals, (b) conducting a far-reaching publicity campaign to create the false and/or unsubstantiated impression that SCO has rights to UNIX and Linux that it does not have and that

IBM and others have violated SCO's rights and (c) otherwise seeking to condition the market to believe that SCO has rights to UNIX and Linux that it does not have and cannot properly enforce.

J.   SCO's Lawsuit Against IBM

57.   On March 7, 2003, without any prior notice or warning that would have allowed IBM to understand SCO's claims and respond to them, SCO sued IBM alleging a host of meritless claims. In its first Complaint, SCO principally alleged that IBM had misappropriated SCO's trade secrets in UNIX System V. SCO also alleged that IBM had breached its contractual obligations to SCO by, among other things, incorporating and inducing others to incorporate SCO's intellectual property into Linux, and that IBM had competed unfairly and interfered with SCO's contracts with others.

58.   SCO submitted an Amended Complaint on July 22, 2003 and a Second Amended Complaint on February 27, 2004.

59.   In its succession of complaints, SCO has asserted legal theories that are meritless, such as that SCO has ownership rights with respect to all of the code in AIX and Dynix. SCO has also sought relief to which it is plainly not entitled, such as a permanent injunction terminating IBM's ability to possess and use the software products it licensed from AT&T Technologies, notwithstanding the fact that those rights are expressly "irrevocable" and "perpetual".

60.   SCO further persisted in maintaining for nearly a year the unsound claim that IBM had misappropriated its trade secrets. Yet when pressed to identify a single trade secret that IBM allegedly misappropriated, SCO could not, even after being ordered to do so by the

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Court. SCO finally (and properly) abandoned this claim, upon which SCO's entire lawsuit was initially premised, in its Second Amended Complaint.

K.   SCO's Campaign of False Publicity to Disparage AIX, Dynix and Linux

61.   Following the commencement of its lawsuit against IBM, SCO continued its campaign of falsehoods by further misrepresenting to the market the interplay of UNIX, AIX, Dynix and Linux, and SCO's and IBM's rights to these products.

62.   SCO has repeatedly made false public statements to the effect that it has the right and authority to revoke, and has effectively revoked, IBM's right to use AIX, IBM's version of UNIX. For example, on May 12, 2003, Chris Sontag, a Senior Vice President of SCO, stated publicly, SCO has "the right to revoke the AIX license", and on June 16, 2003, SCO announced publicly that it had "terminated IBM's right to use or distribute any software product that is a modification of or based on UNIX System V source code". Indeed, in an interview given by SCO CEO Darl McBride to Peter Williams of vnunet.com on June 25, 2003, SCO falsely represented that its contractual rights to "pull" IBM's contract are "bullet-proof". SCO has made similarly false statements relating to Dynix.

63.   In addition to purporting to terminate IBM's rights to use AIX, SCO has also disparaged AIX as "unauthorized". In a press release dated June 16, 2003, SCO's counsel stated that "Today, AIX is an unauthorized derivative of the UNIX operating system source code and its users are, as of this date, using AIX without a valid license to do so". In the same press release, Darl McBride, SCO's Chief Executive Officer, stated that "IBM no longer has the authority to sell or distribute AIX and customers no longer have the right to use AIX software". SCO has made similarly false and disparaging statements relating to Dynix.

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64. SCO's false and misleading statements have not been limited to AIX. In flat contradiction of its allegations in its Second Amended Complaint (i.e., that this case is not about the relative merits of proprietary versus open-source software), SCO has now falsely stated, in effect, it owns and is entitled to collect royalties regarding Linux. For example, on July 21, 2003, McBride stated, on behalf of SCO, Linux infringes SCO's rights and, as "a viable alternative to legal enforcement" SCO is prepared to offer a license to SCO's UNIX products that would, SCO says, permit lawful use of Linux.

65. SCO has in fact commenced selling such "intellectual property licenses", which it falsely claims are necessary for the use of Linux. SCO has publicly touted its success in getting Linux users to sign these licenses with SCO, in order to bolster its meritless claims that SCO possesses rights to Linux.

66. SCO's campaign has not been limited to press releases and public interviews. SCO has also propagated falsehoods about its and IBM's rights in non-public meetings with analysts. SCO has solicited and participated in these meetings to misuse analysts to achieve wider dissemination of SCO's misleading message about UNIX, AIX, Dynix and Linux and to damage IBM and the open-source movement. In a luncheon hosted by Deutsche Bank analyst Brian Skiba, on or about July 22, 2003, for example, SCO falsely stated that IBM transferred the NUMA code from Sequent to Linux without any legal basis to do so and that IBM's actions were giving rise to about $1 billion in damages per week. In an interview in June 2003 with Client Server News, SCO misrepresented to analysts that IBM has improperly released "truckloads" of code into the open-source community.

67.   SCO's false and misleading statements have also damaged the reputation

and prospects of the entire open-source community. SCO's misconduct undermines the

substantial public interest in the provision of software that is reliable, inexpensive, and accessible

by the general public.

L.   SCO's Copyright Threats and Litigation Against IBM and Others

68.   In furtherance of its scheme to disparage and falsely lay claim to Linux,

SCO has made open threats to Linux users that SCO intends to pursue litigation against them,

and has recently filed baseless copyright infringement claims against IBM and another alleged

Linux user.

69.   In May 2003, SCO first sent letters to 1500 of the world's largest

corporations, including IBM, threatening litigation. In its letters, an example of which is

attached hereto as Exhibit L, SCO states, "We believe that Linux infringes on our UNIX

intellectual property and other rights". SCO further states, "We intend to aggressively protect

and enforce these rights" against not only the companies involved with "the Linux development

process" but also "the end user" companies using any Linux technology.

70.   SCO later made more explicit that it intended to bring legal action against

Linux end-users. For example, in a press conference on July 21, 2003, SCO stated that

purchasing a license from SCO was the "alternative to legal enforcement against Linux end-

users".

71.   On November 18, 2003, during a teleconference sponsored by SCO,

SCO's counsel said that it "will be looking to identify a defendant" in "the near term" and such

defendant will be "a significant user that has not paid license fees and is in fact using the

proprietary and copyrighted material". During the same call, SCO Chief Executive, Darl McBride was asked if the 1500 companies threatened earlier were the same group of companies that SCO would pursue. McBride responded: "We will start there. That's not going to be the ending point, but clearly large customers that have, that are using a lot of Linux machines inside of their environment would be the starting point for us."

72.   Although its initial complaints against IBM did not include a claim for copyright infringement, SCO stated publicly after it filed its suit that IBM had infringed SCO's copyrights, and threatened to sue IBM for copyright infringement with respect to Linux. For example, at its 2003 SCO Forum conference, SCO represented to attendees, including press and financial analysts, that Linux is an unauthorized derivative of UNIX, that IBM had infringed its rights in Linux and that SCO was entitled to damages and injunctive relief against IBM.

73.   At the December 5, 2003 hearing concerning discovery issues, SCO further represented to the Court that SCO would be filing a copyright infringement action against IBM "within the coming few days or no less than a week".

74.   After making public its intent to sue IBM for copyright infringement on December 5, SCO also stepped up its threats directed at other Linux users.

75.   On December 22, 2003, SCO announced in a press release that it had "commenced providing notification to selected Fortune 1000 Linux end users outlining . . . violations of SCO's copyrights contained in Linux". In connection with its December 22 press release, SCO released a letter (attached hereto as Exhibit M) dated December 19, 2003 that it sent to Linux users. In the letter, SCO wrote that "a portion of our copyrighted code . . . has been

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incorporated into Linux without our authorization" and that "use of the Linux operating system in a commercial setting violates our rights under the United States Copyright Act".

76. In remarks delivered at Harvard Law School on February 2, 2004, SCO CEO McBride stated that "on the copyright side and on the end user side, we'll be in a courtroom somewhere in America soon . . ." At the same event, McBride predicted that suits would be filed by mid-February, and a SCO executive, Christopher Sontag, who also attended, stated that SCO would "probably have an issue with" any entities using Linux "in a large commercial environment and getting a great deal of economic benefit of the use of some of our portions of our intellectual property".

77. Shortly thereafter, SCO moved for and obtained leave to add a copyright infringement claim against IBM. In the claim, SCO alleges that IBM has infringed, induced the infringement of, and contributed to the infringement of, numerous of the UNIX copyrights SCO claims to own, including through its activities relating to AIX, Dynix and Linux.

78. In particular, with respect to Linux, SCO alleges that "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" and that IBM's work, including at its Linux Technology Center, in using, reproducing and improving Linux therefore infringes, and contributes to the infringement of, SCO's UNIX copyrights.

79. SCO also recently filed suit against a Linux user, alleging that the use of Linux infringes copyrights SCO purports to hold to UNIX.

80.   SCO's complaint in that suit asserts that "Linux has been transformed from a non-commercial operating system into a powerful general enterprise operating system", for which, as stated in its suit against IBM, SCO believes IBM is responsible.

81.   SCO further claims that "parts or all of [SCO's copyrighted material] has been copied or otherwise improperly used as the basis for creation of derivative software code, included [in] one or more Linux implementations, including Linux versions 2.4 and 2.6, without the permission of SCO". Again, as stated in its suit against IBM, SCO claims that IBM is responsible for such copyrighted materials being contributed to Linux.

82.   SCO's threats and its claims against IBM and other Linux users are meritless, and are simply part and parcel of SCO's illicit scheme to get Linux users to pay SCO for unneeded licenses to Linux.

M.   Novell's Exercise of Rights

83.   On June 9, 2003, in response to SCO's actions, and pursuant to its obligations under Amendment X, Novell stated its belief that SCO has no right to terminate IBM's UNIX System V license, which is perpetual and irrevocable. Novell therefore exercised its retained rights to AT&T's UNIX System V licensing agreements to put a stop to SCO's misconduct. Under Section 4.16(b) of the Asset Purchase Agreement between Novell and Original SCO dated September 19, 1995 ("APA"), attached hereto as Exhibit N, Novell directed SCO to "waive any purported right SCO may claim to terminate IBM's [UNIX] licenses enumerated in Amendment X or to revoke any rights thereunder, including any purported rights to terminate asserted in SCO's letter of March 6, 2003 to IBM". A copy of Novell's June 9, 2003 letter is attached hereto as Exhibit O.

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84.   When SCO failed to take the actions directed by Novell, on June 12, 2003, Novell exercised its rights under Section 4.16(b) of the APA to waive and revoke, in SCO's stead, any purported right SCO claimed to terminate IBM's licenses. A copy of Novell's June 12, 2003 letter is attached hereto as Exhibit P.

85.   Notwithstanding the fact that IBM's rights to UNIX System V are expressly "irrevocable" and "perpetual" under Amendment X and the fact that Novell has exercised its right to waive, in any event, any contractual rights SCO claims IBM violated, SCO nevertheless purported to terminate IBM's licenses on June 13, 2003. Moreover, even assuming (contrary to fact) that IBM's rights were terminable, at no time prior to SCO's purported termination did SCO comply with its obligations under the IBM Agreements to identify the specific acts or omissions that SCO alleges constitute IBM's breach, despite IBM's demands that SCO do so.

86.   Rather, SCO has continued to misrepresent that it can, or will, or has in fact revoked IBM's right to use UNIX System V, without disclosing that IBM's rights to UNIX System V are not terminable or that Novell has exercised its right to waive any contractual rights SCO claims IBM violated. In an interview with InformationWeek on or about June 12, 2003, for instance, SCO falsely stated that it has the right to revoke IBM's license and order the destruction of every copy of AIX

87.   Novell additionally invoked its rights under Section 4.16(b) of the APA to correct SCO's illogical and unsupported interpretation of the IBM Agreements and the Sequent Agreements upon which its breach of contract claims are based, and to explicitly waive and revoke any purported right SCO had to assert a breach based on this wrong interpretation.

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88.   On October 7, 2003, Novell informed SCO by letter that its position that

IBM original code contained in AIX "must be maintained as confidential and subject to use

restrictions is contrary to the agreements between AT&T and IBM including Amendment X, to

which Novell is a party". A copy of Novell's October 7, 2003 letter is attached hereto as Exhibit

Q.

89.   According to Novell, the IBM Agreements provide "a straightforward

allocation of rights":

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

Novell concluded that any other interpretation "would defy logic as well as the intent of the

parties".

90.   Novell therefore directed SCO to waive any purported right to assert a

breach of the IBM Agreements based on IBM's use or disclosure of code that does not contain

any of AT&T's UNIX System V code.

91.   When SCO failed to follow Novell's instruction, on October 10, 2003,

Novell expressly waived and revoked any purported right of SCO's to assert a breach of the IBM

Agreements based on IBM's use or disclosure of code that does not contain any UNIX System V

code. A copy of Novell's October 10, 2003 letter is attached hereto as Exhibit R.

92.   On February 6, 2004, Novell similarly directed SCO to waive any

purported right to assert a breach of the Sequent Agreements based on IBM's use or disclosure of

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code contained in Dynix that does not contain any UNIX System V code. A copy of Novell's February 6, 2004 letter is attached hereto as Exhibit S.

93.   In the letter, Novell reiterated that SCO's interpretation of the Sequent Agreements, like its interpretation of IBM Agreements, was wrong and "plainly contrary to the position taken by AT&T, as author of and party to" such agreements.

94.   When SCO failed to follow Novell's instruction, on February 11, 2004, Novell expressly waived any purported right of SCO's to assert a breach of the Sequent Agreements based on IBM's use or disclosure of code that does not contain any UNIX System V code. A copy of Novell's February 11, 2004 letter is attached hereto as Exhibit T.

95.   Despite these proper instructions and waivers by Novell, SCO continues improperly to maintain that IBM has breached the IBM Agreements and the Sequent Agreements by contributing its original code to Linux.

96.   In addition to its waivers of SCO's purported rights with respect to IBM, Novell has additionally asserted publicly that it owns the copyrights for UNIX, and that SCO's registration of copyrights for UNIX was improper.

N.   SCO's Refusal to Specify Its Claims

97.   Rather than particularize its allegations of misconduct by IBM and others, SCO has obfuscated and altered its claims to foster fear, uncertainty and doubt about its rights and the rights of others. In letters dated April 2, 2003, and May 5, 2003, attached hereto as Exhibits U and V, respectively, IBM expressly asked SCO to advise IBM as to what SCO contends IBM has done in violation of any of its agreements, and what SCO contends IBM should do to cure such violations. SCO refused. In fact, SCO's counsel indicated, in an

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interview with Maureen O'Gara of LinuxGram, that it "doesn't want IBM to know what they [SCO's substantive claims] are".

98.   SCO has obfuscated its claims and has hidden its supposed evidence because the evidence does not demonstrate the breaches and violations that SCO has alleged. Moreover, key developers and influence leaders in the open-source community, including leaders of Linux kernel development, have stated publicly that they are prepared immediately to remove any allegedly offending material from the Linux kernel. Rather than permit remediation or mitigation of its alleged injuries (which are non-existent), SCO has declined to reveal the particulars of the alleged violations in order to artificially and improperly inflate the price of its stock.

99.   While refusing to supply IBM with meaningful specifics regarding the alleged breaches, SCO has shown its purported evidence to analysts, journalists and others who are interested in seeing it. For example, at a forum held in Las Vegas on August 17-19, 2003, SCO made a false and misleading presentation concerning its claims against IBM, in which SCO purported to disclose examples of its evidence of alleged misconduct by IBM.

100.   In light of SCO's continuing refusal to provide detail regarding its claims, IBM moved on October 1, 2003 to compel complete responses to IBM's First Set of Interrogatories, and on November 6, 2003, to compel complete responses to IBM's Second Set of Interrogatories. Even in the face of these motions, however, SCO continued to attempt to obfuscate its claims and hide its evidence.

101.   IBM's motions to compel were granted at a hearing on December 5, 2003.

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102. Yet despite an Order directing SCO, among other things, to "identify and state with specificity the source code(s) that SCO is claiming form the basis of their action against IBM" by January 12, 2004, SCO failed adequately to do so. In its supplemental responses purportedly submitted in compliance with the Order, SCO still failed to identify a single line of UNIX System V code that IBM allegedly misappropriated or misused.

103. In fact, finally realizing that it could no longer maintain the illusion that IBM had misappropriated its trade secrets, SCO dropped its trade secrets claim altogether. SCO continues, however, to press equally meritless contract and other claims against IBM, despite being unwilling to identify the UNIX System V code that IBM allegedly misused in violation of any agreement.

104. As a result of SCO's ongoing failure to be forthcoming regarding its claims against IBM, SCO was ordered on March 4, 2004 yet again to provide the specifics of its claims against IBM, this time by April 19, 2004.

105. In the meantime, by failing to disclose the particulars of its claims for more than a year, SCO has been able to cultivate and maintain in the marketplace fear, uncertainty and doubt about its rights and the rights of others.

O.   Effects of SCO's Misconduct and State of Mind

106. As a result of the misconduct described above, SCO has not only artificially inflated its stock price and been unjustly enriched, but it has also injured IBM and, more broadly, the open-source movement. SCO's misconduct has resulted in damage to IBM's business, including its reputation and goodwill, has interfered with IBM's prospective economic relations and has required IBM unduly to divert resources to respond to baseless allegations.

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SCO has injured the open-source movement, of which it was once a part, by fostering fear, uncertainty and doubt about its and others' rights to use UNIX, AIX, Dynix and Linux.

107. SCO's misconduct is especially egregious because SCO has implemented its scheme with actual knowledge or in reckless disregard of the fact that SCO does not have the rights that it seeks to assert (e.g., the right to terminate IBM's irrevocable and perpetual UNIX rights). Moreover, SCO committed not to assert certain proprietary rights over or to restrict further distribution of any program distributed by SCO under the terms of the GPL.

P.   SCO's Copyright Infringement

108. As stated, IBM has made contributions of source code to Linux under the GPL, some of which are identified below. IBM owns valid copyrights in these contributions, as illustrated below, and has identified them with appropriate copyright notices.

109. Notwithstanding SCO's allegations that IBM and others have breached SCO's intellectual property rights, SCO has infringed and is infringing IBM's copyrights in its Linux contributions.

110. IBM granted SCO and others a non-exclusive license to these copyrighted contributions on the terms set out in the GPL and only on the terms set out in the GPL. SCO breached its obligations under the GPL, however, and therefore its rights under the GPL terminated.

111. SCO has infringed and is infringing IBM's copyrights by copying, modifying, sublicensing and/or distributing Linux products including IBM's copyrighted contributions after its rights under the GPL terminated. SCO has taken copyrighted source code

made available by IBM under the GPL, included that code in SCO's Linux products, and copied, modified, sublicensed and/or distributed those products other than as permitted under the GPL.

Q.   SCO's Patent Infringement

112.   In addition to infringing IBM's copyrights, SCO is engaged in pervasive acts of infringement of no fewer than three of IBM's patents, by making, using, selling and/or offering to sell a variety of products, including but not limited to: "UnixWare", a UNIX operating system for Intel and AMD processor-based computer systems; "Open Server", an operating system platform; and "Reliant HA", "clustering" software that permits interconnection of multiple servers to achieve redundancy.

FIRST COUNTERCLAIM

Breach of Contract

113.   IBM repeats and realleges the averments in paragraphs 1 through 112, with the same force and effect as though they were set forth fully herein.

114.   SCO is licensor and IBM licensee of the right to use and sublicense UNIX System V software, as specified in the IBM Agreements, Amendment X, the Sequent Agreements and other similar agreements, all of which are valid contracts.

115.   IBM has performed all its duties and obligations under the IBM Agreements, Amendment X, the Sequent Agreements and other similar agreements.

116.   SCO has breached its express duties and obligations under the IBM Agreements, Amendment X, the Sequent Agreements and other similar agreements by, among other things, purporting to terminate IBM's irrevocable and perpetual UNIX rights and/or refusing to provide IBM adequate notice and opportunity to cure its alleged misconduct.

117.   SCO has also breached the implied covenant of good faith and fair dealing

under the IBM Agreements, Amendment X, the Sequent Agreements and other similar

agreements by affirmatively seeking to deprive IBM of the benefits to which it is entitled under

those contracts through numerous acts of bad faith, including, among other things, making false

and misleading statements to the public about SCO's and IBM's rights under the same.

118.   IBM has suffered damages from SCO's breaches of contract in an amount

to be determined at trial.

SECOND COUNTERCLAIM

Lanham Act Violation

119.   IBM repeats and realleges the averments in paragraphs 1 through 118,

with the same force and effect as though they were set forth fully herein.

120.   IBM sells and distributes AIX and Linux-related products and services in

interstate commerce, and IBM sold and distributed Dynix in interstate commerce.

121.   SCO has made material false representations regarding AIX, Dynix and

IBM's Linux-related products and services, which affect a customer's decision whether to

purchase these products and services. Specifically, SCO has publicly misrepresented the

legitimacy of these products and services by falsely representing that IBM no longer has the

right, authority and license to use, produce and distribute these products and by misrepresenting

SCO's own rights in and to UNIX, AIX, Dynix and Linux.

122.   SCO has published its false statements in a series of widely-distributed

press releases, press interviews and other streams of commerce, as part of its bad faith campaign

to discredit IBM's products and services in the marketplace, to increase the perceived value of

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SCO's limited rights to UNIX and to promote SCO's own UNIX operating systems, UnixWare and Open Server.

123. These statements are likely to cause confusion and mistake and have in fact caused confusion and mistake as to the characteristics of IBM's goods, products and/or services.

124. As a direct result of SCO's false representations, all of which are in violation of 15 U.S.C. § 1125, IBM has suffered damages in an amount to be determined at trial. IBM is also entitled to damages and attorneys' fees pursuant to 15 U.S.C. § 1117(a).

THIRD COUNTERCLAIM

Unfair Competition

125. IBM repeats and realleges the averments in paragraphs 1 through 124, with the same force and effect as though they were set forth fully herein.

126. IBM has invested over two decades and hundreds of millions of dollars in the creation and development of AIX. Through IBM's efforts, innovation and hard work, AIX has become one of the leading UNIX operating systems, and IBM's AIX products and services are sold and used throughout the United States. Similarly, IBM expended substantial resources to acquire Dynix and has invested substantial time and effort in developing its Linux-related products and services.

127. SCO has intentionally, knowingly, wrongfully and in bad faith engaged in a public pattern of conduct aimed at depriving IBM of the value of its AIX, Dynix and Linux-related products and services and misappropriating the same for the benefit of SCO's UNIX licensing business as well as SCO's competing UNIX operating systems. SCO's misconduct is

likely to result in confusion in the marketplace and has in fact resulted in confusion concerning AIX, Dynix and Linux.

128.   SCO has engaged in unfair competition by falsely claiming ownership of IBM's intellectual property as well as the intellectual property created by the open-source community; publishing false and disparaging statements about AIX and Dynix; making bad faith misrepresentations concerning IBM's rights to UNIX, AIX and Dynix; misusing and misrepresenting SCO's limited rights in UNIX to injure IBM; and falsely accusing IBM of theft of SCO's intellectual property.

129.   As a direct result of SCO's unfair competition, IBM has and will continue to suffer damage to its reputation, goodwill, and business in an amount to be determined at trial. Because SCO's acts of unfair competition were and are willful and malicious, IBM is also entitled to punitive damages.

FOURTH COUNTERCLAIM

Intentional Interference with Prospective Economic Relations

130.   IBM repeats and realleges the averments in paragraphs 1 through 129, with the same force and effect as though they were set forth fully herein.

131.   IBM is actively engaged in the development, manufacture and sale of AIX and products and services that work with Linux, and IBM has sold and distributed Dynix. IBM has prospective business relationships with numerous companies and individuals to whom IBM has sold and/or licensed these products and services and/or to whom IBM seeks to sell and/or license these products and services. IBM also has prospective business relationships with business and individual members of the Linux and open-source software development,

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distribution, service and computing communities with whom IBM seeks to do business in various capacities, including through research and development efforts.

132. SCO is fully aware of these prospective business relationships and the importance of the relationships to IBM's continued commercial success.

133. SCO has intentionally interfered with these relationships through improper means, including by making false and misleading statements to IBM's prospective customers that IBM no longer has the right, authority and license to use, produce and distribute AIX, Dynix and Linux-related products. SCO has also misrepresented its own rights relating to these operating systems. The purpose of SCO's unlawful conduct is to injure IBM by driving prospective customers of AIX, Dynix and IBM's Linux-related products and services away from purchasing and licensing the same from IBM.

134. Furthermore, SCO has intentionally interfered with IBM's valuable economic relationships with business and individual members of the Linux and open-source software communities by falsely and publicly accusing IBM of inserting "truckloads" of SCO's intellectual property into the Linux kernel and related software. Again, the purpose of SCO's unlawful conduct is to injure IBM by driving away these businesses and individuals from future open-source collaborations with IBM.

135. IBM has suffered damages from SCO's tortious interference with its economic relations in an amount to be determined at trial. Because SCO's tortious interference with IBM's prospective economic relations was and is willful and malicious, IBM is entitled to punitive damages.

FIFTH COUNTERCLAIM

Unfair and Deceptive Trade Practices

136.   IBM repeats and realleges the averments in paragraphs 1 through 135, with the same force and effect as though they were set forth fully herein.

137.   SCO has engaged in unfair and deceptive trade practices by, among other things, falsely representing that IBM no longer has the right, authority and/or license to use, produce and/or distribute AIX, Dynix and Linux-related products; misrepresenting SCO's and IBM's rights relating to these operating systems; and publishing false and disparaging statements about AIX, Dynix and Linux.

138.   SCO's false statements and misrepresentations were made in connection with SCO's solicitation of business, and in order to induce IBM and others to purchase products and licenses from SCO. SCO's statements and misrepresentations are likely to cause confusion and misunderstanding as to the qualities, benefits and characteristics of AIX, Dynix and Linux. SCO has misrepresented the qualities, benefits and/or characteristics of these products.

139.   SCO's misconduct was undertaken for the purpose of deceiving the marketplace and defaming IBM and has deceived and misled the public and IBM's customers; disparaged the goods, services, and business of IBM; and otherwise injured IBM's business in violation of N.Y. Gen. Bus. Law § 349 and the laws of other states.

140.   IBM has provided SCO with notice of its false and misleading statements, and has given SCO an opportunity to correct those statements. SCO has refused and has instead opted to make more false and misleading statements.

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141. As a direct result of SCO's unfair and deceptive trade practices, the public at large, including AIX, Dynix and Linux users, has been harmed by SCO's campaign to foster fear, uncertainty and doubt about AIX, Dynix and Linux. Moreover, IBM has suffered damages in an amount to be determined at trial. Because SCO's acts of unfair and deceptive trade practices were and are willful, knowing and malicious, IBM is also entitled to treble damages and/or fees pursuant to N.Y. Gen. Bus. Law § 349(h).

SIXTH COUNTERCLAIM

Breach of the GNU General Public License

142. IBM repeats and realleges the averments in paragraphs 1 through 141, with the same force and effect as though they were set forth fully herein.

143. IBM has made contributions of source code to Linux under the GPL on the condition that users and distributors of such code, including SCO, abide by the terms of the GPL in modifying and distributing Linux products, including, for example, the requirement that they distribute all versions of software licensed under the GPL (original or derivative) under the GPL and only the GPL.

144. SCO has taken source code made available by IBM under the GPL, included that code in SCO's Linux products, and distributed significant portions of those products under the GPL. By so doing, SCO accepted the terms of the GPL (pursuant to GPL § 5), both with respect to source code made available by IBM under the GPL and with respect to SCO's own Linux distributions.

145. SCO has breached the GPL by, among other things, copying, modifying, sublicensing or distributing programs licensed under the GPL, including IBM contributions, on

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terms inconsistent with those set out in the GPL; and seeking to impose additional restrictions on the recipients of programs licensed under the GPL, including IBM contributions, distributed by SCO.

146. Based upon its breaches of the GPL and the misconduct described herein, SCO's rights under the GPL, including but not limited to the right to distribute the copyrighted works of others included in Linux under the GPL, terminated (pursuant to § 4 of the GPL). The GPL prohibits SCO from, among other things, asserting certain proprietary rights over, or attempting to restrict further distribution of any program distributed by SCO under the terms of the GPL, except as permitted by the GPL.

147. As a result of SCO's breaches of the GPL, countless developers and users of Linux, including IBM, have suffered and will continue to suffer damages and other irreparable injury. IBM is entitled to a declaration that SCO's rights under the GPL terminated, an injunction prohibiting SCO from its continuing and threatened breaches of the GPL and an award of damages in an amount to be determined at trial.

SEVENTH COUNTERCLAIM

Promissory Estoppel

148. IBM repeats and realleges the averments in paragraphs 1 through 147, with the same force and effect as though they were set forth fully herein.

149. SCO made a clear and unambiguous promise to IBM and others that SCO would copy, modify or distribute programs distributed by IBM and others under the GPL only on the terms set out in the GPL; and would not assert rights to programs distributed by SCO under the GPL except on the terms set out in the GPL.

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150. IBM and others reasonably, prudently and foreseeably relied upon these promises, such as by making contributions under the GPL and committing resources to open-source projects.

151. SCO knew or should have known that IBM and others would rely and in fact relied upon SCO's promises and knew or should have known that those promises would induce and in fact induced action or forbearance on the part of IBM and others.

152. SCO was and is aware of all material facts relating to IBM's reliance on SCO's promises including but not limited to IBM's contributions under the GPL, SCO's distributions under the GPL and the intent, meaning and import of the GPL.

153. As a result of its reliance upon SCO's promises, IBM has sustained injuries and is entitled to an award of damages in an amount to be determined at trial. In addition to an award of damages, IBM is entitled to declaratory and injunctive relief, including but not limited to a declaration that SCO is not entitled to assert proprietary rights with respect to products distributed by SCO under the GPL except upon the terms set out in the GPL.

EIGHTH COUNTERCLAIM

Copyright Infringement

154. IBM repeats and realleges the averments in paragraphs 1 through 153, with the same force and effect as though they were set forth fully herein.

155. As stated, IBM has made contributions of source code to Linux under the GPL. IBM is, and at all relevant times has been, the owner of valid copyrights in these contributions, as well as of all the rights, title and interest in those copyrights.

156. IBM holds the following certificates of copyright from the United States

Copyright Office (copies of which are attached hereto as Exhibit W), among others:

Registration No.	Date of Registration	Title of Work
TX 5-757-696	August 15, 2003	IBM Enterprise Volume Management System
TX 5-757-697	August 15, 2003	IBM Enterprise Class Event Logging
TX 5-757-698	August 15, 2003	IBM Dynamic Probes
TX 5-757-699	August 15, 2003	IBM Linux Support Power PC64
TX 5-757-700	August 15, 2003	IBM Omni Print Driver
TX 5-757-701	August 15, 2003	IBM Journaled File System
TX 5-757-702	August 15, 2003	IBM Next Generation Posix Threading
TX 5-856-466	February 2, 2004	IBM Linux Kernel Support for JFS
TX 5-856-467	February 2, 2004	IBM Linux Kernel S390 Support
TX 5-856-468	February 2, 2004	IBM Linux Kernel Support for Service Processor
TX 5-856-469	February 2, 2004	IBM Linux Kernel Support for Memory Expansion Technology
TX 5-856-470	February 2, 2004	IBM Linux Kernel Support for IBM eServer iSeries Devices
TX 5-856-471	February 2, 2004	IBM Linux Kernel Support for PCI Hotplug
TX 5-856-472	February 2, 2004	IBM Linux Kernel Support for pSeries Hypervisor Terminal
TX 5-856-473	February 2, 2004	IBM Linux Kernel PPC64 Support
TX 5-856-474	February 2, 2004	IBM Linux Kernel Support for Mwave Modem

157. IBM has placed or caused to be placed a copyright notice on these

contributions of source code to Linux under the GPL and has otherwise complied with the

copyright laws of the United States in this respect. IBM does not permit the unauthorized

copying of its Linux contributions.

158. IBM granted SCO and others a non-exclusive license to the above-listed copyrighted contributions to Linux on the terms set out in the GPL and only on the terms set out in the GPL. IBM made these contributions on the condition that users and distributors of its copyrighted code, including SCO, abide by the terms of the GPL in copying, modifying and distributing Linux products.

159. SCO has infringed and is infringing IBM's copyrights by copying, modifying, sublicensing and/or distributing Linux products except as expressly provided under the GPL. SCO has taken copyrighted source code made available by IBM under the GPL, included that code in SCO's Linux products, and copied, modified, sublicensed and/or distributed those products other than as permitted under the GPL. SCO has no right—and has never had any right—to copy, modify, sublicense and/or distribute the IBM copyrighted code except pursuant to the GPL.

160. As a result of SCO's infringement, IBM has been damaged and is entitled to an award of actual and/or statutory damages pursuant to 17 U.S.C. § 504 in an amount to be proven at trial. Because SCO's infringement has been willful, deliberate and in utter disregard and derogation of IBM's rights, IBM is entitled to enhanced statutory damages pursuant to 17 U.S.C. § 504. IBM is entitled to costs and attorneys' fees pursuant to 17 U.S.C. § 505.

161. In addition, IBM is entitled to injunctive relief pursuant to 17 U.S.C. § 502, as SCO will continue to infringe IBM's copyrights in violation of the copyright laws of the United States unless restrained by this Court. IBM is also entitled to an appropriate order pursuant to 17 U.S.C. § 503.

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NINTH COUNTERCLAIM

Declaratory Judgment of Noninfringement of Copyrights

162.   IBM repeats and realleges the averments in paragraphs 1 through 161,

with the same force and effect as though they were set forth fully herein.

163.   SCO purports to hold copyrights relating to UNIX software, including the

following copyrights:

Registration No.	Date of Registration	Title of Work
TXU-510-028	March 25, 1992	UNIX Operating System Edition 5 and Instruction Manual
TXu-511-236	April 7, 1992	UNIX Operating System Edition 6 and Instruction Manual
TXu-516-704	May 15, 1992	UNIX Operating System Edition 32V and Instruction Manual
TXu-516-705	May 15, 1992	UNIX Operating System Edition 7 and Instruction Manual
TXu-301-868	November 25, 1987	Operating System Utility Programs
TX 5-787-679	June 11, 2003	UNIXWARE 7.1.3
TX 5-750-270	July 7, 2003	UNIX SYSTEM V RELEASE 3.0
TX 5-750-269	July 7, 2003	UNIX SYSTEM V RELEASE 3.1
TX 5-750-271	July 7, 2003	UNIX SYSTEM V RELEASE 3.2
TX 5-776-217	July 16, 2003	UNIX SYSTEM V RELEASE 4.0
TX 5-705-356	June 30, 2003	UNIX SYSTEM V RELEASE 4.1ES
TX 5-762-235	July 3, 2003	UNIX SYSTEM V RELEASE 4.2
TX 5-762-234	July 3, 2003	UNIX SYSTEM V RELEASE 4.1
TX 5-750-268	July 9, 2003	UNIX SYSTEM V RELEASE 3.2

164.   SCO has sued IBM claiming that IBM has infringed, induced the

infringement of, and contributed to the infringement of, SCO's purported UNIX copyrights by,

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among other things, continuing to "reproduce, prepare derivative works of, and distribute" copyrighted UNIX materials through its activities relating to AIX and Dynix.

165. IBM does not believe that its activities relating to AIX and Dynix, including any reproduction, improvement and distribution of AIX and Dynix, infringe, induce the infringement of, or contribute to the infringement of valid, enforceable copyrights owned by SCO.

166. An actual controversy exists between SCO and IBM as to the noninfringement of SCO's copyrights and the validity of any purported SCO copyrights concerning UNIX.

167. IBM is entitled to a declaratory judgment pursuant to 28 U.S.C. § 2201 that IBM does not infringe, induce the infringement of, or contribute to the infringement of any SCO copyright through the reproduction, improvement, and distribution of AIX and Dynix, and that some or all of SCO's purported copyrights in UNIX are invalid and unenforceable.

TENTH COUNTERCLAIM

Declaratory Judgment of Noninfringement of Copyrights

168. IBM repeats and realleges the averments in paragraphs 1 through 167, with the same force and effect as though they were set forth fully herein.

169. As discussed above, SCO purports to hold copyrights relating to UNIX software.

170. SCO has sued IBM claiming that IBM has infringed, induced the infringement of, and contributed to the infringement of, SCO's purported UNIX copyrights by,

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among other things, continuing to "reproduce, prepare derivative works of, and distribute" copyrighted UNIX materials through its activities relating to Linux.

171. IBM does not believe that its activities relating to Linux, including any use, reproduction and improvement of Linux, infringe, induce the infringement of, or contribute to the infringement of valid, enforceable copyrights owned by SCO.

172. An actual controversy exists between SCO and IBM as to the noninfringement of SCO's copyrights and the validity of any purported SCO copyrights concerning UNIX.

173. IBM is entitled to a declaratory judgment pursuant to 28 U.S.C. § 2201 that IBM does not infringe, induce the infringement of, or contribute to the infringement of any SCO copyright through its Linux activities, including its use, reproduction and improvement of Linux, and that some or all of SCO's purported copyrights in UNIX are invalid and unenforceable.

ELEVENTH COUNTERCLAIM

Patent Infringement

174. IBM repeats and realleges the averments in paragraphs 1 through 173, with the same force and effect as though they were set forth fully herein.

175. IBM is the lawful owner, by assignment, of the entire right, title and interest in United States Patent No. 4,814,746 ("the '746 Patent"), duly and legally issued on March 21, 1989 to Miller et al., entitled "Data Compression Method". A copy of the '746 Patent is attached hereto as Exhibit X.

176.   Upon information and belief, SCO has infringed, contributorily infringed, and/or actively induced others to infringe the '746 Patent within this judicial district and elsewhere in violation of 35 U.S.C. § 271 by, without authority or license from IBM, (a) making, using, selling and/or offering to sell products, including UnixWare and Open Server, that practice one or more claims of the '746 Patent and (b) actively, knowingly and intentionally causing and assisting others to infringe one or more claims of the '746 Patent.

177.   Upon information and belief, SCO will continue to infringe, contributorily infringe and/or actively induce others to infringe the '746 Patent unless enjoined by this Court.

178.   IBM has been and continues to be damaged and irreparably harmed by the aforesaid acts of infringement of the '746 Patent by SCO, and will suffer additional damages and irreparable harm unless this Court enjoins SCO from further infringement.

179.   Upon information and belief, SCO's continued manufacture, use, sale and/or offer for sale of the infringing products, including UnixWare and Open Server, following receipt of notice from IBM of SCO's infringing activities was and is willful, and such activities by SCO prior to receipt of such notice also have been willful if, after reasonable opportunity for discovery, evidence arises that SCO had actual knowledge that its actions could constitute infringement of the '746 Patent, making this an exceptional case and justifying the assessment of treble damages pursuant to 35 U.S.C. § 284, and the award of attorneys' fees pursuant to 35 U.S.C. § 285.

TWELFTH COUNTERCLAIM

Patent Infringement

180.   IBM repeats and realleges the averments in paragraphs 1 through 179,

with the same force and effect as though they were set forth fully herein.

181.   IBM is the lawful owner, by assignment, of the entire right, title and

interest in United States Patent No. 4,953,209 ("the '209 Patent"), duly and legally issued on

August 28, 1990 to Ryder et al., entitled "Self-Verifying Receipt and Acceptance System for

Electronically Delivered Data Objects". A copy of the '209 Patent is attached hereto as

Exhibit Y.

182.   Upon information and belief, SCO has infringed, contributorily infringed,

and/or actively induced others to infringe the '209 Patent within this judicial district and

elsewhere in violation of 35 U.S.C. § 271 by, without authority or license from IBM, (a) making,

using, selling and/or offering to sell products, including UnixWare, that practice one or more

claims of the '209 Patent and (b) actively, knowingly and intentionally causing and assisting

others to infringe one or more claims of the '209 Patent.

183.   Upon information and belief, SCO will continue to infringe, contributorily

infringe and/or actively induce others to infringe the '209 Patent unless enjoined by this Court.

184.   IBM has been and continues to be damaged and irreparably harmed by the

aforesaid acts of infringement of the '209 Patent by SCO, and will suffer additional damages and

irreparable harm unless this Court enjoins SCO from further infringement.

185.   Upon information and belief, SCO's continued manufacture, use, sale

and/or offer for sale of the infringing products, including UnixWare, following receipt of notice

from IBM of SCO's infringing activities was and is willful, and such activities by SCO prior to receipt of such notice also have been willful if, after reasonable opportunity for discovery, evidence arises that SCO had actual knowledge that its actions could constitute infringement of the '209 Patent, making this an exceptional case and justifying the assessment of treble damages pursuant to 35 U.S.C. § 284, and the award of attorneys' fees pursuant to 35 U.S.C. § 285.

THIRTEENTH COUNTERCLAIM

Patent Infringement

186.   IBM repeats and realleges the averments in paragraphs 1 through 185, with the same force and effect as though they were set forth fully herein.

187.   IBM is the lawful owner, by assignment, of the entire right, title and interest in United States Patent No. 5,805,785 ("the '785 Patent"), duly and legally issued on September 8, 1998 to Dias et al., entitled "Method for Monitoring and Recovery of Subsystems in a Distributed/Clustered System". A copy of the '785 Patent is attached hereto as Exhibit Z.

188.   Upon information and belief, SCO has infringed, contributorily infringed, and/or actively induced others to infringe the '785 Patent within this judicial district and elsewhere in violation of 35 U.S.C. § 271 by, without authority or license from IBM, (a) making, using, selling and/or offering to sell products, including Reliant HA, that practice one or more claims of the '785 Patent and (b) actively, knowingly and intentionally causing and assisting others to infringe one or more claims of the '785 Patent.

189.   Upon information and belief, SCO will continue to infringe, contributorily infringe and/or actively induce others to infringe the '785 Patent unless enjoined by this Court.

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190.   IBM has been and continues to be damaged and irreparably harmed by the

aforesaid acts of infringement of the '785 Patent by SCO, and will suffer additional damages and

irreparable harm unless this Court enjoins SCO from further infringement.

191.   Upon information and belief, SCO's continued manufacture, use, sale

and/or offer for sale of the infringing products, including Reliant HA, following receipt of notice

from IBM of SCO's infringing activities was and is willful, and such activities by SCO prior to

receipt of such notice also have been willful if, after reasonable opportunity for discovery,

evidence arises that SCO had actual knowledge that its actions could constitute infringement of

the '785 Patent, making this an exceptional case and justifying the assessment of treble damages

pursuant to 35 U.S.C. § 284, and the award of attorneys' fees pursuant to 35 U.S.C. § 285.

FOURTEENTH COUNTERCLAIM

Declaratory Judgment

192.   IBM repeats and realleges the averments in paragraphs 1 through 191,

with the same force and effect as though they were set forth fully herein.

193.   SCO has breached its contractual obligations to IBM, violated the Lanham

Act, engaged in unfair competition, interfered with IBM's prospective economic relations,

engaged in unfair and deceptive trade practices, breached the GPL, infringed IBM copyrights

and infringed IBM patents, as stated above.

194.   Pursuant to 28 U.S.C. § 2201, IBM is entitled to declaratory relief with

respect to SCO's and IBM's rights, including among other things a declaration that SCO has

violated IBM's rights as outlined above by breaching its contractual obligations to IBM,

violating the Lanham Act, engaging in unfair competition, interfering with IBM's prospective

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economic relations, engaging in unfair and deceptive trade practices, breaching the GPL, infringing IBM copyrights and infringing IBM patents, and is estopped as outlined above.

195. Moreover, IBM is entitled to a declaration that (1) SCO has no right to assert, and is estopped from asserting, proprietary rights over programs that SCO distributed under the GPL except as permitted by the GPL; (2) SCO is not entitled to impose restrictions on the copying, modifying or distributing of programs distributed by it under the GPL except as set out in the GPL; and (3) any product into which SCO has incorporated code licensed pursuant to the GPL is subject to the GPL and SCO may not assert rights with respect to that code except as provided by the GPL.

196. There is a justiciable controversy between IBM and SCO with respect to all of the issues described above.

197. Absent declaratory relief, SCO's misconduct will continue to cause injury to IBM, the open-source community and the public at large.

PRAYER FOR RELIEF

WHEREFORE, counterclaim-plaintiff IBM prays that this Court enter judgment on the counterclaims in favor of IBM and against SCO:

(a) awarding IBM compensatory damages;

(b) awarding damages pursuant to 15 U.S.C. § 1117(a) and 17 U.S.C. § 504;

(c) awarding IBM punitive damages;

(d) granting IBM treble damages pursuant to 35 U.S.C. § 284;

(e) granting IBM declaratory relief, including a declaration that (i) that IBM does not, through its reproduction, improvement, and distribution of AIX and Dynix, infringe,

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induce the infringement of, or contribute to the infringement of any valid and enforceable copyright owned by SCO; (ii) that IBM does not, through its Linux activities, including its use, reproduction and improvement of Linux, infringe, induce the infringement of, or contribute to the infringement of any valid and enforceable copyright owned by SCO; (iii) SCO has violated IBM's rights as outlined above by breaching its contractual obligations to IBM, violating the Lanham Act, engaging in unfair competition, interfering with IBM's prospective economic relations, engaging in unfair and deceptive trade practices, breaching the GPL, infringing IBM copyrights and infringing IBM patents; (iv) SCO has no right to assert, and is estopped from asserting, proprietary rights over programs that SCO distributed under the GPL except as permitted by the GPL; and is not entitled to impose restrictions on the copying, modifying or distributing of programs distributed by it under the GPL except as set out in the GPL; and (v) any product into which SCO has incorporated code licensed pursuant to the GPL is subject to the GPL and SCO may not assert rights with respect to that code except as provided by the GPL;

(f)   granting IBM injunctive relief, enjoining and restraining SCO and its affiliates, subsidiaries, officers, agents, servants, employees, attorneys, successors and assigns and all others persons acting in concert with them, from further violating IBM's rights as described above, including in particular from (i) misrepresenting SCO's rights and IBM's rights to UNIX technology, such as that SCO can, will or has in fact revoked IBM's right to use UNIX, (ii) misrepresenting that IBM no longer has the right, authority and license to use, produce and distribute AIX, Dynix and IBM's Linux-related products; (iii) publishing false and disparaging statements about AIX, Dynix and IBM's Linux-related products; (iv) engaging in further acts of unfair competition; (v) claiming certain ownership rights over programs made available under

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the GPL; (vi) engaging in unfair and deceptive trade practices; (vii) further infringement of

IBM's copyrights; and (viii) further infringement or inducement of infringement of the '746,

'209 and '785 Patents;

(g)   awarding IBM costs, expenses and reasonable attorneys' fees pursuant to

35 U.S.C. § 285, 15 U.S.C. § 1117(a), Utah Code Ann. § 13-24-5, N.Y. Gen. Bus. Law § 349(h),

and 17 U.S.C. § 505;

(h)   awarding IBM pre- and post-judgment interest on the damages caused to

IBM as a result of all wrongful acts alleged herein; and

(i)   granting IBM such other and further relief as this Court deems just and

proper, including costs, disbursements and reasonable attorneys' fees.

JURY DEMAND

IBM demands a trial by jury on all issues so triable.

DATED this 29th day of March, 2004

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of March, 2004, a true and correct copy of the

foregoing **COUNTERCLAIM-PLAINTIFF IBM'S SECOND AMENDED**

COUNTERCLAIMS AGAINST SCO, JURY TRIAL DEMANDED was hand delivered to

the following:

> Brent O. Hatch
> HATCH, JAMES & DODGE, P.C.
> 10 West Broadway, Suite 400
> Salt Lake City, Utah 84101

and sent by U.S. Mail, postage prepaid, to the following:

> Stephen N. Zack
> Mark J. Heise
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> Santa Monica, California 90401

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EXHIBIT C

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Attorneys for Plaintiff Caldera Systems, Inc. d/b/a The SCO Group

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IN THE THIRD JUDICIAL DISTRICT OF SALT LAKE COUNTY

STATE OF UTAH

CALDERA SYSTEMS, INC.,

a Delaware corporation d/b/a THE SCO GROUP,

Plaintiff,

vs.

INTERNATIONAL BUSINESS MACHINES CORPORATION, a Delaware corporation,

Defendant.

COMPLAINT

(Jury Trial Demanded)

Case No. _____

Judge _____

_____

Plaintiff, Caldera Systems, Inc., a Delaware corporation doing business as The SCO Group ("SCO"), complains of Defendant International Business Machines Corporation ("IBM") and alleges as follows:

Nature of This Action

1. UNIX is a computer operating system program and related software originally developed by AT&T Bell Laboratories ("AT&T"). SCO/UNIX is a modification of UNIX and related software developed by SCO and its predecessors. UNIX and SCO/UNIX are widely used in the corporate, or "enterprise," computing environment.

2. As a result of its acquisition of the rights to UNIX from AT&T and its own development of UNIX and SCO/UNIX, SCO is the present owner of both UNIX and SCO/UNIX software. UNIX and SCO/UNIX are valuable software programs and SCO and its predecessors have invested hundreds of millions of dollars in their development and enhancement. SCO (which, as used herein, includes its predecessor) has licensed UNIX and SCO/UNIX both to software vendors such as IBM and computer end-users such as McDonald's. The UNIX and SCO/UNIX licenses granted to software vendors and end-users are limited licenses, which impose restrictions and obligations on the licensees designed to protect the economic value of UNIX and SCO/UNIX.

3. UNIX and SCO/UNIX compete with other proprietary programs and with "open source" software, which is software dedicated to the public. There are advantages of proprietary programs to end-users (including their proprietary functions in which their developers have invested large amounts

of time and money). There are also advantages to open source programs to end-users (including that they do not have to pay for the program itself) and to software vendors (whom market the additional products and services that end-users who use open source programs ordinarily require). This case is not about the debate about the relative merits of proprietary versus open source software. Nor is this case about IBM's right to develop and promote open source software if it decides to do so in furtherance of its independent business objectives, so long as it does so without SCO's proprietary information. This case is, and is only, about the right of SCO not to have its proprietary software misappropriated and misused in violation of its written agreements and well-settled law.

4.   As set forth in more detail below, IBM has breached its own obligations to SCO, induced and encouraged others to breach their obligations to SCO, interfered with SCO's business, and engaged in unfair competition with SCO, including by

a)   misusing and misappropriating SCO's proprietary software;

b)   inducing, encouraging, and enabling others to misuse and misappropriate SCO's proprietary software; and

c)   incorporating (and inducing, encouraging, and enabling others to incorporate) SCO's proprietary software into open source software offerings.

Parties, Jurisdiction and Venue

5.   Plaintiff SCO is a Delaware corporation with its principal place of business in Utah County, State of Utah.

6.   Defendant IBM is a Delaware corporation with its principal place of business in the State of New York.

7.   This Court has general jurisdiction of this action pursuant to *Utah Code Ann.* §78-3-4(1).

8.   Venue is properly situated in the Third Judicial District pursuant to *Utah Code Ann.* §78-13-5-7 in

that plaintiff's action arose in the State of Utah and IBM maintains an office or place of business in Salt Lake County.

9.   This Court has *in personam* jurisdiction over IBM pursuant to *Utah Code Ann.* §78-27-24 on the bases that IBM (a) is transacting business within this State, (b) is contracting to provide goods and services within this State and (c) is causing tortious injury and breach of contract within this State.

Background Facts

The UNIX Operating System

10.   UNIX is a computer software operating system. Operating systems serve as the link between computer hardware and the various software programs ("applications") that run on the computer. Operating systems allow multiple software programs to run at the same time and generally function as a "traffic control" system for the different software programs that run on a computer.

11.   By way of example, in the personal computing market, Microsoft Windows is the best-known operating system. The Windows operating system was designed to operate on computer processors ("chips") built by Intel. Thus, Windows serves as the link between Intel-based processors and the various software applications that run on personal computers.

12.   In the business computing environment for larger corporations (often called the "enterprise" environment), UNIX is widely used.

13.   The UNIX operating system was built by AT&T Bell Laboratories. Initially, UNIX was used to power AT&T's telecommunications business.

14.   After successful in-house use of the UNIX software, AT&T began to license UNIX as a commercial product for use in enterprise applications by other large companies.

15.   Over the years, AT&T Technologies Inc., a wholly owned subsidiary of AT&T, and its related

companies licensed UNIX for wide-spread enterprise use. IBM, Hewlett-Packard, Inc. ("HP"), Sun Microsystems, Inc. ("Sun") and Silicon Graphics, Inc. ("SGI") became some of the principal United States-based UNIX licensees.

16.   IBM, HP, Sun, SGI and the other major UNIX vendors each modified UNIX to operate on their own processors. Thus, HP-UNIX, for example, started identically to SGI-UNIX, excepting only that HP-UNIX was designed to interface with, and operate on, a different processor chip set than SGI-UNIX. Over time, each of the major vendors has included its own "value added" layer to help distinguish its marketplace offerings. These various versions of UNIX are sometimes referred to as UNIX "flavors."

17.   All commercial UNIX "flavors" in use today are based on the UNIX System V Technology ("System V Technology").

18.   SCO is the present owner of all software code and licensing rights to System V Technology.

19.   IBM has branded its version or "flavor" of the UNIX software as "AIX." All references hereinafter to AIX are so defined. AIX is a modification of AT&T/SCO's licensed UNIX that is designed to run on IBM's processor chip set, currently called the "Power PC" processor.

20.   There are multiple variants of processor chip sets in the industry. Most chip sets will not operate with the processor chip sets designed for other UNIX vendors. Thus, while the Intel chip set is commonly known to consumers because of Intel's aggressive advertising campaign, it is by no means the only chip set used in the industry. Further, processor chip sets manufactured by Intel are not inter-operable with the IBM Power PC processor chip set or other chip sets, such as Sun Microsystem's "SPARC."

21.   In the computing industry, the term "desktop computers" is sometimes used to refer to the less powerful computers used by individuals and some businesses and the term "workstation" is sometimes used to refer to the more powerful computers used primarily by enterprises.

22.   The personal computing market for relatively low-priced desktop computers came to be

dominated by the Windows operating system software operating on Intel-based processor chip sets. Thus, the acronym "Wintel" became known in the industry as the combination of Windows and Intel for relatively low-priced desktop computers for the personal computing market.

23.   The enterprise computing market for high-performance (and higher priced) workstation computers came to be dominated by UNIX and the primary UNIX vendors identified above, each operating on a different processor chip set, and each using UNIX pursuant to licenses from AT&T/SCO. Except for SCO, none of the primary UNIX vendors ever developed a UNIX "flavor" to operate on an Intel-based processor chip set. This is because the earlier Intel processors were considered to have inadequate processing power for use in the more demanding enterprise market applications.

SCO's Creation of a Market for Intel – The Genesis of SCO OpenServer

24.   As computers grew in popularity to perform business functions, the processing power of Intel-based processor chips also began to increase dramatically. Consistent with Intel founder Gordon Moore's famous prediction, computer chips remained inexpensive while exponentially increasing in power and performance.

25.   Seeing this emerging trend, it became evident to SCO that Intel chips would gradually gain widespread acceptance for use in the enterprise marketplace.

26.   Therefore, while other major UNIX vendors modified UNIX for their own respective non-Intel computing platforms, SCO developed and licensed SCO/UNIX for Intel-based processors for enterprise use.

27.   SCO's early engineers faced difficult design challenges in modifying UNIX for effective use on an Intel processing platform. The principal design constraint centered around the limited processing power the Intel chip possessed in the early 1980's. The Intel chip (designed as it was for personal computers) was not nearly as powerful as the enterprise chips used by IBM, Sun, SGI and others in their respective UNIX offerings.

28.   Based on the early design constraint of Intel's limited processing power, SCO found an appropriate enterprise market niche for the early versions of SCO UNIX—single-purpose applications such as point-of-sale control, inventory control and transactions processing, with the highest possible reliability. Intel processors were fully capable of performing these relatively simple, repetitive tasks, and could do so at a lower cost and as reliably as the more powerful enterprise processing platforms sold by the other UNIX vendors, such as Sun and IBM.

29.   One example of a customer well-suited to the earlier version of SCO UNIX software is McDonald's Corp. McDonald's has thousands of stores worldwide and needs all stores to operate on an integrated computing platform for ease of use, immediate access to information and uniformity. However, the actual computing requirements for each individual McDonald's location are functionally simple—sales need to be tracked and recorded, and inventory functions need to be linked to sales. SCO's UNIX reliably fulfills McDonald's computing requirements at reduced cost.

30.   SCO's business model provides enterprise customers the reliability, extensibility (ease of adding or changing functionality), scalability (ease of adding processors or servers to increase processing power) and security of UNIX—but on inexpensive Intel processor chips. This combination allowed customers to perform an extremely high number of transactions and, at the same time, gather and present the information from those transactions in an economical and useful way for enterprise decision makers.

31.   The simplicity and power of this "UNIX on Intel" business model helped SCO grow rapidly. SCO gained other large enterprise customers such as CitiGroup, K-Mart, Cendant, Target Stores, Texas Instruments, BMW, Walgreens, Merck, Sherwin Williams, Radio Shack, Auto Zone, British Petroleum, Papa John's Pizza, Costco and many others.

32.   As Intel's prominence grew in the enterprise computing market, SCO's early version of UNIX also grew into the operating system of choice for enterprise customers who wanted an Intel-based computing solution for a high volume of repetitive, simple computing transactions.

33.   SCO's software offering based on its early development of UNIX for high volume, repetitive

computing transactions is known in the market as "SCO OpenServer."

34. SCO OpenServer is based on the original UNIX Software Code developed by AT&T, but was modified by SCO for the functionality described above. Thus, while performing single-function applications, SCO OpenServer did so, and continues to do so, with the 99.999% reliability of UNIX.

35. Over 4,000 separate applications have been written by developers around the world specifically for SCO OpenServer. Most of these applications are vertical applications for targeted functions, such as point-of-sale control for specific industries, inventory control for specific industries, and funds transfer for the financial industry. Collectively, these various applications (software programs) are referred hereinafter as the "SCO OpenServer Applications."

The SCO OpenServer Libraries

36. In creating the thousands of SCO OpenServer Applications, each designed for a specialized function in a vertical industry, software developers wrote software code specifically for the SCO OpenServer shared libraries (hereinafter the "SCO OpenServer Shared Libraries").

37. A "shared library" is a common set of computer code inside an operating system that performs a routine function for all the applications (software programs) designed to run on that particular operating system. Thus, Microsoft Windows has its own set of shared libraries. SCO OpenServer (UNIX designed for Intel chips) has its set of own shared libraries. Sun Solaris (UNIX designed for SPARC chips) has its own set of shared libraries.

38. The shared libraries of all operating systems are designed with "hooks." These "hooks" are computer code that trigger the operation of certain routine functions. A software developer can shorten the development effort for any new software program and create a more efficient code base by writing programs that access the various "hooks" of the operating system, and thereby use a shared set of code built into the operating system to perform the repetitive, common functions that are involved in every program.

39.   Every one of the specialized applications (software programs) designed by various third-party software developers for use on the SCO OpenServer operating system was written to access the various "hooks" built into SCO OpenServer; and therefore designed to access the SCO OpenServer Shared Libraries.

40.   The SCO OpenServer Shared Libraries are the proprietary and confidential property of SCO. SCO OpenServer has been licensed to numerous customers subject to restrictions on use that prohibit unauthorized use of any of its software code, including without limitation, the SCO OpenServer Shared Libraries.

41.   Shared libraries are by their nature unique creations based on various decisions to write code in certain ways, which are in great part random decisions of the software developers who create the shared library code base. There is no established way to create a specific shared library and the random choices in the location and access calls for "hooks" that are part of the creation of any shared library. Therefore, the mathematical probability of a customer being able to recreate the SCO OpenServer Shared Libraries without unauthorized access to or use of the source code of the SCO OpenServer Shared Libraries is nil.

SCO's Development of UnixWare on Intel

42.   While the original SCO OpenServer operating system performs with all the reliability and dependability of other UNIX systems, it was originally designed for the initially low processing power of Intel chips. Therefore, SCO OpenServer does not contain, or require, the same level of scalability and extensibility that other versions of UNIX offer.

43.   During or about 1992, SCO's predecessor in interest, Novell, Inc. ("Novell"), acquired all right, title and interest in and to the UNIX Software Code from AT&T for $750 million in Novell stock. For branding purposes, Novell renamed UNIX as "UnixWare."

44.   Upon SCO's acquisition of the UNIX assets from Novell, SCO owned the rights to all UNIX software designed for Intel processors. SCO retained its original UNIX product, SCO OpenServer,

which remained dedicated to the relatively low-power computing tasks identified above. SCO also had acquired UnixWare from Novell, which was designed for high-power computing tasks, and competed directly against the related UNIX products of Sun, IBM, SGI and others.

45.   Existing UnixWare customers include large companies, such as NASDAQ, Lucent Technologies, Daimler Chrysler, K-Mart, Goodyear, Comverse, and numerous others. These customers all have highly sophisticated computing needs that now can be performed on an Intel processor chip set.

46.   From and after September 1995, SCO dedicated significant amounts of funding and a large number of UNIX software engineers, many of whom were original AT&T UNIX software engineers, to upgrading UnixWare for high-performance computing on Intel processors.

47.   By approximately 1998, SCO had completed the majority of this task. That is to say, UnixWare had largely been modified, tested and "enterprise hardened" to use Intel-based processors in direct competition against IBM and Power PC chips, the Sun SPARC chip and all other high-performance computing UNIX platforms for all complex computing demands. The term "enterprise hardened" means to assure that a software product is fully capable of performing under the rigorous demands of enterprise use.

48.   SCO was ready to offer large enterprise customers a high-end UNIX computing platform based on inexpensive Intel processors. Given the rapid growth of Intel's performance capabilities and Intel's popularity in the marketplace, SCO found itself in a highly desirable market position. In addition, SCO still has its SCO OpenServer business for retail and inventory-targeted functions, with its 4,000 applications in support.

49.   Prior to the events complained of in this action, SCO was the undisputed global leader in the design and distribution of UNIX-based operating systems on Intel-based processing platforms.

Project Monterey

50.   As SCO was poised and ready to expand its market and market share for UnixWare targeted to

high-performance enterprise customers, IBM approached SCO to jointly develop a new 64-bit UNIX-based operating system for Intel-based processing platforms. This joint development effort was widely known as Project Monterey.

51.　Prior to this time, IBM had not developed any expertise to run UNIX on an Intel chip and instead was confined to its Power PC chip.

52.　In furtherance of Project Monterey, SCO expended substantial amounts of money and dedicated a significant portion of SCO's development team to completion of the project.

53.　Specifically, plaintiff and plaintiff's predecessor provided IBM engineers with valuable information and trade secrets with respect to architecture, schematics, and design of UnixWare and the UNIX Software Code for Intel-based processors.

54.　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.

55.　On or about May 2001, IBM notified plaintiff that it refused to proceed with Project Monterey, and that IBM considered Project Monterey to be "dead." In fact, in violation of its obligations to SCO, IBM chose to use and appropriate for its own business the proprietary information obtained from SCO.

AT&T UNIX Agreements

56.　AT&T Technologies originally licensed the UNIX operating system software code to approximately 30,000 software licensees, including defendant IBM, for the UNIX operating system software source code, object code and related schematics, documentation and derivative works (collectively, the "UNIX Software Code"). To protect the confidential and proprietary source code information, these license agreements, as detailed below, contained strict limitations on use and dissemination of UNIX Software Code.

57.   When SCO acquired the UNIX assets from Novell in 1995, it acquired rights in and to *all* (1) underlying, original UNIX software code developed by AT&T Bell Laboratories, including all claims against any parties relating to any right, property or asset used in the business of developing UNIX and UnixWare; (2) the sale of binary and source code licenses to various versions of UNIX and UnixWare; (3) the support of such products and (4) the sale of other products that are directly related to UNIX and UnixWare.

58.   As a result of this acquisition, SCO became the authorized successor in interest to the original position of AT&T Technologies with respect to all licensed UNIX software products.

59.   There are two primary types of software licensing agreements between AT&T Technologies and its various licensees:

a)   The AT&T-related software agreements are collectively referred to hereinafter as the "AT&T UNIX Software Agreements."

b)   The AT&T-related sublicensing agreements are collectively referred to hereinafter as the "AT&T UNIX Sublicensing Agreements."

The AT&T UNIX Software Agreements and the AT&T UNIX Sublicensing Agreements are sometimes collectively referred to hereinafter as the "AT&T UNIX Agreements."

60.   Plaintiff is successor in interest to, and owner of, all contractual rights arising from the AT&T UNIX Agreements.

61.   On February 1, 1985, AT&T and IBM entered into certain AT&T UNIX Agreements:

a) Software Agreement Number Soft-00015 ("AT&T / IBM Software Agreement" attached hereto and incorporated herein as Exhibit A);

b) Sublicensing Agreement Number Sub-00015A ("AT&T / IBM Sublicensing Agreement" attached hereto and incorporated herein as Exhibit B).

62.   In addition, AT&T and IBM entered into a side letter on that date ("AT&T / IBM Side Letter" attached hereto and incorporated herein as Exhibit C).

63.   Thereafter, Amendment X to Software Agreement SOFT-00015, as amended, was executed on or about October 16, 1996 by and among IBM, The Santa Cruz Operation, Inc. ("SCO") and Novell, Inc. ("IBM Amendment X" attached hereto and incorporated herein as Exhibit D).

64.   Collectively these agreements, side letter and amendment are referred to hereinafter as the "AT&T / IBM UNIX Agreements."

65.   Pursuant to the AT&T / IBM UNIX Agreements, the parties agreed, *inter alia*, to the following terms and conditions:

a)   IBM recognizes the proprietary nature of the Software Products (defined to mean the UNIX Software Code) and the need to protect against its unrestricted disclosure (Side Letter, ¶9);

b)   IBM may not transfer or dispose of the UNIX Software Code in whole or in part (AT&T / IBM Software Agreement §7.10);

c)   IBM is required to hold all UNIX Software Code subject to the AT&T / IBM Agreements in confidence (Software Agreement §7.06(a) as amended by Side Letter ¶9); and

d)   IBM may not use the UNIX Software Code directly for others or allow any use of the UNIX Software Code by others (Software Agreement §2.05).

66.   The cumulative effect of these provisions requires IBM to protect the UNIX Software Code against *unrestricted disclosure, unauthorized transfer or disposition* and *unauthorized use* by others.

67.   In addition, IBM's ability to sublicense UNIX Software Code for the use of others is restricted under §2.01 of the Sublicensing Agreement as follows:

AT&T grants to LICENSEE personal, nontransferable and nonexclusive rights:

a) To make copies of SUBLICENSED PRODUCTS and to furnish, either directly or through DISTRIBUTORS, such copies of SUBLICENSED PRODUCTS to customers anywhere in the world (subject to U.S. government export restrictions) for use on customer CPUs solely for each such customer's internal business purposes, provided that the entity (LICENSEE or a DISTRIBUTOR) furnishing the sublicensed products obtains agreement as specified in section 2.02 from such a customer, before or at the time of furnishing each copy of a SUBLICENSED PRODUCT, that:

i) Only a personal, nontransferable and nonexclusive right to use such copy of the SUBLICENSED PRODUCTS on one CPU at a time is granted to such customer;

ii) No title to the intellectual property in the SUBLICENSED PRODUCT is transferred to such customer;

iii) Such customer will not copy the SUBLICENSED PRODUCT except as necessary to use such SUBLICENSED PRODUCT on such one CPU;

iv) Such customer will not transfer the SUBLICENSED PRODUCT to any other party except as authorized by the entity furnishing the SUBLICENSED PRODUCT;

v) Such customer will not export or re-export the SUBLICENSED PRODUCT without the appropriate United States or foreign government licenses;

vi) Such customer will not reverse compile or disassemble the SUBLICENSED PRODUCT;

b) To use SUBLICENSED PRODUCTS on LICENSEE'S CPUs solely for LICENSEE'S own internal business purposes; and

c) To use, and to permit DISTRIBUTORS to use, SUBLICENSED PRODUCTS without fee solely for testing CPUs that are to be delivered to customers and for demonstrating SUBLICENSED PRODUCTS to prospective customers.

This sublicensing limitation prohibits, among other things, transfer of title, transfer of the software by a customer, and free use of the UNIX Software Code except for demonstration purposes.

68. As a result of the foregoing, SCO's rights include the following five separate and distinct enforcement rights:

a) Rights under trade secrets and developer agreements involving SCO OpenServer;

b) Rights under customer licensing agreements involving SCO OpenServer;

c) Rights under trade secrets and developer agreements involving SCO UnixWare;

d) Rights under customer licensing agreements involving SCO UnixWare; and

e) Rights under all other original UNIX licenses issued by AT&T Technologies and its successors.

Marketplace Value of UNIX

69.   UNIX's value in the enterprise marketplace is largely a function of its reliability, extensibility, and robust performance capability. That is to say, it virtually never needs repair, it performs well under a wide variety of adverse circumstances, and it can be extended throughout an enterprise and across multiple processors to perform unified or disparate tasks in a seamless computing environment. Because of these features, UNIX-based equipment has replaced mainframe computers for all but the most demanding computing tasks. And, because UNIX-based equipment is far cheaper than mainframe computing equipment, a customer who cannot otherwise justify the cost of mainframe computers can otherwise gain the advantages of "supercomputing" operations through use of UNIX-based equipment.

70.   One or more of the different versions of UNIX-based operating systems sold by Sun, IBM, SCO, SGI, and others, is the operating system of choice for large enterprise computing operations in virtually 100% of the Fortune 1000 companies.

71.   UNIX gained this prominence in the computing marketplace because of twenty years of development and over one billion dollars invested by plaintiff and its predecessors to create a stable, reliable operating system to perform the mission critical work required by large enterprises.

72.   The recent rise of the global technology economy has been powered in large part by UNIX. Virtually every mission critical financial application in the world is powered by UNIX, including electronic transfers of funds. Real time stock trades are powered by UNIX. Inventory controls and distributions are powered by UNIX. All major power grids and all major telecommunications systems are powered by UNIX. Many satellite control and defense control systems are powered by UNIX. Virtually every large corporation in the world currently operates part or all of its information technology systems on a UNIX operating system.

73.   Based on its value in the marketplace, UNIX has become the most widely used and widely

accepted operating system for enterprise, institutional and manufacturing applications throughout the world.

The Introduction of Linux

74.   A new operating system derived from and based on UNIX recently has become popular among computer enthusiasts for use on personal, educational-based, and not-for-profit projects and initiatives. This operating system is named Linux.

75.   The name "Linux" is commonly understood in the computing industry to be a combination of the word "UNIX" (referring to the UNIX operating system) and the name "Linus." The name "Linus" was taken from the person who introduced Linux to the computing world, Linus Torvalds.

76.   The initial market positioning of Linux was to create a free UNIX-like operating system to be used by developers and computer hobbyists in personal, experimental, and not-for-profit applications. As such, Linux posed little, if any, commercial threat to UNIX.

The General Public License

77.   Related to the development of the open source software development movement in the computing world, an organization was founded by former MIT professor Richard Stallman entitled "GNU."

78.   The primary purpose of the GNU organization is to create free software based on valuable commercial software. The primary operating system advanced by GNU is Linux.

79.   In order to assure that the Linux operating system (and other software) would remain free of charge and not-for-profit, GNU created a licensing agreement entitled the General Public License ("GPL").

80.   Any software licensed under the GPL (including Linux) must, by its terms, not be held proprietary or confidential, and may not be claimed by any party as a trade secret or copyright property.

81.   In addition, the GPL provides that, unlike SCO's UNIX operating system or IBM's AIX operating system or Sun's Solaris operating system, no warranty whatsoever runs with its software. The GPL includes the following language:

NO WARRANTY

BECAUSE THE PROGRAM IS LICENSED FREE OF CHARGE, THERE IS NO WARRANTY FOR THE PROGRAM, TO THE EXTENT PERMITTED BY APPLICABLE LAW...THE ENTIRE RISK AS TO THE QUALITY AND PERFORMANCE OF THE PROGRAM IS WITH YOU. SHOULD THE PROGRAM PROVE DEFECTIVE, YOU ASSUME THE COST OF ALL NECESSARY SERVICING, REPAIR OR CORRECTION.

Limitations of Linux Before IBM's Involvement

82.   Linux started as a hobby project of a 19-year old student. Linux has evolved through bits and pieces of various contributions by numerous software developers using single processor computers. 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, sophisticated methods, concepts and coordinated know-how, it would be difficult or impossible for the Linux development community to create a grade of Linux adequate for enterprise use.

83.   As long as the Linux development process remained uncoordinated and random, it posed little or no threat to SCO, or to other UNIX vendors, for at least two major reasons: (a) Linux quality was inadequate since it was not developed and tested in coordination for enterprise use and (b) enterprise customer acceptance was non-existent because Linux was viewed by enterprise customers as a "fringe" software product.

84.   Prior to IBM's involvement, Linux was the software equivalent of a bicycle. UNIX was the software equivalent of a luxury car. To make Linux of necessary quality for use by enterprise customers, it must be re-designed so that Linux also becomes the software equivalent of a luxury car. This re-design is not technologically feasible or even possible at the enterprise level without (1) a high degree of design coordination, (2) access to expensive and sophisticated design and testing equipment; (3) access to UNIX code, methods and concepts; (4) UNIX architectural experience; and (5) a very significant financial investment.

85.   For example, Linux is currently capable of coordinating the simultaneous performance of 4 computer processors. UNIX, on the other hand, commonly links 16 processors and can successfully link up to 32 processors for simultaneous operation. This difference in memory management performance is very significant to enterprise customers who need extremely high computing capabilities for complex tasks. The ability to accomplish this task successfully has taken AT&T, Novell and SCO at least 20 years, with access to expensive equipment for design and testing, well-trained UNIX engineers and a wealth of experience in UNIX methods and concepts.

86.   It is not possible for Linux to rapidly reach UNIX performance standards for complete enterprise functionality without the misappropriation of UNIX code, methods or concepts to achieve such performance, and coordination by a larger developer, such as IBM.

IBM's Scheme

87.   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 the combined capabilities of SCO OpenServer, SCO UnixWare and SCO's unique position as UNIX on Intel;

c)   Free Linux had carved a niche in not-for-profit and non-business uses; and

d)   IBM was in the process of evolving its business model from products to services.

88.   In the process of moving from product offerings 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.

89. By undermining and destroying the entire marketplace value of UNIX in the enterprise market, IBM would gain even greater advantage over all its competitors whose revenue model was based on licensing of software rather than sale of services.

90. 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.

91. Among other actions, IBM misappropriated the confidential and proprietary information from SCO in Project Monterey. IBM thereafter misused its access to the UNIX Software Code. On or about August 17, 2000, IBM and Red Hat Inc. 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."

92. 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 filesystem, 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."

93.   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 operating system and, more importantly, the code

that is essential for running mission critical applications (*e.g.,* wire transfers) for large businesses.

94.   Over time, IBM made a very substantial financing 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.

95.   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.*"

96.   Again, "IBM's AIX contributions" consisted of the improper extraction, use, and dissemination of

SCO'S UNIX source code and libraries, and unauthorized misuse of UNIX methods, concepts, and

know-how.

97.   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."

98.   Continuing with its "happy and comfortable" idea that Linux succeeds at the expense of UNIX,

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."

99.   The only way that the pathway is 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 Software Code and libraries. 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.

100.   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 and SuSE (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.

IBM's Coordination of Linux Development Efforts

101.   On information and belief, IBM has knowingly induced, encouraged, and enabled others to distribute proprietary information in an attempt to conceal its own legal liability for such distributions:

"What is wrong about this [Linux] distribution, is basically the millions of lines of code that we never have seen. We don't know if there are any patent infringements [in this code] with somebody we don't know. *We don't want to take the risk of being sued for a patent infringement. That is why we don't do distributions, and that's why we have distributors.* Because distributors are not so much exposed as we are. So that's the basic deal as I understand it."

Karl-Heinz Strassemeyer, IBM The Register, 11/19/2002, www.theregister.co.uk/content/4/28183.html

102.   IBM is affirmatively taking steps to destroy all value of UNIX by improperly extracting and using the confidential and proprietary information it acquired from UNIX and dumping that information into the open source community. As part of this effort, IBM has heavily invested in the following projects to further eliminate the viability of UNIX:

a) The Linux Technology Center was launched in 2001 with the advertised intent and foreseeable purpose of transferring and otherwise disposing of all or part of UNIX, including its concepts, ideas, and know-how, into an open source Linux environment;

b) The IBM Linux Center of Competency was launched to assist and train financial services companies in an accelerated transfer of UNIX to Linux with the advertised intent and foreseeable purpose of transferring and otherwise disposing of all or part of UNIX, including its concepts, ideas, and know-how, into an open source Linux environment;

c) A carrier-grade Linux project has been undertaken to use UNIX code, methods, concepts, and know-how for the unlawful purpose of transforming Linux into an enterprise-hardened operating system;

d) A data center Linux project has been undertaken to use UNIX code, methods, concepts, and know-how for the unlawful purpose of transforming Linux into an enterprise-hardened operating system; and

e) Other projects and initiatives have been undertaken or supported that further evidence the improper motive and means exercised by IBM in its efforts to eliminate UNIX and replace it with free Linux.

103. But for IBM's coordination of the development of enterprise Linux, and the misappropriation of UNIX to accomplish that objective, the Linux development community would not timely develop the quality or customer support necessary for wide-spread use in the enterprise market.

FIRST CAUSE OF ACTION

(Misappropriation of Trade Secrets—*Utah Code Ann*. §13-24-1 *et seq*.)

104. Plaintiff incorporates and re-alleges by reference paragraphs 1-103 above.

105. Plaintiff is the owner of unique know how, concepts, ideas, methodologies, standards, specifications, programming, techniques, UNIX Software Code, object code, architecture, design and schematics that allow UNIX to operate with unmatched extensibility, scalability, reliability and security (hereinafter defined as "SCO's Trade Secrets"). SCO's Trade Secrets provide SCO with an advantage

over its competitors.

106. SCO's Trade Secrets are embodied within SCO's proprietary SCO OpenServer and its related shared libraries and SCO's UnixWare and its related shared libraries.

107. SCO and its predecessors in interest have expended over one billion dollars to develop SCO's Trade Secrets.

108. IBM, through improper means acquired and misappropriated SCO's Trade Secrets for its own use and benefit, for use in competition with SCO and in an effort to destroy SCO.

109. At the time that IBM acquired access to SCO's Trade Secrets, IBM knew that it had a duty to maintain the secrecy of SCO's Trade Secrets or limit their use.

110. SCO's Trade Secrets derive independent economic value, are not generally known to third persons, are not readily ascertainable by proper means by other persons who can obtain economic value from their disclosure and use, and are subject to reasonable efforts by SCO and its predecessors to maintain secrecy.

111. The acts and conduct of IBM in misappropriating and encouraging, inducing and causing others to commit material misappropriation of SCO's Trade Secrets are the direct and proximate cause of a near-complete devaluation and destruction of the market value of SCO OpenServer and SCO UnixWare that would not have otherwise occurred but for the conduct of IBM.

112. Pursuant to *Utah Code Ann.* §13-24-4, plaintiff is entitled to an award of damages against IBM in the following amounts:

a) Actual damages as a result of the theft of trade secrets; together with

b) Profits from IBM's Linux-related business on account of its misappropriation through the time of trial; together with

c) Additional foreseeable profits for future years from IBM's Linux-related business on account of its misappropriation in an amount to be proven at the time of trial.

113. Because IBM's misappropriation was willful, malicious, and in reckless disregard of Plaintiff's rights, SCO is entitled to an award of exemplary damages against IBM in an amount equal to two times the amount of damages, pursuant to *Utah Code Ann.* §13-24-4(2).

114. Plaintiff is also entitled to an award of attorneys' fees and costs in an amount to be proven at the time of trial pursuant to *Utah Code Ann.* §13-24-5.

SECOND CAUSE OF ACTION

(Unfair Competition)

115. Plaintiff incorporates and re-alleges by reference paragraphs 1-114 above.

116. Plaintiff and its predecessors have built the UNIX System V Technology, the Unix Software Code, SCO OpenServer, UnixWare and their derivatives through very substantial efforts over a time span in excess of 20 years and expenditure of money in excess of $1 billion.

117. IBM has engaged in a course of conduct that is intentionally and foreseeably calculated to undermine and/or destroy the economic value of the UNIX Software Code anywhere and everywhere in the world, and to undermine and/or destroy plaintiff's rights to fully exploit and benefit from its ownership rights in and to UNIX System V Technology, the Unix Software Code, SCO OpenServer, UnixWare and their derivatives, and thereby seize the value of UNIX System V Technology, the Unix Software Code, SCO OpenServer, UnixWare and their derivatives directly for its own benefit and indirectly for the benefit of its Linux distribution partners.

118. In furtherance of its scheme of unfair competition, IBM has engaged in the following conduct:

a) Misappropriation of trade secrets and confidential information of plaintiff;

b) Violation of confidentiality provisions running to the benefit of plaintiff;

c) Inducing and encouraging others to violate confidentiality provisions and to misappropriate trade secrets and confidential information of plaintiff;

d)   Contribution of trade secret protected software code for incorporation into one or more Linux or other free UNIX-like software releases, intended for transfer of ownership to the general public and distribution to the enterprise software market under the General Public License, with the effect and intent of transferring ownership thereto;

e) Use of deceptive means and practices in dealing with plaintiff with respect to its software development efforts; and

f)   Other methods of unlawful and/or unfair competition.

119.   IBM's unfair competition has directly and/or proximately caused significant foreseeable and consequential harm to plaintiff in the following particulars:

a) Plaintiff's revenue stream from UNIX licenses for Intel-based processing platforms has decreased substantially;

b)   As Intel-based processors have now become the processing platform of choice for a rapidly-increasing customer base of enterprise software users, plaintiff has been deprived of the opportunity to fairly exploit its market-leading position for UNIX on Intel-based processors, which revenue opportunity would have been very substantial on a recurring, annual basis but for IBM's unfairly competitive practices;

c) Plaintiff stands at imminent risk of being deprived of its entire stream of all UNIX licensing revenue in the foreseeably near future;

d)   Plaintiff has been deprived of the effective ability to market and sell its new UNIX-related improvements, including a 64-bit version of UNIX for Intel-based processors (based on Project Monterey) and its new web-based UNIX-related products, including UNIX System VI;

e) Plaintiff has been deprived of the effective revenue licensing opportunity to transfer its existing UNIX System V customer base to UNIX System VI; and

f) Plaintiff has been deprived of the effective ability to otherwise fully and fairly exploit UNIX's market-leading position in enterprise software market, which deprivation is highly significant given the inability of Microsoft Windows NT to properly support large-scale enterprise applications.

120. As a result of IBM's unfair competition and the marketplace injury sustained by plaintiff as set forth above, plaintiff has suffered damages in an amount to be proven at trial, but no less than $1 billion, together with additional damages through and after the time of trial foreseeably and consequentially resulting from IBM's unfair competition in an amount to be proven at the time of trial.

121. IBM's unfairly competitive conduct was also intentionally and maliciously designed to destroy plaintiff's business livelihood and all opportunities of plaintiff to derive value from the UNIX Software Code in the marketplace. As such, IBM's wrongful acts and course of conduct has created a profoundly adverse effect on UNIX business worldwide. As such, this Court should impose an award of punitive damages against IBM in an amount to be proven and supported at trial.

THIRD CAUSE OF ACTION

(Interference with Contract)

122. Plaintiff incorporates and re-alleges by reference paragraphs 1-121 above.

123. SCO has contracts with customers around the world for licensing of UNIX Software.

124. IBM knew and should have known of these corporate software licensing agreements between SCO and its customers, including the fact that such agreements contain confidentiality provisions and provisions limiting the use to which the licensed code can be put.

125. IBM, directly and through its Linux distribution partners, has intentionally and without justification induced SCO's customers and licensees to breach their corporate licensing agreements,

including but not limited to, inducing the customers to reverse engineer, decompile, translate, create derivative works, modify or otherwise use the UNIX software in ways in violation of the license agreements. These customers include Sherwin Williams, Papa John's Pizza, and Auto Zone, among others. The licensees include Hewlett-Packard, Fujitsu, NEC and Toshiba, among others.

126. IBM's tortious interference has directly and/or proximately caused significant foreseeable damages to SCO, including a substantial loss of revenues.

127. IBM's tortious conduct was also intentionally and maliciously designed to destroy plaintiff's business livelihood and all opportunities of plaintiff to derive value from the UNIX Software Code in the marketplace. As such, this Court should impose an award of punitive damages against IBM in an amount to be proven and supported at trial.

FOURTH CAUSE OF ACTION

(Breach of Contract)

128. Plaintiff incorporates and realleges by reference paragraphs 1-127 above.

129. IBM has numerous obligations under the AT&T / IBM UNIX Agreements, some of which are detailed below.

130. Paragraph 11 of the Side Letter contains the following language regarding the intent of the parties to prevent unrestricted disclosure of UNIX:

You [IBM] recognize the proprietary nature of SOFTWARE PRODUCTS and the need to protect SOFTWARE PRODUCTS from unrestricted disclosure.

131. IBM is prohibited under §7.10 of the Software Agreement from transferring or disposing of UNIX in a way that destroys its economic value. The applicable contract language reads as follows:

Except as provided in Section 7.06(b), nothing 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.

132. IBM has a duty of confidentiality to protect the confidentiality of SCO's trade secrets. The Side

Letter ¶9 provides, in part, as follows:

LICENSEE [IBM] 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, LINCENSEE 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.

IBM is further required by ¶2.01 of the Sublicensing Agreement to obtain confidentiality agreements from its distributors and customers, and by ¶3 of the Side letter to obtain the same from contractors.

133. IBM is prohibited under Section 2.05 of the Software Agreement from using UNIX for others. The applicable language provides:

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.

134. The cumulative effect of these provisions requires IBM to protect SCO's valuable UNIX trade secrets against *unrestricted disclosure, unauthorized transfer or disposition* and *unauthorized use* by others.

135. Notwithstanding these provisions, IBM has subjected SCO's UNIX trade secrets to unrestricted disclosure, unauthorized transfer and disposition, unauthorized use, and has otherwise encouraged others in the Linux development community to do the same. SCO, therefore, has terminated IBM's license to use UNIX-based software products. (See letter dated March 6, 2003, attached hereto and incorporated herein as Exhibit E).

136. As a result of IBM's breaches, SCO has suffered substantial damages in an amount to be proven at trial.

Prayer for Relief

WHEREFORE, having fully set forth its complaint, plaintiff prays for relief from this Court as follows:

1. For relief under the First Cause of Action for misappropriation of trade secrets arising from *Utah Code Ann.* §13-24-1 et seq., and damages for violations thereof, together with additional damages

through and after the time of trial;

2. For relief under the Second Cause of Action for unfair competition arising from common law, and damages for violations thereof, together with additional damages through and after the time of trial;

3. For relief under the Third Cause of Action for tortious interference, and damages for violations thereof, together with additional damages through and after the time of trial;

4. For damages under the Fourth Cause of Action for breach of contract of the AT&T / IBM UNIX Agreements together with additional damages through and after the time of trial foreseeably and consequentially resulting from IBM's breach of contract in an amount to be proven at the time of trial;

5. For punitive damages under common law for IBM's malicious and willful conduct in an amount to be proven at trial;

6. For exemplary damages under *Utah Code Ann.* § 13-24-1 in an amount equal to twice the award under the First Cause of Action for misappropriation of trade secrets;

7. For attorneys' fees as provided by *Utah Code Ann.* §13-24-5 and by contract in an amount to be proven at trial; and

8. For all other relief deemed just and proper by this Court.

Jury Trial Demand

Pursuant to U.R.Civ.P. Rule 38(b), plaintiff demands trial by jury of any issue triable of right by jury and tenders the statutory jury fee upon the filing of this Complaint.

DATED this _____ day of March, 2003.

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IN THE THIRD JUDICIAL DISTRICT COURT

OF SALT LAKE COUNTY, STATE OF UTAH

THE SCO GROUP, INC., a Delaware corporation, Plaintiff, vs. NOVELL, INC., a Delaware corporation, Defendant.	**COMPLAINT** **(Jury Trial Demanded)** Civil No.: 040900936 Judge: Anthony B. Quinn

Plaintiff, The SCO Group, Inc. ("SCO") sues Defendant Novell, Inc. ("Novell") and alleges as follows:

I.   NATURE OF THIS ACTION

1.   Through an Asset Purchase Agreement dated September 19, 1995, as amended ("Asset Purchase Agreement," attached hereto with amendments as Exhibit "A") wherein Novell received 6.1 million shares of SCO common stock, valued at the time at over $100 million in consideration, 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.

2.   In Attachment E of Novell's Disclosure Schedule to the Asset Purchase Agreement (Exh. A at Attachment E), Novell provided a list of approximately 106 copyright registrations (encompassing 8 pages) covering products relating to the business transferred to SCO.

3.   In the course of exercising its rights with respect to UNIX and UnixWare, SCO has filed for copyright protection with the United States Copyright Office.

4.   In a bad faith effort to interfere with SCO's exercise of its rights with respect to UNIX and UnixWare technologies, Novell has, in disregard of its obligations under the Asset Purchase Agreement, and subsequent to the Asset Purchase Agreement, filed for copyright protection in the same UNIX technology covered by SCO's copyrights.

5.   Recently, Novell repeatedly claimed publicly in press releases and otherwise that it, and not SCO, owns the UNIX and UnixWare copyrights.

6. Novell has made such statements with the intent to cause customers and potential customers of SCO to not do business with SCO and to slander and impugn the ownership rights of SCO in UNIX and UnixWare, and to attempt, in bad faith, to block SCO's ability to enforce its copyrights therein.

7. Novell's false and misleading representations that it owns the UNIX and UnixWare copyrights has caused and is continuing to cause SCO to incur significant irreparable harm to its valuable UNIX and UnixWare copyrights, to its business, and its reputation.

8. Through this action for slander of title against Defendant Novell, SCO seeks the following:

   a) a preliminary and permanent injunction: (i) requiring Novell to assign to SCO all subsequently registered copyrights Novell has registered in UNIX and UnixWare; (ii) preventing Novell from representing in any forum that it has any ownership interest whatsoever in the UNIX and UnixWare copyrights; and (iii) requiring Novell to retract or withdraw all representations it has made regarding its purported ownership of the UNIX and UnixWare copyrights; and

   b) actual, special, and punitive damages in an amount to be proven at trial based on Novell's slander of SCO's title and interest in the UNIX and UnixWare copyrights.

II. PARTIES, JURISDICTION AND VENUE

9. Plaintiff SCO is a Delaware corporation with its principal place of business in Utah County, State of Utah.

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10. Defendant Novell is a Delaware corporation with its executive offices and headquarters in Waltham, Massachusetts that does business in the State of Utah, has a registered agent in Salt Lake County, Utah, and lists a sales office located at 15 West South Temple, Suite 500, Salt Lake City, Utah.

11. This Court has subject matter jurisdiction over this matter pursuant to section 78-3-4 of the Utah Code.

12. This Court has personal jurisdiction over Novell because Novell transacts substantial business in the State of Utah.

13. Venue is proper in this Court pursuant to section 78-13-7 of the Utah Code.

III. FACTUAL BACKGROUND

14. 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 test results, as well as all reference manuals and support materials normally distributed by [Novell] to end-users and potential end-users in connection with the distribution 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.

(Exh. A, at Schedule 1.1(a) I and II)

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15. 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."

(Exh. A, Amendment No. 2 to the Asset Purchase Agreement dated October 16, 1996 at 1)

16. Software technology is valuable only insofar as the intellectual property contained therein

is protected from unlawful misappropriation. Copyrights provide critical protection

against misappropriation established by the United States Congress under the Copyright

Act. SCO requires the full copyright protection it purchased from Novell to enforce its

rights in UNIX and UnixWare technology, including proprietary source code, against

infringing parties.

17. Based on the clear and unambiguous terms of the Asset Purchase Agreement and

Amendment No. 2 thereto, SCO is the sole and exclusive owner of all copyrights related to

UNIX and UnixWare source code and all documentation and peripheral code and systems

related thereto.

18. Novell, with full knowledge of SCO's exclusive ownership of the copyrights related to

UNIX and UnixWare, has embarked on a malicious campaign to damage SCO's ability to

protect its valuable copyrights in UNIX and UnixWare. In particular, Novell has

wrongfully asserted ownership over UNIX and UnixWare technologies by filing for

copyright protection in its own name, and has made numerous false and misleading public

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representations disparaging SCO's ownership of the UNIX and UnixWare copyrights and claiming that it, and not SCO, owns the Unix and UnixWare copyrights.

19. Novell's false oaths and misleading public representations and wrongful assertion of ownership rights in UNIX and/or UnixWare include, but are not limited to, the following:

a) Despite the clear language of the Asset Purchase Agreement and Amendment No. 2 thereto, on May 28, 2003, Novell's Chairman, President, and CEO Jack Messman ("Messman") based at Novell's headquarters in Waltham, Massachusetts, publicly claimed that Novell did not transfer the UNIX and UnixWare copyrights to SCO and that "SCO is not the owner of the UNIX copyrights." Messman's statement was published in several newspapers, including the Salt Lake Tribune and Deseret News, and was timed by Messman to be released on the eve of the release of SCO's quarterly statements.

b) In a letter dated June 6, 2003, directed from SCO to Novell, SCO brought to Novell's attention Amendment 2 to the Asset Purchase Agreement that clearly evidences that the UNIX copyrights were in fact transferred from Novell to SCO.

c) Following Novell's receipt of SCO's June 6, 2003, letter, Novell issued a press release dated that same date which recanted Messman's prior statement claiming Novell owned UNIX copyrights stating "[t]he amendment [to the Asset Purchase Agreement] appears to support SCO's claim that ownership of certain copyrights for UNIX did transfer to SCO in 1996."

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d) In a letter of the same day, June 6, 2003, directed to SCO, Joseph Lasala, Novell's General Counsel based at Novell's headquarters in Waltham, Massachusetts, continued to call SCO's claims "absurd" and "unsubstantiated."

e) In a letter to SCO on June 26, 2003, from Joseph Lasala, Novell's General Counsel based at Novell's headquarters in Waltham, Massachusetts, Novell acknowledged that Amendment No. 2 "appears to support a claim" by SCO to "some copyrights", but at the same time, Novell called SCO's claims of ownership of UNIX and UnixWare "simply wrong" and declared "that we do not agree with SCO's public statements on this matter."

f) In a letter from Joseph Lasala, Novell's General Counsel based at Novell's headquarters in Waltham, Massachusetts, dated August 4, 2003, Novell responded to SCO's registration of UNIX System V copyrights with the United States Copyright Office, and explicitly "dispute[d] SCO's claim to ownership of the copyrights."

g) Despite Amendment 2 of the Asset Purchase Agreement that clearly established SCO's ownership of the copyrights, Novell continued with its unfounded and malicious campaign to slander SCO's ownership of the copyrights. In fact, Novell, again falsely asserted ownership of UNIX copyrights by submitting twelve certifications beginning on September 22, 2003 through October 14, 2003, to the United States Copyright Office. In these certifications, Novell publicly claimed to be the copyright owner of several versions of UNIX, including the following: (1)

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UNIX System V/386 Release 4 Version 3; (2) UNIX System V/386 Release 4 2;

(3) UNIX System V/386 Release 4 Version 4; (4) UNIX System V/386 Release 3

2; (5) UNIX System V/386 Release 3 0; (6) UNIX System V/386 Release 4 0; (7)

UNIX System V/386 Release 4 1ES; (8) UNIX System V Release 3 2/386; (9)

UNIX System V Release 3/386; (10) UNIX System V Release 4 2MP; (11) UNIX

System V Release 2; and (12) UNIX System V Release 4 1ES/386. Novell

published its false certifications to the world by placing them online at its website.

h)   Also on October 10, 2003, Novell publicly filed under oath with the United States

Copyright Office four different iterations of a "Declaration Regarding Ownership"

of UNIX copyrights TXU-510-028, TXU-511-236, TXU-516-704, and TXU-516-

705. In each of these sworn documents, Novell declared "that it retains all or

substantially all of the ownership of the copyrights in UNIX, including the U.S.

Copyright Registration referenced above."

i)   In a press release dated December 22, 2003, Novell, despite its June 2003 statement

that SCO owns the copyrights, Novell stated that "it owns the copyrights in UNIX,

and has applied for and received copyright registrations pertaining to UNIX

consistent with that position."

j)   In a press release dated January 13, 2004, Novell again knowingly and wrongfully

made the false claim that "it retained ownership of [UNIX] copyrights."

20.   Novell's false oaths and wrongful claims of copyrights and ownership in UNIX and

UnixWare are in bad faith and constitute a knowing and intentional disregard for the truth.

21. Novell's wrongful claims of copyrights and ownership in UNIX and UnixWare have caused, and continue to cause, irreparable harm to SCO, in the following particulars:

   a) Customers and potential customers of SCO are unable to ascertain the truth of ownership in UNIX and UnixWare, and make decisions based thereon; and

   b) SCO's efforts to protect its ownership of UNIX and UnixWare, and copyrights therein, are subject to a false cloud of ownership created by Novell.

IV. CLAIM FOR RELIEF
(Slander of Title)

22. SCO realleges and incorporates all prior paragraphs by this reference as if fully set forth herein.

23. SCO is the sole and exclusive owner of all copyrights related to UNIX and UnixWare source code and all documentation and peripheral code and systems related thereto.

24. Novell has slandered SCO's title and rights to its UNIX and UnixWare copyrights and damaged SCO's business reputation and relationships with potential customers by making false oaths of ownership to public officials, and by repeatedly representing both to the public in general and directly to several of SCO's customers and potential customers that Novell, and not SCO, owns the UNIX and UnixWare copyrights.

25. Novell's representations regarding its purported ownership of UNIX and UnixWare are patently false, and Novell made such representations intentionally, maliciously, and with the utter disregard for the truthfulness thereof.

26. As a consequence of Novell's conduct as alleged herein, SCO has incurred actual and special damages in an amount to be proven with at trial.

27. Novell's conduct as alleged herein was intentionally and maliciously designed to destroy SCO's valuable rights to the UNIX and UnixWare copyrights and further destroy SCO's business livelihood. As such, this Court should impose an award of punitive damages against Novell in an amount to be proven at trial.

V. PRAYER FOR RELIEF

WHEREFORE, Plaintiff SCO prays this Court grant relief against Defendant Novell in favor of SCO as follows:
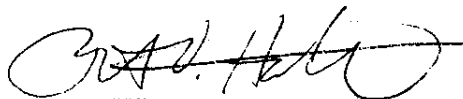
1. For actual and special damages in an amount to be proven at trial for Novell's slander of SCO's title to the UNIX and UnixWare copyrights;

2. For punitive damages in an amount to be proven at trial for Novell's malicious and willful conduct as alleged herein.

3. For a preliminary and permanent injunction (a) requiring Novell to assign to SCO any and all copyrights Novell has registered in UNIX and UnixWare; (b) preventing Novell from representing in any forum that it has any ownership interest whatsoever in the UNIX and UnixWare copyrights; and (c) requiring Novell to retract or withdraw all representations it has made regarding its purported ownership of the UNIX and UnixWare copyrights.

4. For attorneys' fees, costs, pre- and post-judgment interest, and all other legal and equitable relief deemed just and proper by this Court.

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VI. JURY TRIAL DEMAND

SCO demands trial by jury on all issues so triable.

DATED this 20th day of January, 2004.

By: _____

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP, INC., a Delaware corporation, Plaintiff, vs. NOVELL, INC., a Delaware corporation, Defendant.	**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** Case No. 2:04CV00139 Judge Dale A. Kimball

Defendant Novell, Inc. submits this Memorandum in Support of its Motion to Dismiss The SCO Group, Inc.'s ("SCO") Complaint for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

PRELIMINARY STATEMENT

The crux of SCO's slander of title claim is its assertion that pursuant to an agreement attached to its Complaint, it owns the copyrights to UNIX and UnixWare; that Novell's statements that SCO does not hold such title are false; and that these statements have left SCO's customers and potential customers unable to ascertain the truth about its copyright ownership.

The Complaint fails, however, to allege facts sufficient to support two necessary elements of slander of title: falsity and special damages. As to falsity, the documents SCO relies upon to establish ownership of the copyrights fail on their face to meet the federal copyright law requirements for such an instrument. Without conclusively establishing that it owns the UNIX and UnixWare copyrights, SCO cannot show that Novell's statements to the contrary are false, and cannot prevail. As to special damages, SCO has not set forth its alleged special damages sufficiently to state a claim.

Because SCO's Complaint fails as a matter of law, the motion to dismiss should be granted.

STATEMENT OF FACTS

SCO alleges that "[t]hrough an Asset Purchase Agreement dated September 19, 1995, as amended," 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 rights related thereto. . . ." (Compl. ¶ 1.)

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The operative language from the Asset Purchase Agreement (sometimes, the "APA") is

as follows:

> On the terms and subject to the conditions set forth in this Agreement, Seller will sell, convey, transfer, assign and deliver to Buyer and Buyer will purchase and acquire from Seller on the Closing Date (as defined in Section 1.7), all of Seller's right, title and interest in and to the assets and properties of Seller relating to the Business (collectively the "Assets") identified on Schedule 1.1(a) hereto. Notwithstanding the foregoing, the Assets to be so purchased shall not included those assets (the "Excluded Assets") set forth on Schedule 1.1(b).

(APA § 1.1(a), attached at Compl. Ex. A.)

Schedule 1.1(b) sets forth—as Excluded Assets—"[a]ny asset not listed on Schedule

1.1(a)" and "[a]ll copyrights and trademarks, except for the trademarks UNIX and UnixWare."

(APA Schedule 1.1(b) §§ I, V.A., attached at Compl. Ex. A.) Thus, the Asset Purchase

Agreement specifically excludes all copyrights from the assets to be transferred to the buyer.

On October 16, 1996, Novell and SCO's alleged predecessor, The Santa Cruz Operation,

Inc. ("Santa Cruz"), executed Amendment No. 2 to the APA. (*See* Compl. ¶ 15; APA

Amendment No. 2, attached at Compl. Ex. A.) APA Amendment No. 2 contains the following

language:

> With respect to Schedule 1.1(b) of the [Asset Purchase Agreement], titled 'Excluded Assets,' Section V, Subsection A shall be revised to read:
>
> *All copyrights* and trademarks, *except for the copyrights* and trademarks owned by Novell as of the date of the [Asset Purchase Agreement] *required for [Santa Cruz] to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies.* However, in no event shall Novell be liable to [Santa Cruz] for any claim brought by any third party pertaining to said copyrights and trademarks.

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(APA Amendment No. 2, attached at Compl. Ex. A (emphasis added).) Thus, APA Amendment No. 2 continues to exclude copyrights from the assets to be transferred, except those that SCO can demonstrate are "required . . . to exercise its rights with respect to the acquisition of UNIX and UnixWare."

SCO's Complaint is silent as to any particular loss it alleges it suffered as a result of Novell's statements. The only allegations relating to the harm SCO supposedly suffered are the vague assertions that "[c]ustomers and potential customers of SCO are unable to ascertain the truth of ownership in UNIX and UnixWare," and that there is a "cloud of ownership" created by Novell. (Compl. ¶ 21.)

LEGAL STANDARD

A motion to dismiss must be granted where a plaintiff fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In ruling on a motion to dismiss under Rule 12(b)(6), the trial court is to accept the well-pleaded factual allegations in the complaint as true and construe them most favorably to the plaintiff. *Hayes v. Whitman*, 264 F.3d 1017, 1022 (10th Cir. 2001).

All documents attached as exhibits to the complaint are properly considered in ruling on a motion to dismiss. *Issa v. COMP USA*, No. 03-4024, 2003 U.S. App. Lexis 26280, at *10 (10th Cir. Dec. 24, 2003). The trial court need not accept as true "allegations of fact that are at variance with the express terms of an instrument attached to the complaint as an exhibit and made a part thereof." *Jackson v. Alexander*, 465 F.2d 1389, 1390 (10th Cir. 1972). In such instances, the instrument controls. *GFF Corp. v. Associated Wholesale Grocers*, 130 F.3d 1381, 1385 (10th Cir. 1997); *Jackson*, 465 F.2d at 1390. Therefore, the Court should ignore any

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allegations in the Complaint that are contradicted by the Asset Purchase Agreement and Amendment No. 2.

ARGUMENT

In order to prevail in a slander of title action, SCO must establish:

(1) there was a publication of a slanderous statement disparaging claimant's title,
(2) the statement was false,
(3) the statement was made with malice, and
(4) the statement caused actual or special damages.

First Sec. Bank of Utah v. Banberry Crossing, 780 P.2d 1253, 1256-67 (Utah 1989). SCO's Complaint fails on two grounds.

First, SCO has not pled sufficient facts demonstrating falsity. Indeed, the very documents SCO relies upon fail to meet the requirements of the Copyright Act for a valid transfer of copyright ownership. In the absence of such a transfer, SCO cannot show that it is the owner of the copyrights at issue and cannot show Novell's statements to be false.

Second, SCO has not adequately pled special damages. SCO is required to plead with specificity its alleged realized or liquidated pecuniary damages, and instead has pled speculative damages of a general nature. SCO's alleged damages, as pled, cannot sustain its slander of title action.

I. SCO HAS NOT SHOWN A VALID TRANSFER OF COPYRIGHT OWNERSHIP UNDER THE COPYRIGHT ACT, AND THEREFORE IT HAS NOT PROPERLY PLED THAT NOVELL'S STATEMENTS ARE FALSE.

SCO's Complaint is premised on the theory that the Asset Purchase Agreement and Amendment No. 2 transferred ownership of the copyrights in UNIX and UnixWare to its alleged predecessor, Santa Cruz. (Compl. ¶¶ 1, 14, 15, 17.) Therefore, SCO claims, Novell's statements that Novell still owns the copyrights are false.

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The Copyright Act, however, imposes very strict requirements on purported transfers of copyright ownership. Under section 204(a) of the Act, "[a] transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent." 17 U.S.C. § 204(a); *Radio Television Espanola S.A. v. New World Entm't, Ltd.*, 183 F.3d 922, 926 (9th Cir. 1999).[1] Here, the documents relied upon by SCO do not constitute such an instrument of conveyance.

Indeed, SCO admits in its own Complaint that it does not own the copyrights at issue, and that it remains for Novell to transfer them. (*See* Compl. p. 10, ¶ 3) (SCO requests that the Court issue an injunction "requiring Novell to assign to SCO any and all copyrights Novell has registered in UNIX and UnixWare.")

Because the Complaint fails to establish the falsity of Novell's purportedly slanderous statements, it should be dismissed.

A. The Asset Purchase Agreement and Amendment No. 2 Are Merely a Promise to Assign and Therefore Do Not Evidence a Valid Transfer of Copyright Ownership Under the Copyright Act.

The Asset Purchase Agreement, standing alone, does not constitute a written instrument of conveyance under the Copyright Act sufficient to transfer copyright ownership. SCO alleges that Schedule 1.1(a) of the APA sets forth the assets transferred from Novell to Santa Cruz. (Compl. ¶ 14.) The operative portion of the agreement, however, is Section 1.1(a), not Schedule

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[1] The question of whether a purported copyright assignment constitutes a written instrument of conveyance under the Copyright Act requires interpretation of the Copyright Act and is sufficient to render this action within the original jurisdiction of the federal courts. *Jasper v. Bovina Music, Inc.*, 314 F.3d 42, 46-47 (2d Cir. 2002).

1.1(a). Section 1.1(a) is merely a promise to transfer, upon closing, all of the assets listed in Schedule 1.1(a), and also states:

> Notwithstanding the foregoing, the Assets to be so purchased shall not include those assets (the "Excluded Assets") set forth on Schedule 1.1(b).

(APA Section 1.1(a), attached at Compl. Ex. A.) Schedule 1.1(b) lists "all copyrights" as being excluded. (APA Schedule 1.1(b) §V.A., attached at Compl. Ex. A.) Thus, on its face, the Asset Purchase Agreement did not transfer any copyrights to Santa Cruz.

Likewise, APA Amendment No. 2, standing alone, does not constitute a written instrument of conveyance under the Copyright Act sufficient to transfer copyright ownership. Where a document makes no mention of a grant, transfer, or assignment of copyrights, it is not an instrument of conveyance under the Copyright Act. *Radio TV*, 183 F.3d at 927. In *Radio TV*, one of the documents claimed to constitute a section 204(a) instrument referred to delivery of certain television episodes but did not mention a grant of an exclusive license or other assignment. *Id.* at 927-28. The court found that this document did not, therefore, constitute a written instrument of conveyance under section 204(a). *Id.* APA Amendment No. 2 similarly does not purport to transfer anything in and of itself; it merely amends a section of the "Excluded Assets" section of the Asset Purchase Agreement.

Finally, read together, the Asset Purchase Agreement and Amendment No. 2 do not constitute an instrument that transfers copyright ownership. Instead, the two documents at most constitute a mere promise to assign certain unidentified copyrights if those copyrights are "required." A review of the first substantive clause of the Asset Purchase Agreement makes this fact clear:

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> On the terms and subject to the conditions set forth in this Agreement, Seller *will* sell, convey, transfer, assign and deliver to Buyer and Buyer *will* purchase and acquire from Seller on the Closing Date (as defined in Section 1.7), all of Seller's right, title and interest in and to the assets and properties of Seller relating to the Business (collectively, the "Assets") identified on Schedule 1.1 (a) hereto. Notwithstanding the foregoing, the Assets to be so purchased shall not include those assets (the "Excluded Assets") set forth on Schedule 1.1(b).

(APA § 1.1(a), attached at Compl. Ex. A (emphasis added).) Neither this clause nor any other clause in the Agreement states that the Seller "hereby" assigns, or that the Buyer "hereby" acquires.

The Asset Purchase Agreement and Amendment No. 2 therefore constitute solely a *promise* to assign in the future. A mere promise to assign in the future, however, is not an actual assignment. This sharp distinction between a promise to assign and an actual assignment is well-recognized. *See, e.g., Monarch Licensing, Ltd. v. Ritam Int'l, Ltd.*, 24 U.S.P.Q.2d (BNA) 1456, 1459 (S.D.N.Y. 1992) (distinguishing between promise to assign trademarks and copyrights and actual execution of assignment of trademarks and copyrights); *Arachnid, Inc. v. Merit Indus., Inc.*, 939 F.2d 1574, 1580-1581 (Fed. Cir. 1991) (distinguishing between agreement to assign patents and actual assignment of patents); *Li'l Red Barn, Inc. v. The Red Barn Sys., Inc.*, 322 F. Supp. 98, 107 (N.D. Ind. 1970), *aff'd* at 174 U.S.P.Q. (BNA) 193 (7th Cir. 1972) (distinguishing between agreement to assign trademarks and actual assignment of trademarks).

In the absence of an actual assignment, a promise to assign is insufficient to satisfy the requirements of a written instrument of conveyance established by section 204(a). Therefore, the Asset Purchase Agreement and Amendment No. 2, even when read together, do not constitute an instrument under the Copyright Act sufficient to transfer copyright ownership. Absent an actual

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transfer of copyright ownership, Novell continues to be the owner of copyrights at issue, and

SCO has accordingly failed to properly allege the falsity of Novell's ownership assertions.[2]

B. Assuming *Arguendo* that the Asset Purchase Agreement and Amendment No. 2 Purport to Transfer Copyright Ownership, They Fail to Meet the Copyright Act Requirement That Purported Transfers Specify What Copyrights Are Being Transferred.

Even if the documents SCO cited facially purported to constitute an actual transfer rather

than merely a promise to transfer, the agreements would still fail to satisfy the Copyright Act's

conveyancy requirements. In order to suffice as a written instrument of conveyance under the

Copyright Act, the purported assignment must state "precisely what rights are being transferred."

Effects Assoc., Inc. v. Cohen, 908 F.2d 555, 557 (9th Cir. 1990); *Konigsberg Int'l, Inc. v. Rice*,

16 F.3d 355, 357 (9th Cir. 1994). The terms of the transfer must be clear and definite in order to

fulfill the purposes of the statute, to "enhance predictability" in copyright ownership and to make

intellectual property "readily marketable." *Effects Assoc.*, 908 F.2d at 557; *Konigsberg*, 16 F.3d

at 357. *See also Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 749-50 (1989)

("Congress' paramount goal in revising the 1976 [Copyright] Act [was that of] enhancing

predictability and certainty of copyright ownership."); *Schiller & Schmidt, Inc. v. Nordisco*

Corp., 969 F.2d 410, 412 (7th Cir. 1992) (explaining that the purpose of the analogous writing

requirement in § 101(2) of the act was "to make the ownership of property rights in intellectual

property clear and definite").

Particularly when a purported assignment seeks to transfer something less than "all

rights," definiteness is required. Here, there are multiple works potentially at issue, as UNIX and

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[2] Nor can SCO successfully amend its Complaint by referring to an acquisition closing document that transferred the assets promised to the buyer under the APA. This document merely incorporated the APA's definition of included and excluded assets, and the APA excluded copyrights from the assets to be transferred.

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UnixWare had many versions and releases. Moreover, as to any particular work, copyright ownership is comprised of a bundle of rights, which can be transferred in whole or in part. *Effects Assoc.*, 908 F.2d at 559. Without specificity as to which particular copyrighted works and which rights within each copyrighted work's bundle of rights were purportedly transferred, the purported assignment fails.

Amendment No. 2's vagueness as to which copyrights are at issue is glaring. It merely amends the schedule of excluded assets as follows:

> All copyrights and trademarks, except for the copyrights and trademarks owned by Novell as of the date of the [Asset Purchase Agreement] required for [Santa Cruz] to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies.

(APA Amendment No. 2, attached at Compl. Ex. A.) Amendment No. 2 does not identify which, if any, particular rights associated with which, if any, copyrighted works are "required." It thus fails as a written instrument of conveyance due to its vagueness, and it is insufficient to satisfy section 204(a) of the Copyright Act.[3]

Contrary to SCO's assertions, Amendment No. 2 does not purport to concern "all copyrights pertaining to the UNIX and UnixWare technologies." Instead, it concerns only the unidentified rights that make up the copyrights required for Santa Cruz to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies. Not only are those rights not identified, but SCO's "rights with respect to the acquisition of UNIX and UnixWare

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[3] In its Complaint, SCO also refers to the copyrights listed in Attachment E to the Seller Disclosure Schedule of the Asset Purchase Agreement. (Compl. ¶ 2.) A review of the Asset Purchase Agreement demonstrates that Attachment E is unrelated to the assets transferred under the Asset Purchase Agreement. (APA § 1.1(a), attached at Compl. Ex. A; APA Schedule 1.1(a), attached at Compl. Ex. A; APA Schedule 1.1(b), attached at Compl. A.) Moreover, nowhere in its Complaint does SCO reference Attachment E in connection with its claim of ownership. (Compl. ¶¶ 14-17.) Hence, Attachment E is irrelevant to the question of copyright ownership.

technologies" are unidentified. In the face of such vague and ambiguous language, the governing authority is clear: the purported assignment must be construed in favor of the copyright holder and against a transfer of any copyrights. *Bieg v. Hovnanian Entes., Inc.*, 157 F. Supp. 2d 475, 480 (E.D. Pa. 2001). *See Effects Assoc.*, 908 F.2d at 557 (stating that the writing requirement avoids inadvertent transfers of copyright ownership by copyright holders).

Because the documents SCO relies upon contradict its allegation that it owns the copyrights, SCO has failed to adequately plead the element of falsity in its slander of title cause of action. Without pleading falsity, there is no theory upon which SCO can recover for slander of title. Accordingly, SCO's Complaint should be dismissed.

II. SCO HAS MADE ONLY VAGUE ALLEGATIONS OF YET UNREALIZED LOSSES AND THEREFORE HAS NOT PLED SPECIAL DAMAGES SUFFICIENT TO STATE A CLAIM FOR SLANDER OF TITLE.

In order to state a claim for slander of title, a plaintiff must plead special damages with particularity. *Valley Colour, Inc. v. Beuchert Builders, Inc.*, 944 P.2d 361, 364 (Utah 1997) ("A slander of title action requires proof of actual or special damages.")(quoting *Banberry Crossing*, 780 P.2d at 1257); *Bass v. Planned Mgmt. Servs., Inc.*, 761 P.2d 566, 568 (Utah 1988) ("Slander of title actions are based only on palpable economic injury and require a plaintiff to prove special damages . . . . There are no general or presumed damages in slander of title actions."). Utah Rule of Civil Procedure 9(g) ("When items of special damage are claimed, they shall be specifically stated."). They must be pled specifically "so that the opposing party has an adequate opportunity to defend against the plaintiff's claims." *Hodges v. Gibson Prods. Co.*, 811 P.2d 151, 162 (Utah 1991); *see Cohn v. J.C. Penney Co., Inc.*, 537 P.2d 306, 311 (Utah 1975) ("It is a question of whether or not the pleadings contain such information as will apprise the defendant of such damages as must of necessity flow from that which is alleged.").

In a slander of title action, the special damages alleged must consist of a "realized" or "liquidated" pecuniary loss. *Valley Colour*, 944 P.2d at 364; W. Page Keeton, PROSSER AND KEETON ON THE LAW OF TORTS 971 (1984) ("The special damage rule requires the plaintiff to establish pecuniary loss that has been realized or liquidated, as in the case of specific lost sales."); RESTATEMENT (SECOND) OF TORTS §§ 624, 633. Merely alleging that the value of the property at issue has dropped is insufficient to state a claim for slander of title. *Valley Colour*, 944 P.2d at 364. Similarly, where a plaintiff has simply alleged a loss of market capitalization and a negative impact on its dealings with third parties, it has insufficiently pled special damages in a slander of title action. *Computerized Thermal Imaging, Inc. v. Bloomberg, L.P.*, 312 F.3d 1292, 1299 (10th Cir. 2002) (applying Utah substantive law regarding claim of libel *per quod*, a claim that requires pleading of special damages). Finally, the plaintiff must allege that the specific, realized pecuniary loss alleged is directly caused by the actions of the defendant. *Dowse v. Doris Trust Co.*, 208 P.2d 956, 958 (Utah 1949). Where a plaintiff fails to allege "a pecuniary loss resulting from the act of the defendant," the plaintiff cannot prevail. *Id.*

SCO does not meet the pleading standard. The Complaint contains allegations relating to harm in three paragraphs, but does not set forth with particularity a realized pecuniary loss. SCO generally alleges that Novell "has caused and is continuing to cause [SCO] to incur significant irreparable harm to its valuable UNIX and UnixWare copyrights, to its business, and its reputation." (Compl. ¶ 7.) It also states that "[a]s a consequence of Novell's conduct alleged herein, SCO has incurred actual and special damages in an amount to be proven at trial." (Compl. ¶ 26.) Finally, it provides the following general description of its alleged injuries:

> Novell's wrongful claims of copyrights and ownership in UNIX
> and UnixWare have caused, and continue to cause, irreparable
> harm to SCO, in the following particulars:

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a.   Customers and potential customers of SCO are unable to ascertain the truth of ownership in UNIX and UnixWare, and make decisions based thereon; and

b.   SCO's efforts to protect its ownership of UNIX and UnixWare, and copyrights therein, are subject to a false cloud of ownership created by Novell.

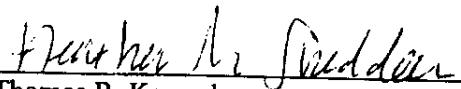(Compl. ¶ 21.) This is the sum total of SCO's damages allegations.

SCO's allegations are plainly insufficient. The alleged injuries are not a "realized" or "liquidated" loss. Instead, they are precisely the type of general allegations of some speculative injury that the special damages pleading requirements for a slander of title action are meant to avoid. Ordinarily, special damages are alleged by "evidence of a lost sale or the loss of some other pecuniary advantage." *Bass*, 761 P.2d at 568. SCO has not alleged anything of the sort. SCO did not adequately plead special damages, and thus its claim for slander of title must be dismissed.

CONCLUSION

For the foregoing reasons, SCO's Complaint should be dismissed.

DATED: February 9, 2004.

ANDERSON & KARRENBERG

Thomas R. Karrenberg
Thomas R. Karrenberg
John P. Mullen
Heather M. Sneddon
Attorneys for Defendant Novell, Inc.

12

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this __9th__ day of February, 2004, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** to be served via first class mail, postage prepaid, to the following:

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Stephen N. Zack
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Telephone: (801) 534-1700
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Attorneys for Defendant Novell, Inc.

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP, INC., a Delaware corporation, Plaintiff, vs. NOVELL, INC., a Delaware corporation, Defendant.	**NOTICE OF REMOVAL OF CIVIL ACTION UNDER 28 U.S.C. §§ 1441 AND 1446** **(Federal Question Jurisdiction)** Judge Dale A. Kimball DECK TYPE: Civil DATE STAMP: 02/06/2004 @ 14:49:53 CASE NUMBER: 2:04CV00139 DAK

Defendant Novell submits this Notice of Removal of this action to the United States

District Court for the District of Utah, Central Division, pursuant to 28 U.S.C. §§ 1441 and 1446.

In support of this removal, Novell states the following:

1.   On January 20, 2004, an action was commenced in the Third Judicial District

Court, in and for Salt Lake County, State of Utah, entitled *The SCO Group, Inc. v. Novell, Inc.*,

Civil Case No. 040900936. A true and correct copy of the Summons, Complaint, and all other

process, pleadings, and orders served upon Novell are attached hereto as Exhibit A as provided in 28 U.S.C. § 1446(a).

2. On January 20, 2004, The SCO Group, Inc. ("SCO") served Novell with a copy of the Summons and Complaint. Aside from the material in Exhibit A, Novell is not aware of any other process, pleadings or orders served upon Novell in this action.

3. Novell files this Notice of Removal within one year of the date the action was originally filed and within thirty days of receipt of the Complaint by Novell. Removal is accordingly timely.

4. Promptly after filing this Notice of Removal, Novell shall give written notice of the removal to SCO by and through its designated counsel, and to the Clerk of the Third Judicial District Court in and for Salt Lake County, State of Utah as provided in 28 U.S.C. § 1446(d). A true and correct copy of the Notice to Plaintiff and to Clerk of Court of Removal of Civil Action to Federal Court (without exhibits) is attached hereto as Exhibit B.

JURISDICTION

5. This Court has original jurisdiction over this civil action pursuant to 28 U.S.C. § 1331 (federal question) in that SCO's cause of action arises under the federal Copyright Act, 17 U.S.C. § 101 *et. seq.*

FEDERAL QUESTION JURISDICTION

6. A district court has original jurisdiction over cases "arising under" federal law. 28 U.S.C. § 1331.

7. A case arises under federal law if it requires interpretation of the Copyright Act. *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 828 (2d Cir. 1964) ("an action 'arises under' the

Copyright Act . . . if the complaint . . . assert a claim requiring construction of the Act."); *Gerig*

v. Krause Publ'n., Inc., 58 F. Supp. 2d 1261, 1267, 1267 n.5 (D. Kan. 1999) (stating that the

Tenth Circuit has adopted this test).

8.   In its Complaint, SCO sets forth a cause of action for slander of title based upon

its alleged ownership of certain copyrights by transfer from Novell. SCO alleges that it has

become the sole and exclusive owner of certain copyrights by virtue of the Asset Purchase

Agreement and Amendment No. 2 thereto. (Ex. A, Compl. ¶ 17.)

9.   SCO further alleges that Novell has made false claims of ownership of the UNIX

and UnixWare copyrights. (Ex. A, Compl. ¶ 24.)

10.   One of the elements of a slander of title claim under Utah law is that "the

[allegedly slanderous] statement was false." *First Security Bank of Utah v. Banberry Crossing*,

780 P.2d 1253, 1256-57 (Utah 1989). SCO has alleged that Novell's statements asserting

ownership of the UNIX and UnixWare copyrights are false.

11.   Accordingly, SCO's cause of action for slander of title requires that it prove

Novell's statements asserting ownership of the UNIX and UnixWare copyrights are false; that is,

that SCO owns the UNIX and UnixWare copyrights.

12.   According to SCO's Complaint, Novell's statements asserting ownership of the

UNIX and UnixWare copyrights are false because the Asset Purchase Agreement and

Amendment No. 2 constitute a transfer of copyright ownership to SCO.

13.   The Copyright Act exclusively governs all transfers of copyright and states that

"[a] transfer of copyright ownership . . . is not valid unless an instrument of conveyance or a note

or memorandum of the transfer, is in writing . . . ." 17 U.S.C. § 204(a).

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14. Therefore, SCO will need to establish that the Asset Purchase Agreement and/or Amendment No. 2 constitutes an "instrument of conveyance" or "note or memorandum of [ ] transfer" under the Copyright Act sufficient to transfer copyright ownership to SCO. 17 U.S.C. § 204(a).

15. The Asset Purchase Agreement and/or Amendment No. 2 does not constitute a "instrument of conveyance" or "note or memorandum of [ ] transfer" under the Copyright Act sufficient to transfer copyright ownership. 17 U.S.C. § 204(a).

16. The question of whether a purported copyright assignment constitutes an "instrument of conveyance" or "note or memorandum of [ ] transfer" under the Copyright Act requires interpretation of the Copyright Act and is sufficient to render this action within the original jurisdiction of the federal courts. *Jasper v. Bovina Music, Inc.*, 314 F.3d 42, 46-47 (2d Cir. 2002).

17. Therefore, this action is removable to this Court pursuant to 28 U.S.C. § 1441.
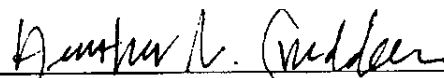
VENUE

18. Removal to the United States District Court for the District of Utah, Central Division, is proper because the Complaint was filed in Salt Lake County, Utah. 28 U.S.C. § 1441(a).

WHEREFORE, Defendant Novell gives notice that the above-described action pending against it in the Third Judicial District Court, in and for Salt Lake County, State of Utah, is removed to this Court.

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DATED: February 6, 2004.

ANDERSON & KARRENBERG

_____
Thomas R. Karrenberg
John P. Mullen
Heather M. Sneddon
Attorneys for Defendant Novell, Inc.

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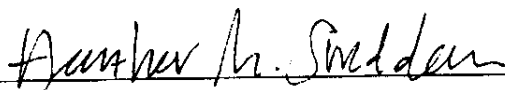
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of February, 2004, I caused to be mailed a true and correct copy of the foregoing **NOTICE OF REMOVAL OF CIVIL ACTION UNDER 28 U.S.C. §§ 1441 AND 1446**, via first class U.S. mail, postage prepaid, to the following:

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Attorneys for Plaintiff The SCO Group, Inc.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

THE SCO GROUP, INC., a Delaware corporation, Plaintiff, vs. NOVELL, INC., a Delaware corporation, Defendant.	**MOTION TO REMAND** Civil No.: 2:04CV00139 Judge Dale A. Kimball

Plaintiff The SCO Group ("SCO") respectfully moves this Court for an order remanding

this case to Utah Third Judicial District Court.[1] The grounds for this Motion are as follows:

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[1] Novell has filed a Motion to Dismiss SCO's Compliant. This Court should not address Novell's Motion until it has addressed and ruled on SCO's Motion to Remand. *See In re Bear River Drainage District,* 267 F.2d 849 (10th Cir. 1959) (when a district court is faced with a motion to remand and a motion to dismiss, the court should "rule first on the motion to remand" and if granted send "the motion to dismiss back to state court").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5 day of March 2004, I caused to be mailed a true and correct copy of the foregoing via first class U.S. Mail, postage prepaid, to the following:

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Neilina Haidubosunic

FILED
U.S. DISTRICT COURT
5 MAR 04 PM 4: 25
DISTRICT OF UTAH
BY:_____
DEPUTY CLERK

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Attorneys for Plaintiff The SCO Group, Inc.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

THE SCO GROUP, INC., a Delaware corporation, Plaintiff, vs. NOVELL, INC., a Delaware corporation, Defendant.	**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS** Civil No.: 2:04CV00139 Judge Dale A. Kimball Magistrate Judge Brooke C. Wells

Plaintiff The SCO Group, Inc. ("SCO") respectfully submits this Memorandum in Opposition to Defendant's Motion to Dismiss.[1]

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[1] SCO has filed a Motion to Remand this case to state court on the basis that this Court lacks subject matter jurisdiction. This Court should not address Novell's Motion to Dismiss until it has addressed and ruled on SCO's Motion to Remand. *See In re Bear River Drainage District,* 267 F.2d 849 (10th Cir. 1959) (when a district court is faced with a motion to remand and a motion to dismiss, the court should "rule first on the motion to remand" and if granted send "the motion to dismiss back to state court"). While SCO may in fact prefer having its claim heard in federal court, it is obligated to raise the issues that SCO believes preclude this Court from exercising jurisdiction over this case

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INTRODUCTION

Through an Asset Purchase Agreement dated September 19, 1995, as amended, SCO, through its predecessor in interest, paid Novell, Inc. ("Novell") 6.1 million shares of SCO common stock to acquire 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, operations and maintenance information concerning UNIX and UnixWare, *including source code, source documentation, source listings and annotations, appropriate engineering notebooks, test data and test results*, as well as all reference manuals and support materials normally distributed by [Novell] to end-users and potential end-users in connection with the distribution 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.
>
> III. All of [Novell's] rights pertaining to UNIX and UnixWare under any software development contracts, licenses and any other contracts to which [Novell] is a party or by which it is bound and which pertains to the Business...

[Asset Purchase Agreement at Schedule 1.1(a) (emphasis added).]

Subsequent to the Asset Purchase Agreement, on October 16, 1996, the parties executed Amendment No. 2 to the Asset Purchase Agreement which clarified 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." In Attachment E of Novell's Disclosure Schedule to the Asset Purchase Agreement, Novell listed 106 separate copyright registrations filed with the United States Copyright Office at the time of the Asset Purchase Agreement covering products and materials relating to the UNIX and UnixWare business transferred to SCO. As set forth in the Asset Purchase Agreement and as alleged in SCO's Complaint, SCO is the exclusive owner of all of the subsequently or previously registered copyrights

and all non-registered copyrights fixed by operation of law in the UNIX and UnixWare source code, object code and documentation.

SCO has exercised exclusive and unchallenged control over the UNIX and UnixWare technologies for the entire period since execution of the Asset Purchase Agreement – a period in excess of eight years. Notwithstanding the clear language of the Asset Purchase Agreement, Amendment No. 2 and the eight-plus years SCO has exercised exclusive control over the copyrights in UNIX and UnixWare, Novell's new management[2] has recently begun a malicious campaign to slander SCO's ownership rights in UNIX and UnixWare. Not coincidentally, Novell's slander campaign was directly timed to its change of senior executive management and its decision to embrace Linux-related business activities in partnership with IBM. As alleged in SCO's Complaint, Novell has repeatedly represented both publicly and directly to customers and potential customers of SCO that Novell and not SCO owns the UNIX and UnixWare copyrights. Novell has also recently filed several false copyright registration applications with respect to the very UNIX and UnixWare technologies it indisputably transferred to SCO through the Asset Purchase Agreement.

Now Novell, through its Motion to Dismiss, asks this Court to find that SCO has no ownership interest in the UNIX and UnixWare copyrights because Novell claims the writing it negotiated and executed transferring those valuable rights to SCO was not technically sufficient under the Copyright Act. Novell's Motion must be denied. Novell misrepresents the applicable law and entirely ignores the allegations in SCO's Complaint and the plain language and the intent of the parties as set forth in the Asset Purchase Agreement. As set forth below and as alleged in SCO's Complaint, SCO owns UNIX and UnixWare and all copyrights related thereto.

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[2] Novell's management at the time of the Asset Purchase Agreement that transferred the copyrights to SCO is largely no longer at Novell.

STANDARD OF REVIEW

In considering a motion to dismiss, a court must take the allegations of the complaint at face value and must construe them favorably to the plaintiff. The allegations in the plaintiff's complaint are presumed true. *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991). A court should not grant a motion to dismiss unless it appears beyond doubt that the plaintiff could prove no set of facts supporting the claim which would entitle plaintiff to relief. *Huxall v. First State Bank*, 842 F.2d 249, 250- 51 (10th Cir.1988). The court's function on a Rule 12(b)(6) motion is merely "to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Miller*, 948 F.2d at 1565.

ARGUMENT

Novell claims in its Motion to Dismiss that the nearly 50-page Asset Purchase Agreement between Novell and SCO, together with its numerous schedules and amendments, was not a sufficient "writing", "note", or "memorandum" under Section 204(a) of the Copyright Act to transfer the UNIX and UnixWare copyrights from Novell to SCO. Novell then claims that because it purportedly owns the UNIX and UnixWare copyrights, Novell's public representations of ownership are not false and therefore SCO has not alleged a claim for slander of title.

As support for its position, Novell claims that Section 204(a) imposes "very strict requirements on purported transfers of copyright ownership" and that SCO has not alleged a writing sufficient to meet those strict requirements. [Novell's Mem. at 5.] Novell grossly overstates the law and mischaracterizes both the terms of the Asset Purchase Agreement, as amended, and the allegations in SCO's Complaint. As the Ninth Circuit has held in a leading case on the subject, "[t]he [§204(a)] rule is really quite simple: If the copyright holder agrees to transfer ownership to another party, that party must get the copyright holder to sign a piece of paper saying so. It doesn't have to

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be the Magna Charta; a one-line pro forma statement will do." *Effects Associates, Inc. v. Cohen,* 908 F.2d 555, 557 (9th Cir. 1990). The Asset Purchase Agreement as amended and as alleged in SCO's Complaint clearly meets the requirements of a Section 204(a) writing.

Novell also claims that SCO has not alleged special damages with sufficient particularity under Rule 9(g) of the Federal Rules of Civil Procedure to support its slander of title claim. Again, Novell has attempted to elevate a simple standard to something it is not. Rule 9(g) only requires a plaintiff to plead damages in a manner that apprises the defendant of the claims at issue and the damages alleged to flow from those claims. Moreover, attorneys' fees are recoverable as special damages under Utah law for a claim of slander of title and SCO has obviously incurred attorneys' fees in protecting its valuable ownership rights in UNIX and UnixWare and has specifically sought attorneys' fees in its Complaint.

I.   **SCO IS THE OWNER OF THE UNIX AND UNIXWARE COPYRIGHTS PURSUANT TO THE ASSET PURCHASE AGREEMENT AND NOVELL'S PUBLIC STATEMENTS TO THE CONTRARY ARE FALSE.**

In its Complaint, SCO alleges in several places that it is the sole and exclusive owner of all right, title, and interest in and to the UNIX and UnixWare business, operating system, source code, all copyrights related thereto, and all claims relating to any right, property, or asset included in the business. [Compl. at ¶¶ 1, 16-17, and 23.] SCO's allegations, together with the plain language of the Asset Purchase Agreement, as amended, are sufficient to establish SCO's ownership of the UNIX and UnixWare copyrights and the falsity of Novell's public representations to the contrary. Novell asks this Court to ignore the allegations in SCO's Complaint and declare that Novell owns the UNIX and UnixWare copyrights because Novell claims the Asset Purchase Agreement as amended is not a sufficient writing to transfer the UNIX and UnixWare copyrights to SCO under Section 204(a) of the Copyright Act. Novell is wrong and has misstated the law regarding Section 204(a).

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The purpose of Section 204(a) is to "protect copyright holders from persons mistakenly or fraudulently claiming oral licenses or copyright ownership." *Imperial Residential Design, Inc. v. The Palms Development Group, Inc.*, 70 F.3d 96, 99 (11th Cir. 1995). "No magic words must be included in a document to satisfy § 204(a)." *Radio Television Espanola S.A. v. New World Entertainment, LTD.*, 183 F.3d 922, 927 (9th Cir. 1999). Courts have held that the document need not even include the word "copyright" to constitute a valid transfer. *See, e.g., Schiller & Schmidt v. Nordisco Corporation*, 969 F.2d 410, 413 (7th Cir. 1992). As set forth above, the rule is simple and requires as little as a "one-line" signed note reflecting the parties' intent to transfer copyrights. *Effects Assoc.*, 908 F.2d at 557. *See also Radio Television Espanola*, 183 F.3d at 927 (holding that the Section 204(a) requirement is "simple"); *Kenbrooke Fabrics, Inc.v. Soho Fashions, Inc.*, 690 F.Supp. 298, 300 (S.D.N.Y. 1988) (finding that a short letter transferring ownership of certain products but never mentioning copyrights and an invoice showing payment was a sufficient writing under Section 204(a) to defeat a motion for summary judgment).

Contrary to the above law, Novell claims in its Memorandum that Section 204(a) provides draconian requirements of specificity and clarity, and that written agreements that do not meet Novell's proposed heightened standard are invalid. Novell has not, however, cited a single case where a writing even remotely as detailed as the Asset Purchase Agreement as amended has been found insufficient under Section 204(a). In fact, of the three cases Novell cites in support of its supposed heightened standard, two did not involve written agreements. *See Effects Assoc., Inc. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990) (holding that **oral** agreement did not meet Section 204(a) requirement of a "writing") and *Konigsberg Intl., Inc. v. Rice*, 16 F.3d 355, 356 (9th Cir. 1994) (same). In the third case Novell cites, *Schiller & Schmidt, Incorporated v. Nordisco Corporation*, 969 F.2d 410, 412 (7th Cir. 1992), the Seventh Circuit held that a basic sales agreement that did not

mention the word "copyright" was sufficient to meet the requirements of Section 204(a). The court's opinion in *Schiller & Schmidt* actually **supports** SCO's position.

The Asset Purchase Agreement, as amended, is clearly sufficient to meet Section 204(a)'s requirement of a "writing," "note" or "memorandum." The issue, if any, is an interpretation of the Asset Purchase Agreement as amended – not whether a writing exists transferring assets and copyrights. Schedule 1.1(a) to the Asset Purchase Agreement provides that SCO acquired from Novell "all rights and ownership" of **all** versions of UNIX and UnixWare, its source code, and all related materials. *See* p. 2 *infra.* Amendment 2 to the Asset Purchase Agreement specifically set forth 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." Novell, of course, ignores the contract language in its Motion.

Because SCO obtained "all rights and ownership of UNIX and UnixWare," SCO obviously has the exclusive right to market and distribute products using its UNIX and UnixWare technologies or license others to do the same, and to create and distribute new products and derivative works using its UNIX and UnixWare technologies. *SCO could not exercise its those rights without ownership of the UNIX and UnixWare copyrights as specifically set forth in Amendment 2.* Novell's claim that SCO has all rights and ownership of UNIX and UnixWare including all source code but somehow not all of the copyrights required to exercise those rights contradicts both the plain language of the Asset Purchase Agreement as amended and the intent of the parties as expressed in the agreement. Novell's Motion also asks the Court to ignore SCO's allegations in its Complaint that must be taken as true for purposes of Novell's Motion to Dismiss.[3]

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[3] Novell also claims that the Asset Purchase Agreement as amended fails to meet the requirements of Section 204(a) because UNIX and UnixWare "had many versions and releases" and Amendment 2 does not specifically state which copyrights to which versions of UNIX and UnixWare were transferred to SCO. [Novell's Mem. at 8-9.] Novell's

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In *Schiller & Schmidt, Incorporated v. Nordisco Corporation*, 969 F.2d 410 (7th Cir. 1992), the court addressed the issue of a transfer of copyrights under Section 204(a). In *Schiller*, the plaintiff sued the defendant for copyright infringement based on the use of 18 photographs. The defendant claimed that the plaintiff did not own the copyrights to the photographs because the original owner of the photographs had transferred them to a third party before he had purportedly transferred them to the plaintiff. The Seventh Circuit reviewed the "sale agreement" between the original owner of the photographs and the third party to determine whether the sale agreement was a writing sufficient to transfer the copyrights under Section 204(a): "Although the agreement does not mention the word "copyright," its wording leaves little doubt that [the original owner] sold all the assets of [his business], tangible and intangible alike." *Id.* at 413. The court noted that if the third party had not obtained the copyrights, he would not have obtained the right to use the negatives to make prints. The original owner also would have been unable to make prints because he no longer owned the negatives. Recognizing this absurd result, the court determined that the intent of the original owner and the third party was to transfer all ownership – including ownership of copyrights – to the third party and that the sale agreement was sufficient to transfer the copyrights under Section 204(a) even though it did not specifically mention or refer to "copyrights." *Id.*

The Asset Purchase Agreement as amended is significantly more detailed regarding the transfer of copyrights than the agreement the court found sufficient in *Schiller*. SCO acquired, pursuant to the Asset Purchase Agreement as amended, "*[a]ll rights and ownership* in UNIX and UnixWare" and ownership of all copyrights required for SCO to exercise "*all rights and ownership*" in UNIX and UnixWare. SCO could not exercise its rights as the exclusive owner of UNIX and UnixWare without the copyrights it purchased as specifically set forth in Amendment 2. Likewise,

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position is meritless. As set forth in the Asset Purchase Agreement, SCO acquired from Novell "all rights and ownership" in "all versions of UNIX and UnixWare" and all copyrights related thereto.

the copyrights to UNIX and UnixWare would have no use to Novell because Novell has no ownership rights whatsoever in any of the UNIX and UnixWare products to which the copyrights apply. The Asset Purchase Agreement as amended clearly complies with Section 204(a).

Novell also claims that because the Asset Purchase Agreement states that Novell "will sell, convey, transfer, assign, and deliver" UNIX and UnixWare to SCO "on the Closing Date," the Asset Purchase Agreement was merely a promise to assign assets in the future (at the Closing Date) and therefore does not meet the requirements of Section 204(a). Again, Novell's argument is meritless. The Closing occurred in December 1995. Novell received 6.1 million shares of stock from SCO and SCO received all rights and ownership in UNIX and UnixWare and the copyrights related thereto from Novell and has exercised those rights enfettered for more than eight years. The allegations in the Complaint make this clear and must be accepted as true for purposes of Novell's Motion. The cases Novell cites do not involve Section 204(a) and are not remotely comparable to this case.[4] As stated, the purpose of Section 204(a) is to prevent the inadvertent transfer of copyrights by requiring a writing signed by both parties. Reading Section 204(a) in the hyper-technical manner Novell suggests would not serve this purpose and is contrary to law. Novell's Motion should be denied.

II. SCO HAS SUFFICIENTLY ALLEGED DAMAGES.

Novell also claims SCO's Complaint should be dismissed because SCO has not sufficiently alleged damages. In order to state a claim under Utah law for slander of title, a plaintiff must plead that the false statement caused actual or special damages. *See First Security Bank of Utah, N.A. v. Banberry Crossing,* 780 P.2d 1253, 1257 (Utah 1989). Unlike general damages which "naturally and necessarily result from the harm done," special damages "are a particular type of damages which are

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[4] For example, Novell cites *Li'l Red Barn, Inc. v. The Red Barn System, Inc.,* 322 F.Supp. 98 (N.D. Ind. 1970). In that case, the parties entered into an agreement providing that a trademark would be reassigned if the purchasing party defaulted in the performance of the terms of a purchase agreement. The court merely held that an agreement that a trademark could be reassigned upon the occurrence of a breach was not an actual assignment. *Id.* at 107. That case does not support Novell's motion.

a natural consequence of the injury caused but are not the type of damages that necessarily flow from the harmful act." *Hodges v. Gibson Products Co.*, 811 P.2d 151, 162 (Utah 1991).

In Utah slander of title cases, special damages are proved by "evidence of a lost sale or the loss of some other pecuniary advantage." *Bass v. Planned Management Servs., Inc.*, 761 P.2d 566, 568 (Utah 1988). In its complaint, SCO has pled precisely such a loss of pecuniary advantage. Paragraph 21 of SCO's complaint reads:

> Novell's wrongful claims of copyrights and ownership in UNIX and UnixWare have caused, and continue to cause, irreparable harm to SCO, in the following particulars:
>
> a.   Customers and potential customers of SCO are unable to ascertain the truth of ownership in UNIX and UnixWare, and make decisions based thereon; and
> b.   SCO's efforts to protect its ownership of UNIX and UnixWare, and copyrights therein, are subject to a false cloud of ownership created by Novell.
> *   *   *   *
> As a consequence of Novell's conduct as alleged herein, SCO has incurred actual and special damages in an amount to be proven with at trial.

Complaint at ¶¶ 21, 26.

Moreover, it is well-settled that attorneys' fees are recoverable as "special damages" if incurred "to clear title or to undo any harm created by whatever slander of title occurred." *Bass*, 761 P.2d at 569. SCO has obviously incurred attorneys' fees in protecting its rights and clearing its title to UNIX and UnixWare and SCO seeks the recovery of such fees in its Complaint at ¶ 4 of the Prayer for Relief.

In its Memorandum, Novell has substantially overstated the Rule 9(g) pleading requirement. The Utah Supreme Court held in *Cohn v. J.C. Penny Co., Inc.*, 537 P.2d 306 (Utah 1975) that in Utah there is no "inflexible rule" regarding the pleading of special damages. 537 P.2d at 311. Rather, it is simply "a question of whether or not the pleadings contain such information as *will apprise the defendant of such damages* as must of necessity flow from that which is alleged." *Id.* (emphasis added); *see also Simmons v. Wilkin*, 15 P.2d 321, 322 (Utah 1932) ("The purpose of the rule is to

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avoid surprise to the defendant."). Thus, while special damages must be specifically plead, "the law does not require that the exact dollar amount of special damages be specifically pleaded." *Hodges*, 811 P.2d at 162 (holding that general allegations of "lost wages, medical expenses, and severe emotional distress" contained in a complaint are sufficient "to satisfy the requirement of Rule 9(g)").
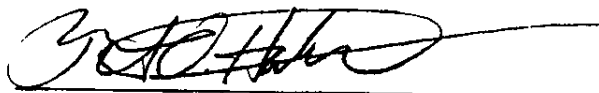
SCO has pled with sufficient particularity the damage it incurred and is continuing to incur as a result of Novell's slander of SCO's title to the UNIX and UnixWare copyrights. It has set forth the specific loss of pecuniary advantage that SCO's customers are unable to ascertain the truth of ownership in UNIX and UnixWare because of Novell's wrongful acts. SCO has also incurred legal fees protecting its valuable ownership rights in UNIX and UnixWare. SCO's allegations are sufficiently particular to "apprise" Novell of SCO's claims. Indeed, Novell knows exactly what is at issue in this case and, as alleged in SCO's Complaint, Novell has acted with the specific intent of causing SCO the precise type of damages SCO has alleged. SCO has met the pleading requirements for its claim of slander of title in this action. Novell's Motion to Dismiss should be denied.[5]

CONCLUSION

For all of the foregoing reasons, Novell's Motion to Dismiss should be denied. SCO has properly alleged a claim for slander of title under Utah law.

DATED this 5th day of March, 2004.

By: _____

HATCH JAMES & DODGE
Brent O. Hatch
Mark R. Clements

BOIES, SCHILLER & FLEXNER LLP
Stephen N. Zack
Mark J. Heise
Attorneys for Plaintiff

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[5] Even if the Court determined that SCO did not allege damages with sufficient particularity to apprise Novell of SCO's claim, SCO should be granted leave to amend its Complaint. This case is in its initial stage and Novell would not suffer any prejudice if SCO were granted leave to amend.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of March 2004, I caused to be mailed a true and correct copy of the foregoing to the following by the method described below:
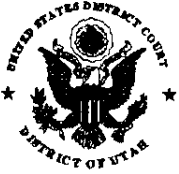
By Hand Delivery:

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

SCO Grp,

    Plaintiff,

        vs.

Novell Inc,

    Defendant.

AMENDED NOTICE

Case No. 2:04-cv-139-DAK

TYPE OF CASE   CIVIL

PLEASE TAKE NOTICE that a proceeding in this case has been set for hearing before Honorable Dale A. Kimball at:

        Room 220
        350 South Main Street
        Salt Lake City, Utah

    On Tuesday, 5/11/04 at 3:00 p.m.

TYPE OF PROCEEDING: Motion to Dismiss and Motion to Remand

                MARKUS B. ZIMMER,
                Clerk of Court

            By: Bonnie L. King
                Deputy Clerk

DATE: April 12, 2004

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United States District Court
for the
District of Utah
April 12, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:04-cv-00139

True and correct copies of the attached were either mailed, faxed or e-mailed
by the clerk to the following:

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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.	**SECOND AMENDED COMPLAINT** (Jury Trial Demanded) Case No. 03-CV-0294 Hon. Dale A. Kimball Magistrate Judge Brooke C. Wells

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Plaintiff, The SCO Group, Inc., a Delaware corporation ("SCO"), sues Defendant International Business Machines Corporation ("IBM") and alleges as follows:

Nature of This Action

1. UNIX is a computer operating system program and related software and documentation originally developed by AT&T Bell Laboratories ("AT&T"). UNIX is widely used in the corporate, or "enterprise," computing environment.

2. Through a series of corporate acquisitions, SCO presently owns all right, title and interest in and to UNIX and UnixWare operating system source code, software and sublicensing agreements, together with copyrights, additional licensing rights in and to UNIX and UnixWare, and claims against all parties breaching such agreements. Through agreements with UNIX vendors, SCO controls the right of all UNIX vendors to use and distribute UNIX. These restrictions on the use and distribution of UNIX are designed to protect the economic value of UNIX.

3. A variant or clone of UNIX currently exists in the computer marketplace called "Linux." Linux is, in material part, based upon UNIX source code and methods.

4. The UNIX software distribution vendors, such as IBM, are contractually and legally prohibited from giving away or disclosing proprietary UNIX source code and methods for external business purposes, such as contributions to Linux, or from otherwise using UNIX for the benefit of others. This prohibition extends to products that are modifications of, or derivative works based on, UNIX System V source code or technology. IBM is violating this prohibition, *en masse*, as though no prohibition or proprietary restrictions exist at all

with respect to the UNIX technology. As a result of IBM's wholesale disregard of its contractual and legal obligations to SCO, Linux 2.4.x and 2.6.x and the development Linux kernel, 2.5.x, are replete with protected technology. As such, the Linux 2.4.x, Linux 2.5.x and 2.6.x kernels are unauthorized derivatives of UNIX System V.

5. This case is not about the debate about the relative merits of proprietary versus open source software. Nor is this case about IBM's right to develop and promote open source software if it decides to do so in furtherance of its independent business objectives, so long as it does so without SCO's proprietary information. This case is, and is only, about the right of SCO not to have its proprietary software misappropriated and misused in violation of its written agreements and well-settled law.

6. As set forth in more detail below, IBM has breached its obligations to SCO, induced and encouraged others to breach their obligations to SCO, interfered with SCO's business, and engaged in unfair competition with SCO, including by:

a) misusing UNIX software licensed by SCO to IBM and Sequent;

b) inducing, encouraging, and enabling others to misuse and misappropriate SCO's proprietary software; and

c) incorporating (and inducing, encouraging, and enabling others to incorporate) SCO's proprietary software into Linux open source software offerings.

7. As a result of these breaches, SCO sent a notice of termination to Mr. Sam Palmisano, the Chief Executive Officer of IBM on March 6, 2003. The termination notice specified that, pursuant to SCO's contractual rights under controlling agreements, IBM's right to use or distribute any software product based on UNIX System V technology, including its own

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version of UNIX known as "AIX," would be terminated on June 13, 2003, unless such breaches were reasonably cured prior to that time.

8. The termination notice was based, in part, on IBM's publicly announced contributions of AIX source code to Linux, and use of UNIX/AIX methods for accelerating the development of Linux in contravention of IBM's contractual obligations to SCO.

9. Pursuant to its rights under the controlling agreements, IBM was entitled to 100 days to cure its underlying contractual breaches, provided it was willing and able to do so. Both parties were contractually required to "exert their mutual good faith best efforts to resolve any alleged breach short of termination."

10. To that end, SCO did everything reasonably in its power to exert a good faith effort to resolve the termination of IBM's UNIX contract rights. Conversely, during the 100-day period, IBM did not set forth a single proposal or idea for cure.

11. SCO has therefore terminated IBM's right to use any part of the UNIX System V source code, including its derivative AIX, effective as of June 13, 2003 (the "AIX Termination Date").

12. For similar reasons and following a similar process, SCO has terminated IBM's right to use any part of Dynix/ptx, also a derivative work of UNIX System V, which was developed under license with SCO, effective as of July 30, 2003 (the "Dynix/ptx Termination Date").

13. As of the AIX Termination Date, IBM is contractually obligated to discontinue use of and return or destroy any and all copies of the Software Products defined in the controlling agreements, which include UNIX System V source code and all its derivatives, including AIX.

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14. As of the Dynix/ptx Termination Date, IBM is contractually obligated to discontinue use of and return or destroy any and all copies of the Software Products defined in the controlling agreements, which include UNIX System V source code and all its derivatives, including Dynix/ptx.

Parties, Jurisdiction and Venue

15. Plaintiff SCO is a Delaware corporation with its principal place of business in Utah County, State of Utah.

16. Defendant IBM is a New York corporation with its principal place of business in the State of New York.

17. Sequent Computer Systems, Inc. ("Sequent") was formerly an Oregon corporation that contracted with SCO's predecessor in interest, AT&T. Sequent was subsequently merged into IBM in a stock transaction.

18. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§1331, 1332, 1338 and 1367. There is complete diversity of citizenship between the parties and the amount in controversy exceeds $75,000, exclusive of interest and costs, and the copyright claims arise under federal law.

19. Venue is properly situated in this District pursuant to 28 U.S.C. §§ 1391 and 1400.

Background Facts

<u>The UNIX Operating System</u>

20. UNIX is a computer software operating system. Operating systems serve as the link between computer hardware and the various software programs ("applications") that run on the computer. Operating systems allow multiple software programs to run at the same time

and generally function as a "traffic control" system for the different software programs that run on a computer.

21. By way of example, in the personal computing market, Microsoft Windows is the best-known operating system. The Windows operating system was designed to operate on computer processors ("chips") built by Intel. Thus, Windows serves as the link between Intel-based processors and the various software applications that run on personal computers.

22. In the business computing environment for the Fortune 1000 and other large corporations (often called the "enterprise" environment), UNIX is widely used. As detailed below, before IBM's involvement in and improper contributions to Linux, Fortune 1000 companies were not using Linux for mission critical applications, such as wire transfers and satellite control systems. Linux, as an operating system, simply was incapable of performing such high level enterprise computing before IBM's improper contributions to Linux.

23. The UNIX operating system was originally developed by Dennis Ritchie, Ken Thompson and other software engineers at AT&T. After successful in-house use of the UNIX software, AT&T began to license UNIX as a commercial product for use in enterprise applications by other large companies.

24. Over the years, AT&T Technologies, Inc.("AT&T Technologies"), a wholly owned subsidiary of AT&T, and its related companies licensed UNIX for widespread enterprise use. IBM, Hewlett-Packard, Inc. ("HP"), Sun Microsystems, Inc. ("Sun"), Silicon

Graphics, Inc. ("SGI") and Sequent became some of the principal United States-based UNIX licensees, among many others.

25. IBM, HP, Sun, SGI and the other major UNIX vendors each modified UNIX to operate on their own processors. Thus, for example, the operating system known as "HP-UX" is HP's version of UNIX. HP-UX is a modification of, and derivative work based on, UNIX System V source code.

26. Similarly, the operating system known as "Solaris" is Sun's version of UNIX. Solaris is a modification of, and derivative work based on, UNIX System V source code.

27. SGI's UNIX-based operating system is known as "IRIX." IRIX is a modification of, and derivative work based on, UNIX System V source code.

28. IBM's UNIX-based operating system is known as "AIX." AIX is a modification of, and derivative work based on, UNIX System V source code.

29. Sequent's UNIX-based operating system is known as "Dynix/ptx." Dynix/ptx is a modification of, and derivative work based on, UNIX System V source code.

30. The various identified versions of UNIX are sometimes referred to as UNIX "flavors." All commercial UNIX "flavors" in use today are modifications of, and derivative works based on, the UNIX System V Technology ("System V Technology").

31. SCO is the sole and exclusive owner of all Software and Sublicensing Agreements that control use, distribution and sublicensing of UNIX System V and all modifications thereof and derivative works based thereon. SCO is also the sole and exclusive owner of copyrights related to UNIX System V source code and documentation and peripheral code and systems related thereto.

32. During the 1990s the enterprise computing market for high-performance workstation computers came to be dominated by UNIX and the primary UNIX vendors identified above, each supplying its own version of the UNIX operating system based on UNIX System V pursuant to the license agreements with SCO's predecessors in interest. UNIX became synonymous with "workstation" computers that typically operated on a RISC processing platform.

33. The RISC processing platform provides high-power computing capabilities at a relatively higher price for "workstation" computing. The alternative to "workstation" computing is commonly known as "desktop" computing on personal computers. The operating system market for "desktop" personal computers is dominated by Microsoft Corporation and its various Windows-based operating system products. The reason for this distinction is that most desktop computers (PCs) are designed to operate on Intel and Intel-compatible computing platforms. Most workstations are designed to operate on variants of RISC processing platforms and RISC-compatible computing platforms. PC systems and RISC systems are not hardware compatible with each other. Thus, most versions of UNIX will not operate on Intel-based PC's for desktop computing; and Windows will not operate on RISC-based workstations for enterprise computing.

34. Most of the primary UNIX vendors identified above did not attempt to develop a UNIX "flavor" to operate on an Intel-based processor chip set. This is because the earlier Intel processors were considered to have inadequate processing power for use in the more demanding enterprise market applications.

SCO's Creation of a Market for Intel – The Genesis of SCO OpenServer

35. As computers grew in popularity to perform business functions, the processing power of Intel-based processor chips also began to increase dramatically. Consistent with Intel founder Gordon Moore's prediction, computer chips remained inexpensive while exponentially increasing in power and performance.

36. Seeing this emerging trend, it became evident to SCO that Intel chips would gradually gain widespread acceptance for use in the enterprise marketplace.

37. Therefore, while other major UNIX vendors modified UNIX for their respective RISC-based computing platforms, SCO developed and licensed the UNIX-based operating system for Intel-based processors for enterprise use that is now known as "SCO OpenServer."

38. SCO's early engineers faced difficult design challenges in modifying UNIX for effective use on an Intel processing platform. The principal design constraint centered on the limited processing power the Intel chip possessed in the early 1980's. The Intel chip (designed as it was for personal computers) was not nearly as powerful as the enterprise RISC chips used by IBM, Sun, SGI and others in their respective UNIX offerings.

39. Despite the early design constraint of Intel's limited processing power, SCO was able to develop a version of UNIX for Intel PCs with full multi-processing and multi-user support as well as excellent reliability. A PC running SCO's OpenServer UNIX was a much more viable business application platform than the same PC running any available version of Windows. SCO found an appropriate enterprise market niche for the early versions of SCO OpenServer as a highly reliable platform for business critical applications such as point-of-sale control, inventory control and transactions processing. Intel systems running UNIX

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were fully capable of performing multi-user business applications and could do so at a much lower cost (and just as reliably) as the proprietary mini-computer hardware sold by other UNIX vendors, such as Sun and IBM.

40. One example of a customer well suited to the earlier version of SCO OpenServer software is McDonald's Corp. McDonald's has thousands of stores worldwide and needs all stores to operate on an integrated computing platform for ease of use, immediate access to information and uniformity. However, the actual computing requirements for each individual McDonald's location are functionally simple—sales need to be tracked and recorded, and inventory functions need to be linked to sales. SCO OpenServer reliably fulfills McDonald's computing requirements at reduced cost.

41. SCO's business model for SCO OpenServer provides enterprise customers the reliability, extensibility (ease of adding or changing functionality), scalability (ease of adding processors or servers to increase processing power) and security of UNIX—but on inexpensive Intel processor chips. This combination allowed customers to perform an extremely high number of transactions and, at the same time, gather and present the information from those transactions in an economical and useful way for enterprise decision makers.

42. The simplicity and power of this "UNIX on Intel" business model helped SCO grow rapidly. SCO gained other large enterprise customers such as CitiGroup, K-Mart, Cendant, Target Stores, Texas Instruments, Walgreens, Merck, Sherwin Williams, Radio Shack, Auto Zone, British Petroleum, Papa John's Pizza, Costco and many others.

43. As Intel's prominence grew in the enterprise computing market, SCO's early version of OpenServer also grew into the operating system of choice for enterprise customers who wanted an Intel-based computing solution for a high volume of repetitive computing transactions.

44. SCO OpenServer is based on the original UNIX Software Code developed by AT&T, but was modified by SCO for the functionality described above. Thus, while performing single-function applications, SCO OpenServer did so, and continues to do so, with the 99.999% reliability of UNIX.

45. Over 4,000 separate applications have been written by developers around the world specifically for SCO OpenServer. Most of these applications are vertical applications for targeted functions, such as point-of-sale control for specific industries, inventory control for specific industries, and related functions.

SCO's Development of UnixWare on Intel

46. While the original SCO OpenServer operating system performs with all the reliability and dependability of other UNIX systems, it was originally designed for the initially low processing power of Intel chips. Therefore, SCO OpenServer does not offer the same level of multiprocessor capabilities that other flavors of UNIX offer.

47. During or about 1993, SCO's predecessor in interest, Novell, Inc. ("Novell"), acquired from AT&T all right, title and interest in and to the UNIX software code, the AT&T Software and Sublicensing Agreements, the copyrights and related and ancillary products. For branding purposes, Novell renamed UNIX as "UnixWare."

48. On or about September 19, 1995, The Santa Cruz Operation, Inc. acquired all right, title

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and interest in and to UNIX and UnixWare source code, the AT&T Software and Sublicensing Agreements, the copyrights, claims arising after the closing date against any party and all related and ancillary products and rights from Novell, excepting only the right to certain existing ongoing royalty payments which was retained by Novell.

49. From and after September 1995, SCO dedicated significant amounts of funding and a large number of UNIX software engineers, many of whom were original AT&T UNIX software engineers, to upgrade UnixWare for high-performance computing on Intel processors.

50. By approximately 1998, SCO had completed the majority of this task. That is to say, UnixWare had largely been modified, tested and "enterprise hardened" to use Intel-based processors in competition against IBM and Power PC chips, the Sun SPARC chip and all other high-performance computing UNIX platforms for all complex computing demands. The term "enterprise hardened" means to assure that a software product is fully capable of performing under the rigorous demands of enterprise use.

51. SCO was ready to offer large enterprise customers high-end UNIX computing platforms based on inexpensive Intel processors. Given the rapid growth of Intel's performance capabilities and Intel's popularity in the marketplace, SCO found itself in a highly desirable market position. In addition, SCO still had its SCO OpenServer business for retail and inventory-targeted functions, with its 4,000 applications.

52. Prior to the events complained of in this action, SCO was the undisputed global leader in the design and distribution of commercial UNIX-based operating systems on Intel-based processing platforms.

Project Monterey

53. As SCO was poised and ready to expand its market and market share for UnixWare targeted to high-performance enterprise customers, 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.

54. At this point in time, IBM's UNIX expertise was centered on its own Power PC processor. IBM had little or no expertise on Intel processors.

55. 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.

56. 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.

57. On or about May 2001, IBM notified plaintiff that it refused to proceed with Project Monterey, and that IBM considered Project Monterey to be "dead."

The AT&T UNIX Agreements

58. AT&T Technologies originally licensed the UNIX operating system software code to hundreds of software licensees, including defendant IBM, for the UNIX operating system software source code, object code and related schematics, documentation, modifications and derivative works (collectively, the "UNIX Source Code"). To protect the confidential and proprietary source code information, these license agreements, as detailed below, contained strict limitations on use and distribution of UNIX source and binary code. These provisions prohibited licensees from copying or replacing UNIX source code in competing systems that would diminish the value of UNIX.

59. When SCO acquired the UNIX assets from Novell in 1995, it acquired all right, title and interest in and to the UNIX operating system technology, including all claims against any parties relating to any right, property or asset used in the business of developing UNIX and UnixWare. As a result of this acquisition, SCO became the authorized successor in interest to the original position of AT&T with respect to all licensed UNIX software products.

60. There are two primary types of software licensing agreements between AT&T Technologies and its various licensees:

 a) The AT&T-related software agreements are collectively referred to hereinafter as the "AT&T UNIX Software Agreements."

 b) The AT&T-related sublicensing agreements are collectively referred to hereinafter as the "AT&T UNIX Sublicensing Agreements."

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The AT&T UNIX Software Agreements and the AT&T UNIX Sublicensing Agreements are sometimes collectively referred to hereinafter as the "AT&T UNIX Agreements."

61. Plaintiff is successor in interest to, and owner of, all contractual rights arising from and related to the AT&T UNIX Agreements.

The IBM Related Agreements

62. On February 1, 1985, AT&T and IBM entered into certain AT&T UNIX Agreements:

   a) Software Agreement Number Soft-00015 ("AT&T / IBM Software Agreement" attached hereto and incorporated herein as Exhibit A);

   b) Sublicensing Agreement Number Sub-00015A ("AT&T / IBM Sublicensing Agreement" attached hereto and incorporated herein as Exhibit B).

63. AT&T and IBM also entered into a side letter on that date ("AT&T / IBM Side Letter" attached hereto and incorporated herein as Exhibit C).

64. In addition, AT&T and IBM have entered into nearly 400 supplemental agreements over the years, including Supplement No. 170 (Supplement No. 170 is attached hereto and incorporated herein as Exhibit D). Supplement No. 170 is the document that specifies the royalty amounts and computer CPUs upon which royalty amounts were due to be paid by IBM.

65. Thereafter, Amendment X to Software Agreement SOFT-00015, as amended, was executed on or about October 16, 1996 by and among IBM, The Santa Cruz Operation, Inc. ("SCO") and Novell, Inc. ("IBM Amendment X" attached hereto and incorporated herein as Exhibit E). Among other things, Amendment X effectuated a royalty buy-out by IBM pursuant to

the royalty terms and amounts specified in Supplement No. 170, and it confirmed other restrictions on IBM, including restrictions on the use of source code.

66. Collectively, these agreements, side letter and amendment are referred to hereinafter as the "IBM Related Agreements."

The Sequent Agreements

67. On January 28, 1986, AT&T and Sequent (now merged into IBM through a stock acquisition) entered into certain AT&T UNIX Agreements:

   a) Software Agreement Number SOFT-000321 ("Sequent Software Agreement" attached hereto and incorporated herein as Exhibit F);

   b) Sublicensing Agreement Number SUB-000321A ("Sequent Sublicensing Agreement" attached hereto and incorporated herein as Exhibit G).

68. The Sequent Software Agreement and the Sequent Sublicensing Agreement are sometimes collectively referred to hereinafter as the "Sequent Agreements."

69. The IBM Related Agreements and Sequent Agreements collectively identify the "Protected Materials."

Marketplace Value of UNIX

70. UNIX's value in the enterprise marketplace is largely a function of its reliability, extensibility, and robust performance capability. That is to say, it virtually never needs repair, it performs well under a wide variety of adverse circumstances, and it can be extended throughout an enterprise and across multiple processors to perform unified or disparate tasks in a seamless computing environment. Because of these features, UNIX-based equipment has replaced mainframe computers for all but the most demanding

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computing tasks. And, because UNIX-based equipment is far cheaper than mainframe computing equipment, a customer who cannot otherwise justify the cost of mainframe computers can otherwise gain the advantages of "supercomputing" operations through use of UNIX-based equipment.

71. One or more of the different versions of UNIX-based operating systems sold by Sun, IBM, SCO, SGI, and others, is the operating system of choice for large enterprise computing operations in virtually 100% of the Fortune 1000 companies.

72. UNIX gained this prominence in the computing marketplace because of twenty years of development and over one billion dollars invested by plaintiff and its predecessors to create a stable, reliable operating system to perform the mission critical work required by large enterprises.

73. The recent rise of the global technology economy has been powered in large part by UNIX. Virtually every mission critical financial application in the world is powered by UNIX, including electronic transfers of funds. Real time stock trades are powered by UNIX. Inventory controls and distributions are powered by UNIX. All major power grids and all major telecommunications systems are powered by UNIX. Many satellite control and defense control systems are powered by UNIX. Virtually every large corporation in the world currently operates part or all of its information technology systems on a UNIX operating system.

74. Based on its value in the marketplace, UNIX has become the most widely used and widely accepted operating system for enterprise, institutional and manufacturing applications throughout the world.

Linux

75. Linux is an operating system variant or clone of UNIX System V Technology. According to leaders within the Linux community, Linux is not just a "clone," but is intended as a successor to displace UNIX System V. Linux, unlike UNIX, is distributed without a fee to its users. Moreover, it is developed under and open source model, meaning that the source code is publicly available to all who want to see or use it.

76. IBM's entry into the open source community and its concerted effort to control the community for its own economic benefit have substantially altered the use and impact of Linux.

77. In furtherance of its plan to destroy its UNIX competitors, IBM has 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.

78. 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.

79. 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.

The Functional Limitations of Linux Before IBM's Involvement

80. 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.

81. 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.

82. To make Linux of necessary quality for use by enterprise customers, it needed to be re-designed 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 re-design of Linux for enterprise use.

83. As a result of the forgoing, Linux is a clone of UNIX, including protected UNIX System V Technology, including modifications and derivatives thereof.

IBM's Scheme

84. 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 the 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.

85. In the process of moving from product offerings 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.

86. 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*.

87. 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.

88. As detailed elsewhere, IBM misappropriated the confidential and proprietary information

from SCO in Project Monterey. IBM also misused its access to the UNIX source code, in

violation of the IBM Related Agreements..

89. 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.*

90. 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.*

91. 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.

92. 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

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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.

93. 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.*

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

95. 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

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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.

96. Continuing with its "happy and comfortable" idea that Linux succeeds at the expense of

UNIX, 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.

97. 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

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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.

98. 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.

99. 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. Among the numerous contributions are the AIX Journaling File System, the AIX Enterprise Volume Management System, and the Dynix/ptx Read Copy Update technology.

100. The contribution of the Journaling File System ("JFS") was done in a series of "drops" of AIX code identified as "reference files" inside Linux. The first such drop occurred on or about February 2000, with multiple additions and significant follow-up work by IBM since that time to adapt AIX/JFS for enterprise use inside Linux. These drops of reference files do not necessarily become part of the source code in the Linux kernel, but rather are public displays of the Protected Materials so that anyone has access to them and can use them to

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construct a similar file in Linux. The first drop contains (a) a partially functioning port, or

transfer, of JFS from AIX to Linux; (b) a set of reference directories (named ref/) which

contain the AIX reference version of AIX/JFS; (c) AIX/JFS-related utility files used to

maintain and upkeep AIX/JFS; and (d) a set of directories (named directory ref_utils/)

which contain the AIX reference version of utilities. Copies of AIX/JFS files into Linux

are shown in Table A, below. Table A compares a 1999 version of AIX and shows the

following similarities, demonstrating copying of code, structures and/or sequences.

TABLE A

AIX 9922A_43NIA File	Line #s	Linux 2.2.12 ref/ File	Line #s
usr/include/jfs/inode.h	16-37	include/linux/jfs/ref/jfs_inode.h	84-95, 126-138
kernel/sys/vnode.h	109-133	include/linux/jfs/ref/jfs_inode.h	96-122
usr/include/jfs/inode.h	39-40	include/linux/jfs/ref/jfs_inode.h	189-90
usr/include/jfs/inode.h	161-166	include/linux/jfs/ref/jfs_inode.h	414-421
usr/include/jfs/inode.h	172-180	include/linux/jfs/ref/jfs_inode.h	37-48
usr/include/jfs/inode.h	199-205	include/linux/jfs/ref/jfs_inode.h	52-59
usr/include/jfs/inode.h	62-66	include/linux/jfs/ref/jfs_inode.h	286-290
usr/include/jfs/inode.h	72-76	include/linux/jfs/ref/jfs_inode.h	295-302
usr/include/jfs/inode.h	83-158	include/linux/jfs/ref/jfs_inode.h	322-411

These transfers of AIX/JFS to Linux are in violation of the IBM Related Agreements, and are an improper use of

AIX for adaptation to a general operating system.

101. IBM has also improperly transferred a UNIX/AIX-based enterprise volume management

system ("AIX/EVMS") to Linux. Again, this was done by IBM to transfer enterprise-class

capabilities from AIX to Linux, and was a violation of the IBM Related Agreements and

IBM's promise not to adapt AIX as a general operating system for a non-IBM company.

The purpose of AIX/EVMS is to allow the management of disk storage in terms of logical

'volumes' in a large enterprise environment. Tools with this level of sophistication and performance were entirely unavailable and unknown to the open source development community prior to IBM's improper transfer to Linux. The actual transfer "patch" by IBM can be found at http://www.sourceforge.net/project/showfiles.php?group_id=25076&package_id=17436. The first code drop of AIX/EVMS by IBM was v0.0.1, which occurred on 03/21/2001. The first major release of AIX/EVMS by Linux was v1.0.0, in Linux 2.4, which occurred on 03/27/2003. The latest Linux release version of AIX/EVMS is v2.2.1, which occurred on 12/20/2003. The following table, Table B, identifies the AIX/EVMS "patches" of source code improperly transferred by IBM to the Linux 2.4 version.

TABLE B

AIX MERCED/9922A_43NIA	Line #s	EVMS 1.0.0 patches to Linux 2.4.x	Line #s
kernel/sys/IA64/bootrecord.h	64-170	include/linux/evms/evms_aix.h	157-263
usr/include/liblvm.h	234-250	include/linux/evms/evms_aix.h	311-327
usr/include/liblvm.h	252-272, 289-307	include/linux/evms/evms_aix.h	329-349
usr/include/liblvm.h	316-363	include/linux/evms/evms_aix.h	352-400
usr/include/lvmrec.h	24-92	include/linux/evms/evms_aix.h	266-294
usr/include/lvm.h	26-35	include/linux/evms/evms_aix.h	6-11
kernel/sys/hd_psn.h	32	include/linux/evms/evms_aix.h	26
kernel/sys/vgsa.h	37, 56-73	include/linux/evms/evms_aix.h	13, 300-309

102. As with the other violations described herein, these transfers by IBM constitute improper use of AIX for and by others, improper transfers of AIX to others, and improper adaptation of AIX as a general operating system for a non-IBM company under the

restrictions of the IBM Related Agreements. In disregard of the IBM Related Agreements, IBM has transferred this key enterprise technology from AIX to Linux.

104. Sequent also had certain contractual obligations and restrictions on its use of the UNIX System V code that it licensed from AT&T, SCO's predecessor. These restrictions, which are more fully stated in the Sequent Agreements, also restricted Sequent's use of the modifications they made to UNIX System V and derivative works of UNIX System V, including Sequent's Dynix/ptx. Like IBM, Sequent agreed to restrictions on Dynix/ptx, including that Dynix/ptx would be used solely for internal business purposes, that it would not allow the use of Dynix/ptx for or by others, and that it would not transfer any part of Dynix/ptx to parties who do not have a UNIX System V source code agreement with SCO. Sequent also agreed that they would maintain all of Dynix/ptx in confidence. In violation of these contractual restrictions, IBM provided entire files of Dynix/ptx source code as a patch to Linux 2.4.1-01, including Read Copy Update ("RCU").

105. RCU is a mechanism that can significantly improve the performance and scalability of multi-processor systems by allowing simultaneous access to data without the need for expensive and time consuming locking protocols. Dynix/ptx/RCU structures and sequences were originally offered as a patch to the Linux 2.4 kernel by IBM, with rather limited functionality inside Linux 2.4. However, in the development of Linux version 2.6, the deployment of Dynix/ptx/RCU structures and sequences has spread into new uses inside Linux, including networking, device drivers, list management, and directory access. This demonstrates how improper contribution of a few hundred lines from

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Dynix/ptx has had a massive impact on Linux kernel efficiency, particularly relating to multi-processor functionality and processor memory synchronization. Virtually the entire files identified in Table C that originated in Dynix/ptx were published as a patch to Linux 2.4.1-01, with only minimal changes.

TABLE C

DynixV v4.6.1 Files	Linux 2.4.1-01 files
kernel/sys/rclock.h	include/linux/rclock.
kernel/os/rclock.c	kernel/rclock.c
kernel/sys/kma_defer.h	include/linux/kmemdef.h
kernel/os/kma_defer.c	kernel/kmemdef.c

106. As stated, the entire files specified above show direct line-by-line copying of the files with the same name in Dynix as in Linux, with slight changes made to reflect some variations between the two operating systems. That the code in Linux comes from Dynix/ptx is further confirmed by the commentary in the Linux patch that expressly states that it is "[b]ased on a Dynix/ptx implementation by Paul McKenney..." Mr. McKenney was formerly an engineer at Sequent, and is now employed at IBM following IBM's acquisition of Sequent. After the first initial improper contribution of RCU by IBM, RCU became more widespread in the Linux kernel.

107. Code from Dynix/ptx files, but less than the entire file, was also copied line-for-line from DynixV v4.6.1 to Linux 2.4.1-01. Table D maps the line-for-line copied code from specified lines in DynixV v4.6.1 to Linux 2.4.1-01, with the file name and file line number in each code base identified appropriately.

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TABLE D

DynixV v4.6.1 Files and line #s		Linux 2.4.1-01 files and line #s	
kernel/os/kern_clock.c	2028-2059	arch/i386/kernel/apic.c	25-28, 662-664, 676-684
kernel/os/kern_clock.c	2028-2059	kernel/timer.c	26-29, 681-683, 688-697
kernel/i386/locore.s	1487-1497	arch/i386/kernel/entry.S	199-205
kernel/i386/trap.c	1554-1563	arch/i386/kernel/traps.c	52-54, 244-247, 331-334, 542-545, 659-662, 718-721
kernel/i386/startup.c	2054	init/main.c	30-33, 609-616

108. Although the actual count of lines of code in each of these contributions appears small, the impact is significant for a number of reasons: (a) In the case of JFS and EVMS, the number of lines that can be conclusively proven with the evidence currently available is shown. There is much more copying that is anticipated to be found in discovery; (b) In the case of RCU, a highly valuable and effective technological improvement can be expressed rather succinctly in computer code; and (c) In most cases, simple changes to code can have far reaching effects, and once the technology is revealed, thousands of developers can apply the technology to a myriad of places in the kernel.

IBM's Coordination of Linux Development Efforts

109. On information and belief, IBM has knowingly induced, encouraged, and enabled others to distribute proprietary information in an attempt to conceal its own legal liability for such distributions:

> What is wrong about this [Linux] distribution, is basically the millions of lines of code that we never have seen. We don't know if there are any patent infringements [in this code] with somebody we don't know. *We don't want to take the risk of being sued for a patent infringement. That is why we don't do distributions, and that's why we have distributors.* Because distributors are not so much exposed as we are. So that's the basic deal as I understand it.

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Karl-Heinz Strassemeyer, IBM The Register, 11/19/2002,
www.theregister.co.uk/content/4/28183.html

110.IBM is affirmatively taking steps to destroy all value of UNIX by improperly extracting

and using the confidential and proprietary information it acquired from UNIX and

dumping that information into the open source community. As part of this effort, IBM has

heavily invested in the following projects to further eliminate the viability of UNIX:

a) The Linux Technology Center was launched in 2001 with the intent and foreseeable

purpose of transferring and otherwise disposing of all or part of UNIX, including its

derivative works, modifications and methods, into an open source Linux environment;

b) The IBM Linux Center of Competency was launched to assist and train financial

services companies in an accelerated transfer of UNIX to Linux with the advertised

intent and foreseeable purpose of transferring and otherwise disposing of all or part of

UNIX, including its derivative works, modifications and methods into open source.

c) A carrier-grade Linux project has been undertaken to use UNIX source code, derivative

works, modifications and methods for the unlawful purpose of transforming Linux into

an enterprise-hardened operating system;

d) A data center Linux project has been undertaken to use UNIX source code, derivative

works, modifications and methods for the unlawful purpose of transforming Linux into

an enterprise-hardened operating system; and

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e) Other projects and initiatives have been undertaken or supported that further evidence the improper motive and means exercised by IBM in its efforts to eliminate UNIX and replace it with free Linux.

109. But for IBM's coordination of the development of enterprise Linux, and the misappropriation of UNIX to accomplish that objective, the Linux development community would not have timely developed enterprise quality software or customer support necessary for widespread use in the enterprise market.

FIRST CAUSE OF ACTION
(Breach of IBM Software Agreement)

110. Plaintiff incorporates and re-alleges paragraphs No. 1-109, above.

111. As set forth above, SCO is the successor to AT&T under that certain Software Agreement originally executed by and between AT&T and IBM designated as SOFT-00015. The 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").

112. 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. 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

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are *treated hereunder as part of the original Software Product.*
[Emphasis added.]

113. IBM has violated §2.01 of the Software Agreement by, *inter alia,* using, and assisting others to use, the Software Products (including System V source code, derivative works, documentation related thereto and methods based thereon) for *external purposes* that are different from, and broader than, IBM's own internal business purposes. By actively supporting, assisting and promoting the transfer of UNIX technology to Linux, and using its access to UNIX technology to accomplish this objective, IBM is (a) using the Software Product for *external business purposes,* which include use for the benefit of Linus Torvalds, the general Linux community and IBM's Linux distribution partners, Red Hat, Inc., Novell, Inc., SuSE Linux AG and their respective subsidiaries; and is (b) directly and indirectly preparing *unauthorized derivative works* based on the Software Products and *unauthorized modifications thereto* in violation of §2.01 of the Software Agreement.

114. In addition, § 2.01 limited use to the United States. This limitation was modified in the Side Letter to include other countries, but at no time was IBM granted the right to use the Software Products (including System V source code, derivative works, modifications, documentation related thereto and methods based thereon) in India. On information and belief, IBM has violated this restriction by allowing the Protected Materials to be used in India.

115. IBM agreed in §2.05 of the Software Agreement to the following additional restrictions on use of the Software Products (including System V source code, derivative works, modifications, documentation related thereto and methods based thereon):

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> 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*.

116. IBM has breached §2.05 of the Software Agreement by, *inter alia*, actively promoting and

allowing use of the Software Products, documentation and development methods related

thereto in an open and hostile attempt to destroy the entire economic value of the Software

Products and plaintiff's rights to protect the proprietary nature of the Software Products.

By way of example and not limitation, IBM has used protected UNIX source code,

documentation, development notes and methods for others in accelerating development of

the 2.4.x kernel and above in, among others, the following areas: (a) scalability

improvements, (b) performance measurement and improvements, (c) serviceability and

error logging improvements, (d) NUMA scheduler and other scheduler improvements, (e)

Linux PPC 32- and 64-bit support, (f) AIX Journaling File System, (g) enterprise volume

management system to other Linux components, (h) clusters and cluster installation,

including distributed lock manager and other lock management technologies, (i) threading,

(j) general systems management functions, and (k) other areas. But for the use by IBM of

these protected UNIX methods in Linux development, the Linux 2.4.x kernel, 2.5.x kernel,

and 2.6.x kernel's capacity to perform high-end enterprise computing functions would be

severely limited.

117. IBM agreed in §7.10 of the Software Agreement to the following restrictions on *transfer*

of the Software Product, including AIX as a derivative work of 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.

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118.IBM has breached §7.10 of the Software Agreement by, *inter alia*, transferring portions of the Software Products (including System V source code, documentation, modifications, derivative works and methods based thereon), 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.

119.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 Software Agreement.

120.IBM agreed in Side Letter ¶9, a substitute provision to §7.06(a) of the Software Agreement, to the following restrictions on *confidentiality* of the Software Product, including AIX as a derivative work of 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.

121.In recognition of SCO's right of confidentiality of the Software Products, 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:

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LMATM is in the process of licensing [AIX] from IBM to be used for integration purposes only. Per the attached supplement to the subject 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).

* * *

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 System 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) or *equivalent SCO Group License.*

122.IBM has 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

(including System V source code, modifications, derivative works and methods based

thereon, together with documentation and development notes) to open source development

of Linux and by using UNIX development methods, programming notes, change logs and

other documentation in making modifications to Linux 2.4.x kernel and above, which are,

in material part, unauthorized derivative works of the Software Product. These include,

among others, (a) scalability improvements, (b) performance measurement and

improvements, (c) serviceability and error logging improvements, (d) NUMA scheduler

and other scheduler improvements, (e) Linux PPC 32- and 64-bit support, (f) AIX

Journaling File System, (g) enterprise volume management system to other Linux components, (h) clusters and cluster installation, including distributed lock manager and other lock management technologies, (i) threading, (j) general systems management functions, and (k) others.

123.IBM has further stated its intention to transfer the entirety of AIX into open source in anticipatory violation of its obligations under §7.06 (a) of the Software Agreement.

124.Export of UNIX technology is controlled by the United States government. Thus, SCO, IBM and all other UNIX vendors are subject to strict export control regulations with respect to any UNIX-based customer distribution. To this end, IBM agreed in §4.01 of the Software Agreement to restrictions on *export* of the Software Product (including System V source code, derivative works, modifications, and methods based thereon), 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.

This provision was later modified to allow export rights to several countries outside the United States. However, no permission has ever been granted by SCO or its predecessors to IBM to allow it to indirectly make available all or portions of the Software Product to countries outside the United States that are subject to strict technology export control by the United States government: *viz.*, Cuba, Iran, Syria, North Korea and Libya. IBM is ignoring and attempting to circumvent the export control restrictions that apply to UNIX as it accelerates development of Linux for enterprise use.

125.Thus, IBM has breached §4.01 of the Software Agreement by, *inter alia*, making extensive, advanced multiprocessor scaling functions of the Software Product, including

derivative works and methods based thereon, available for free distribution to anyone in the world with a computer. As it relates to Linux 2.4.x and above releases, IBM is indirectly making the Software Product and operating system modifications available to countries and organizations in those countries for scaling single processor computers into multi-processor supercomputers that can be used for encryption, scientific research and weapons research.

126. IBM was 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, Amendment X, ¶3.7, 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 Amendment [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).

127. As is made perfectly clear in ¶3.7 of Amendment X, 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,

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AIX, and Dynix/ptx for use in a competing operating system (i.e. Linux) in violation of its obligations to SCO.

128.SCO has the self-executing contractual right to terminate IBM's right to use and distribute the Software Product, including derivative works and methods based thereon, if IBM fails to fulfill one or more of its obligations under the Software Agreement. This authority is contractually granted under the following provisions of the IBM Related Agreements:

> 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. [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]

129. Consistent with these rights, on March 6, 2003, plaintiff 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.

130. Following delivery of the AIX Termination Notice, plaintiff took every reasonable step to meet and confer with IBM regarding IBM's breach of the Software Agreement and Related Agreements.

131. IBM has 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, the IBM Related Agreements are terminated and IBM has no further rights thereunder.

132. 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.

133. 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."

134. As a result of IBM's breaches before termination, SCO has been damaged in the marketplace for violations by IBM in an amount to be proven at trial, but not less than $1 billion.

135. In addition, and to the extent that IBM continues to completely repudiate its obligations regarding the Software Product, plaintiff will sustain substantial continuing and ongoing

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damages. These damages include the full amount IBM receives as a result of its ongoing sales of AIX, including software, services and hardware.

136. Moreover, if IBM does not return or destroy all source and binary copies of the Software Products and/or continues to contribute some or all of these protected materials to open source, SCO will be irreparably harmed. As a result, SCO is entitled to a permanent injunction requiring IBM to return or destroy all source code and binary copies of the Software Products and/or prohibiting IBM from further contributions of the protected Software Products into open source.

SECOND CAUSE OF ACTION
(Breach of IBM Sublicensing Agreement)

137. Plaintiff incorporates and re-alleges paragraphs No. 1-136, above.

138. As set forth above, 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 Sublicensing Agreement grants the right to *distribute object-based code* of UNIX System V and modifications thereto and derivative works based thereon.

139. SCO has terminated IBM's right to use and distribute the Software Product, including derivative works and methods based thereon as of the AIX Termination Date, June 13, 2003.

140. From and after the AIX Termination Date, any and all distributions of AIX by IBM are in violation of the Sublicensing Agreement.

141. IBM has disregarded and continues to completely disregard and repudiate its obligations under the Sublicensing Agreement, to plaintiff's substantial, continuing and ongoing

damage. These damages include the full amount IBM receives as a result of its ongoing sales of AIX, including software, services and hardware.

142. Moreover, if IBM does not return or destroy all source and binary copies of the Software Products and/or continues to contribute some or all of these protected materials to open source, SCO will be irreparably harmed. As a result, SCO is entitled to a permanent injunction requiring IBM to return or destroy all source code and binary copies of the Software Products and/or prohibiting IBM from further contributions of the protected Software Products into open source.

THIRD CAUSE OF ACTION
(Breach of Sequent Software Agreement)

143. Plaintiff incorporates and re-alleges paragraphs No. 1-142, above.

144. As set forth above, SCO is the successor to AT&T under that certain Software Agreement originally executed by and between AT&T and Sequent designated as SOFT-000321. The 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/Sequent based on UNIX System V (collectively, the "Software Products").

145. With respect to the rights granted for use of the System V source code under Section 2.01 of the 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 CPUs 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

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are *treated hereunder as part of the original Software Product.*
[Emphasis added.]

146. IBM has violated §2.01 of the Sequent Software Agreement by, *inter alia*, modifying and

assisting others to modify the Software Products (including System V source code,

derivative works, documentation related thereto and methods based thereon) for purposes

other than Sequent and/or IBM's own internal business purposes. By actively supporting,

assisting and promoting the transfer from UNIX to Linux, and using its access to UNIX

technology to accomplish this objective, IBM is (a) using the Software Product for

external business purposes, which include use for the benefit of the Open Source

Development Laboratory ("OSDL"), IBM's various joint venture partners in OSDL, Linus

Torvalds, the general Linux community and IBM's Linux distribution partners, Red Hat,

Inc., Novell, Inc. and SuSE Linux AG and their respective subsidiaries; and is (b) directly

and indirectly preparing *unauthorized derivative works* based on the Software Product and

unauthorized modifications thereto in violation of §2.01 of the Sequent Software

Agreement.

147. In addition, § 2.01 limited use to the United States. At no time was Sequent granted the

right to use the Software Products (including System V source code, derivative works,

modifications, documentation related thereto and methods based thereon) in India. On

information and belief, IBM has violated this restriction by allowing the Protected

Materials to be used in India.

148. Sequent agreed in §2.05 of the Sequent Software Agreement to the following restrictions on *use* of the Software Products (including System V source code, modifications, derivative works, documentation related thereto and methods based thereon):

> 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.*

149. IBM has breached Sequent's obligations under §2.05 of the Sequent Software Agreement by, *inter alia*, actively promoting and allowing use of the Software Products and development methods related thereto in an open and hostile attempt to destroy the entire economic value of the Software Products and plaintiff's rights to protect the proprietary nature of the Software Products. Particularly, IBM has caused all or materially all of Dynix/ptx-based NUMA source code and methods, and RCU source code and methods, to be used for the benefit of Linux. But for the use by IBM of these protected UNIX methods in Linux development, the Linux 2.4.x kernel through 2.6.x kernel's capacity to perform high-end enterprise computing functions would be severely limited.

150. 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 2.4.x:

> 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 will be useful, but WITHOUT ANY WARRANTY; without even the implied warranty of MERCHANTABILITY or FITNESS FOR A PARTICULAR

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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).

151. 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 Sequent Software Agreement.

152. Sequent agreed in §7.10 of the Sequent Software Agreement to the following restrictions on *transfer* of the Software Product, including Dynix/ptx as a derivative work of 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.

153. IBM has breached Sequent's obligations under §7.10 of the Sequent Software Agreement by, *inter alia*, transferring portions of the Software Product (including System V source code, modifications, derivative works and methods based thereon), including Dynix/ptx source code, documentation and methods for NUMA, RCU and SMP technologies, 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.

154. Sequent agreed under §7.06(a) of the Sequent Software Agreement, to the following restrictions on *confidentiality* of the Software Product, including Dynix/ptx as a derivative work of 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

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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.

155. IBM has breached Sequent's obligation of confidentiality by contributing portions of the Software Product (including System V source code, derivative works, modifications, and methods based thereon) to open source development of Linux and by using UNIX development methods in making modifications to Linux 2.4.x kernel and above, which are in material part, unauthorized derivative works of the Software Product, including but not limited to Dynix/ptx-based NUMA technology, source code and methods, RCU source code and methods, and SMP source code and methods.

156. 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 Software Agreement to restrictions on *export* of the Software Product (including System V source code, derivative works, documentation related thereto and methods based thereon), 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.

No permission has ever been granted by SCO or its predecessors to Sequent to allow it to directly or indirectly make available all or portions of the Software Product to countries outside the United States that are subject to strict technology export control by the United

States government: *viz.*, Cuba, Iran, Syria, North Korea and Libya. IBM is ignoring and attempting to circumvent the export control restrictions that apply to UNIX as it accelerates development of Linux for enterprise use.

157. Thus, IBM has breached §4.01 of the Sequent Software Agreement by, *inter alia*, making extensive, advanced multiprocessor scaling functions of the Software Product, including NUMA technology, RCU technology, SMP technology and other derivative works and methods based thereon, available for free distribution to anyone in the world with a computer. As it relates to Linux 2.4.x and above releases, IBM is indirectly making the Software Product and operating system modifications, particularly NUMA technology, RCU technology and SMP technology, available to countries and organizations in those countries for scaling single processor computers into multi-processor supercomputers that can be used for encryption, scientific research and weapons research.

158. SCO has the self-executing, contractual right to terminate IBM's right to use and distribute the Software Product, including modifications, derivative works and methods based thereon, if IBM fails to fulfill one or more of its obligations under the Software Agreement. This authority is contractually granted under the following provisions of the Sequent Agreements:

> 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. [Software Agreement, §6.03]

159. Consistent with these rights, plaintiff delivered a notice of termination to Sequent (the "Dynix/ptx Termination Notice") for IBM's breaches of the Software (and Sublicensing) Agreement.

160. Following delivery of the Dynix Termination Notice, IBM did not respond during the two months provided to cure.

161. IBM has 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, the Sequent Agreements were terminated and IBM has no further rights thereunder.

162. 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.

163. 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."

164. As a result of IBM's breaches before termination, SCO has been damaged in the marketplace for violations by IBM in an amount to be proven at trial, but not less than $1 billion.

165. In addition, and to the extent that IBM continues to completely repudiate its obligations under the Sequent Agreements regarding the Software Product, plaintiff will sustain substantial continuing and ongoing damages. These damages include the full amount IBM

receives as a result of its ongoing sales of Dynix/ptx, including software, services and hardware.

166.Moreover, if IBM does not return or destroy all source and binary copies of the Software Products received pursuant to the Sequent Agreements and/or continues to contribute some or all of these Protected Materials to open source, SCO will be irreparably harmed. As a result, SCO is entitled to a permanent injunction requiring IBM to return or destroy all source code and binary copies of the Software Products and/or prohibiting IBM from further contributions of the protected Software Products into open source.

FOURTH CAUSE OF ACTION
(Breach of Sequent Sublicensing Agreement)

167.Plaintiff incorporates and re-alleges paragraphs No. 1-166, above.

168.As set forth above, SCO is the successor to AT&T under that certain Sequent Sublicensing Agreement originally executed by and between AT&T and Sequent designated as SUB-000321A. The Sequent Sublicensing Agreement grants the right to distribute *object-based code* of UNIX System V and modifications thereto and derivative works based thereon.

169.SCO has 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.

170.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 Sequent Sublicensing Agreement.

171. IBM has disregarded and continues to completely disregard and repudiate Sequent's obligations under the Sequent Sublicensing Agreement, to plaintiff's substantial, continuing and ongoing damage. These damages include the full amount IBM receives as a result of its ongoing sales of Dynix/ptx, including software, services and hardware.

172. Moreover, if IBM does not return or destroy all source and binary copies of the Software Products and/or continues to contribute some or all of these protected materials to open source, SCO will be irreparably harmed. As a result, SCO is entitled to a permanent injunction requiring IBM to return or destroy all source code and binary copies of the Software Products and/or prohibiting IBM from further contributions of the protected Software Products into open source.

FIFTH CAUSE OF ACTION
(Copyright Infringement)

173. Plaintiff incorporates and re-alleges paragraphs No. 1-172, above.

174. As set forth above, SCO is the successor in interest to the IBM Related Agreements and the Sequent Agreements.

175. Despite termination of such Agreements, IBM has continued to reproduce, prepare derivative works of, and distribute UNIX software, source code, object code, programming tools, and documentation related to UNIX operating system technology, and has induced others to do the same.

176. SCO is the owner of copyright rights to UNIX software, source code, object code, programming tools, documentation related to UNIX operating system technology, and derivative works thereof. These materials are covered by numerous copyright registrations

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issued by the United States Copyright Office (the "Copyrighted Programs"). These registrations have been obtained by SCO and its predecessors in interest and are owned by SCO. For example, included among such registrations (attached as Exhibits H toU) are the following:

	Title	Registration Number	Registration Date
H	UNIX Operating System Edition 5 and Instruction Manual	TXU-510-028	March 25, 1992
I	UNIX Operating System Edition 6 and Instruction Manual	TXu-511-236	April 7, 1992
J	UNIX Operating System Edition 32V and Instruction Manual	TXu-516-704	May 15, 1992
K	UNIX Operating System Edition 7 and Instruction Manual	TXu-516-705	May 15, 1992
L	Operating System Utility Programs	TXu-301-868	November 25, 1987
M	UNIXWARE 7.1.3	TX 5-787-679	June 11, 2003
N	UNIX SYSTEM V RELEASE 3.0	TX 5-750-270	July 7, 2003
O	UNIX SYSTEM V RELEASE 3.1	TX 5-750-269	July 7, 2003
P	UNIX SYSTEM V RELEASE 3.2	TX 5-750-271	July 7, 2003
Q	UNIX SYSTEM V RELEASE 4.0	TX 5-776-217	July 16, 2003
R	UNIX SYSTEM V RELEASE 4.1ES	TX 5-705-356	June 30, 2003
S	UNIX SYSTEM V RELEASE 4.2	TX 5-762-235	July 3, 2003
T	UNIX SYSTEM V RELEASE 4.1	TX 5-762-234	July 3, 2003
U	UNIX SYSTEM V RELEASE 3.2	TX 5-750-268	July 9, 2003

177.SCO and its predecessors in interest created the Copyrighted Programs as original works of authorship, and, as such, the Copyrighted Programs constitute copyrightable subject matter under the copyright laws of the United States. The Copyrighted Programs were automatically subject to copyright protection under 17 U.S.C. § 102(a) when such programs were fixed in a tangible medium of expression. Copyright protection under 17 U.S.C. § 106 extends to derivative works which are defined in 17 U.S.C. §101 to include

works based on the original work or any other form in which the original work may be recast, transformed, modified or adapted.

178.Pursuant to 17 U.S.C. §410 (c), the certificates of copyright registrations for each Copyrighted Program constitute *prima facie* evidence of the validity of the copyrights and of the facts stated in the certificates. SCO and its predecessors' registered copyrights in the Copyrighted Programs are entitled to such statutory presumptions.

179.IBM's breaches of the IBM Related Agreements and the Sequent Agreements and its post-termination actions have infringed, have induced infringement of, and have contributed to the infringement of, copyright registrations of SCO and its predecessors. Such actions have been willful and have been done with knowledge of the copyright rights of SCO.

180.SCO has been damaged by IBM's conduct and has no adequate remedy at law. IBM's conduct has caused, and, if not enjoined, will continue to cause, irreparable harm to SCO. As a result of IBM's wrongful conduct, SCO is entitled to injunctive relief pursuant to 17 U.S.C. § 502 and SCO's actual damages and IBM's profits as a result of the infringing acts pursuant to 17 U.S.C. § 504 (a), statutory damages to the extent applicable pursuant to 17 U.S.C. § 504 (b) and enhanced damages, together with attorneys' fees and costs pursuant to 17 U.S.C. § 505.

SIXTH CAUSE OF ACTION
(Unfair Competition)

181.Plaintiff incorporates and re-alleges paragraphs No. 1-180, above.

182. Plaintiff and its predecessors have built the UNIX System V Technology, the UNIX Software Code, SCO OpenServer, UnixWare and their derivatives through very substantial efforts over a time span in excess of 20 years and expenditure of money in excess of $1 billion.

183. IBM has engaged in a course of conduct that is intentionally and foreseeably calculated to undermine and/or destroy the economic value of UNIX anywhere and everywhere in the world, and to undermine and/or destroy plaintiff's rights to fully exploit and benefit from its ownership rights in and to UNIX System V Technology, the UNIX Software Code, SCO OpenServer, UnixWare and their derivatives, and thereby seize the value of UNIX System V Technology, the Unix Software Code, SCO OpenServer, UnixWare and their derivatives directly for its own benefit and indirectly for the benefit of its Linux distribution partners.

184. In furtherance of its scheme of unfair competition, IBM has engaged in the following conduct:

a) Misappropriation of source code, methods, and confidential information of plaintiff;

b) Breach of contract;

c) Violation of confidentiality provisions running to the benefit of plaintiff;

d) Inducing and encouraging others to violate confidentiality provisions;

e) Contribution of protected source code and methods for incorporation into one or more Linux software releases, intended for transfer of ownership to the general public;

f) Use of deceptive means and practices in dealing with plaintiff with respect to its software development efforts; and

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g) Other methods of unlawful and/or unfair competition.

185. IBM's unfair competition has directly and/or proximately caused significant foreseeable and consequential harm to plaintiff in the following particulars:

a) Plaintiff's revenue stream from UNIX licenses for Intel-based processing platforms has decreased substantially;

b) As Intel-based processors have now become the processing platform of choice for a rapidly-increasing customer base of enterprise software users, plaintiff has been deprived of the opportunity to fairly exploit its market-leading position for UNIX on Intel-based processors, which revenue opportunity would have been very substantial on a recurring, annual basis but for IBM's unfairly competitive practices;

c) Plaintiff stands at imminent risk of being deprived of its entire stream of all UNIX licensing revenue in the foreseeably near future;

d) Plaintiff has been deprived of the effective ability to market and sell its new UNIX-related improvements, including a 32-bit version of UNIX for Intel processors developed prior to Project Monterey, and its new web-based UNIX-related products, including UNIX System V Release 6;

e) Plaintiff has been deprived of the effective revenue licensing opportunity to transfer its existing UNIX System V Release 4 and Release 5 customer base to UNIX System V Release 6; and

f) Plaintiff has been deprived of the effective ability to otherwise fully and fairly exploit UNIX's market-leading position in enterprise software market, which deprivation is

highly significant given the inability of Microsoft Windows to properly support large-scale enterprise applications.

186. As a result of IBM's unfair competition and the marketplace injury sustained by plaintiff as set forth above, plaintiff has suffered damages in an amount to be proven at trial, but no less than $1 billion, together with additional damages through and after the time of trial foreseeably and consequentially resulting from IBM's unfair competition in an amount to be proven at the time of trial.

188. IBM's unfairly competitive conduct was also intentionally and maliciously designed to destroy plaintiff's business livelihood and all opportunities of plaintiff to derive value from its UNIX-based assets in the marketplace. As such, IBM's wrongful acts and course of conduct has created a profoundly adverse effect on UNIX business worldwide. As such, this Court should impose an award of punitive damages against IBM in an amount to be proven and supported at trial.

SEVENTH CAUSE OF ACTION
(Interference with Contract)

187. Plaintiff incorporates and re-alleges by reference paragraphs 1-186, above.

188. SCO has contracts with customers around the world for licensing of SCO OpenServer and UnixWare.

189. IBM knew, or should have known, of these corporate software licensing agreements between SCO and its customers, including the fact that such agreements contain confidentiality provisions and provisions limiting the use of the licensed object-based code.

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190.IBM, directly and through its Linux distribution partners, has intentionally and without justification induced SCO's customers and licensees to breach their corporate licensing agreements, including but not limited to, by inducing the customers to reverse engineer, decompile, translate, create derivative works, modify or otherwise use the UNIX software in ways that violate the license agreements. These customers include Sherwin Williams, Auto Zone, and others.

191.IBM's tortious interference has directly and/or proximately caused significant foreseeable damages to SCO, including a substantial loss of revenues.

192.IBM's tortious conduct was also intentionally and maliciously designed to destroy plaintiff's business livelihood and all opportunities of plaintiff to derive value from its UNIX-based assets in the marketplace. As such, this Court should impose an award of punitive damages against IBM in an amount to be proven and supported at trial.

EIGHTH CAUSE OF ACTION
(Interference with Contract)

193.Plaintiff incorporates and re-alleges by reference paragraphs 1- 192, above.

194.Through an Asset Purchase Agreement dated September 19, 1995, as amended ("Asset Purchase Agreement," attached hereto with amendments as Exhibit "V") wherein Novell received 6.1 million shares of SCO common stock, valued at the time at over $100 million in consideration, 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.

195.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 reference manuals and support materials normally distributed by [Novell] to end-users and potential end-users in connection with the distribution 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.

(Exh. V, at Schedule 1.1(a) I and II)

196.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." (Exh. V, Amendment No. 2 to the Asset Purchase Agreement dated October 16, 1996 at 1).

197.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, attached hereto as Exhibit E.

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198.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.

199.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.

200.In addition, IBM intentionally and improperly interfered with the Asset Purchase Agreement by inducing or otherwise causing Novell to violate the Asset Purchase Agreement by claiming Novell could waive and was waiving breaches of license agreements by various licensees, including IBM. Specifically, with the IBM Termination Date looming only days away, Novell wrote to SCO claiming that either SCO must waive its right to terminate IBM's license based upon IBM's numerous breaches thereof or else Novell would purportedly waive SCO's right to terminate the license and otherwise excuse IBM's numerous breaches of the license agreements.

201.Again, Novell's position, improperly encouraged and induced by IBM, is flatly contrary to the terms of the Asset Purchase Agreement.

202.Under the Asset Purchase Agreement, Novell merely retained an interest in receiving future royalties from System V licensees. SCO, conversely, obtained "all of Sellers' 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."

203. 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.

204. As a beneficiary of the royalties, Novell arguably can modify or waive the royalty amounts due under a license agreement. However, at IBM's improper urging and inducement, Novell now claims that it can amend, modify or waive any and all terms of the software and sublicensing agreements. Thus, according to Novell's position prompted by IBM, if a licensee such as IBM is egregiously breaching its 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 over $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 the royalties to which Novell was entitled, Novell cannot waive rights it clearly unequivocally sold to SCO (*i.e.* the 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.

205.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 so that Novell can complete the purchase of SuSE, the largest Linux distributor in Europe.

206.IBM's tortious interference has directly and/or proximately caused significant foreseeable damages to SCO.

207.IBM's tortious conduct was also intentionally and maliciously designed to destroy plaintiff's business livelihood and all opportunities of plaintiff to derive value from its Unix based assets in the marketplace. As such, this Court should impose and award punitive damages against IBM in an amount to be proved and supported at trial.

NINTH CAUSE OF ACTION
(Interference with Business Relationships)

208.Plaintiff incorporates and re-alleges by reference paragraphs 1- 207, above.

209.SCO had existing or potential economic relationships with a variety of companies in the computer industry, including but not limited to Hewlett Packard.

210.IBM has intentionally interfered with plaintiff's existing or potential economic relations. For example, at Linux World in January, 2003 IBM representatives contacted various companies with whom SCO had existing or potential economic relations. These IBM representatives said that IBM was discontinuing doing business with SCO and that these

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other companies, some of whom are business partners with IBM, also should discontinue doing business with SCO.

211. IBM, as the world's largest information technology company, as well as the world's largest business and technology services provider ($36 billion), and the world's largest IT financier ($35 billion in assets), has considerable clout with these companies that it told to stop doing business with SCO.

212. IBM's intentional interference was for an improper purpose and/or by improper means.

213. IBM's intentional interference has directly and/or proximately caused significant foreseeable damages to SCO.

214. IBM's tortious conduct was also intentionally and maliciously designed to destroy plaintiff's business livelihood. As such, this Court should impose an award of punitive damages against IBM in an amount to be proved and supported at trial.

WHEREFORE, having fully set forth its complaint, plaintiff prays for relief from this Court as follows:

1. Under the First Cause of Action, damages for breach of the IBM Software Agreement in an amount not less than $1 billion, together with additional damages through and after the time of trial foreseeably and consequentially resulting from IBM's breach, in an amount to be proven at the time of trial; and together with a permanent injunction requiring IBM to return or destroy all source code and binary copies of the Software Products and/or prohibiting IBM from further contributions of the protected Software Products into open source; and for restitution in an amount measured by the benefits conferred upon IBM by its ongoing, improper use of the Software Products, including the full amount IBM receives as a result of

its ongoing sales of AIX, including software, services and hardware; and for attorneys fees and costs;

2. Under the Second Cause of Action, damages for breach of the IBM Sublicensing Agreement in an amount not less than $1 billion, together with additional damages through and after the time of trial foreseeably and consequentially resulting from IBM's breach, in an amount to be proven at the time of trial; and together with a permanent injunction requiring IBM to return or destroy all source code and binary copies of the Software Products and/or prohibiting IBM from further contributions of the protected Software Products into open source; and for restitution in an amount measured by the benefits conferred upon IBM by its ongoing, improper use of the Software Products, including the full amount IBM receives as a result of its ongoing sales of AIX, including software, services and hardware; and for attorneys fees and costs;

3. Under the Third Cause of Action, damages for breach of the Sequent Software Agreement in an amount not less than $1 billion, together with additional damages through and after the time of trial foreseeably and consequentially resulting from IBM's breach, in an amount to be proven at the time of trial; and together with a permanent injunction requiring IBM to return or destroy all source code and binary copies of the Software Products and/or prohibiting IBM from further contributions of the protected Software Products into open source; and for restitution in an amount measured by the benefits conferred upon IBM by its ongoing, improper use of the Software Products, including the full amount IBM receives as a result of its ongoing sales of Dynix/ptx, including software, services and hardware; and for attorneys fees and costs;

4. Under the Fourth Cause of Action, damages for breach of the Sequent Sublicensing Agreement in an amount not less than $1 billion, together with additional damages through and after the time of trial foreseeably and consequentially resulting from IBM's breach, in an amount to be proven at the time of trial; and together with a permanent injunction requiring IBM to return or destroy all source code and binary copies of the Software Products and/or prohibiting IBM from further contributions of the protected Software Products into open source; and for restitution in an amount measured by the benefits conferred upon IBM by its ongoing, improper use of the Software Products, including the full amount IBM receives as a result of its ongoing sales of Dynix/ptx, including software, services and hardware; and for attorneys fees and costs;

5. Under the Fifth Cause of Action, injunctive relief pursuant to 17 U.S.C. § 502 and SCO's actual damages and IBM's profits as a result of the infringing acts pursuant to 17 U.S.C. § 504 (a), statutory damages to the extent applicable pursuant to 17 U.S.C. § 504 (b) and enhanced damages, together with attorneys' fees and costs pursuant to 17 U.S.C. § 505

6. Under the Sixth Cause of Action, for damages in an amount not less than $1 billion, for unfair competition arising from common law, and damages for violations thereof, together with additional damages through and after the time of trial;

7. Under the Seventh through Ninth Causes of Action, for damages in an amount to be proven at trial for tortious interference, together with additional damages through and after the time of trial;

8. For a permanent injunction to prohibit IBM from further contributions of the protected Software Products into open source;
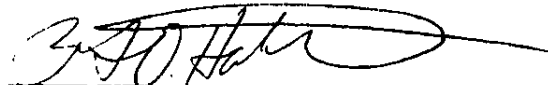
9. For punitive damages under the Sixth through Ninth Causes of Action for IBM's malicious and willful conduct, in an amount to be proven at trial;

10. For attorneys' fees and costs as provided by statute and/or by contract in an amount to be proven at trial; together with pre- and post-judgment interest and;

11. For all other legal and equitable relief deemed just and proper by this Court.

Jury Trial Demand

SCO demands trial by jury on all issues so triable.

DATED THIS _27_ th day of February, 2004

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

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

Attorneys for The SCO Group, Inc.

Plaintiff's address:

355 South 520 West
Lindon, Utah 84042

CERTIFICATE OF SERVICE

The undersigned attorney for Plaintiff The SCO Group hereby certifies that on this 27th

day of February 2004, a true and correct copy of the following:

- *Second Amended Complaint*

was served on the following by the indicated method of service:

By **Hand Delivery** to:

Todd Shaughnessy, Esq.
Snell & Wilmer L.L.P
15 West South Temple, Ste. 1200
Gateway Tower West
Salt Lake City, UT 84101

And by **Regular Mail** to:

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Brent O. Hatch
HATCH, JAMES & DODGE
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT

CENTRAL DIVISION, DISTRICT OF UTAH

THE SCO GROUP INC.	:	Case No. 2:03cv00294 DK
Plaintiff,	:	
	:	
vs.	:	ORDER GRANTING
		INTERNATIONAL BUSINESS
INTERNATIONAL BUSINESS MACHINES CORP.		MACHINE'S MOTIONS TO COMPEL DISCOVERY AND REQUESTS FOR PRODUCTION OF DOCUMENTS
Defendant.		

Defendant/Couterclaim-Plaintiff International Business Machines Corporation's (IBM's) First and Second Motions to Compel Discovery having come before this Court, and the Court having read the corresponding memoranda submitted by both parties, and having heard oral argument on pertinent matters at a hearing on December 5, 2003, hereby enters the following Order

The Court, finding good cause shown, **GRANTS** IBM's First and Second Motions to Compel Discovery.

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In accordance with the Court's order Plaintiff/Counterclaim-Defendant The SCO Group, Inc. (SCO) is hereby ORDERED:

1. To respond fully and in detail to Interrogatory Nos. 1-9 as stated in IBM's First Set of Interrogatories.

2. To respond fully and in detail to Interrogatory Nos. 12 and 13 as stated in IBM's Second Set of Interrogatories.

3. IBM is to provide SCO a list of requested documents as stated in IBM's First and Second Requests for the Production of Documents and SCO is to produce all requested documents.

4. To identify and state with specificity the source code(s) that SCO is claiming form the basis of their action against IBM. This is to include identification of all Bates numbered documents previously provided.

5. To the extent IBM's requests call for the production of documents or are met by documents SCO has already provided, SCO is to identify with specificity the location of responsive answers including identification of the Bates numbered documents previously provided if applicable.

6. If SCO does not have sufficient information in its possession, custody, or control to specifically answer any of IBM's requests that are the subject of this order, SCO shall provide an affidavit setting forth the full nature of its efforts, by whom they were taken, what further efforts it intends

to utilize in order to comply, and the expected date of compliance.
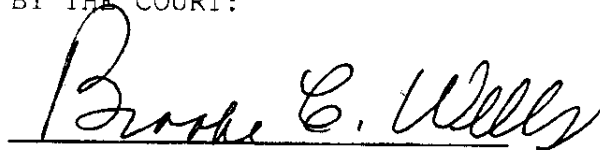
SCO is required to provide such answers and documents within thirty days from the date of this order.

All other discovery, including SCO's Motion to Compel is hereby STAYED until this Court determines that SCO has fully complied with this Order.

The Court will hold a hearing on the forgoing issues January 23, 2004 at 10:00 a.m.

DATED this 12th day of December, 2003.

BY THE COURT:

_____
BROOKE C. WELLS
United States Magistrate Judge

United States District Court
for the
District of Utah
December 12, 2003

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cv-00294

True and correct copies of the attached were either mailed, faxed or e-mailed
by the clerk to the following:

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EXHIBIT L

IN THE UNITED STATES DISTRICT COURT

CENTRAL DIVISION, DISTRICT OF UTAH

THE SCO GROUP INC.	:	Case No. 2:03cv00294 DK
Plaintiff,	:	
	:	ORDER REGARDING SCO'S
vs.		MOTION TO COMPEL DISCOVERY AND IBM'S MOTION TO COMPEL
INTERNATIONAL BUSINESS MACHINES CORP.		DISCOVERY
Defendant.		

On February 6, 2004, the Court heard arguments regarding SCO

Group Incorporated's (SCO) compliance with the Court's prior

order of December 12, 2003. The Court also heard argument on

SCO's Motion to Compel Discovery. SCO was represented by Mark

Heise, Brent Hatch and Kevin McBride. International Business

Machines Corporation (IBM) was represented by David Marriot, Todd

Schaughnessy, Chris Chow and Amy Sorenson.

The Court having heard argument, having read the parties'

memoranda, having considered relevant case law, and finding good

cause shown, hereby enters the following Orders:

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I. SCO

Plaintiff/Counterclaim-Defendant SCO is hereby ORDERED:

1. To fully comply within 45 days of the entry of this order with the Court's previous order dated December 12, 2003. This is to include those items that SCO had difficulty in obtaining prior to the Court's previously ordered deadline of January 12, 2004.

2. As previously ordered, SCO is to provide and identify all specific lines of code that IBM is alleged to have contributed to Linux from either AIX or Dynix. This is to include all lines of code that SCO can identify at this time.

3. SCO is to provide and identify all specific lines of code from Unix System V from which IBM's contributions from AIX or Dynix are alleged to be derived.

4. SCO is to provide and identify with specificity all lines of code in Linux that it claims rights to.

5. SCO is to provide and identify with specificity the lines of code that SCO distributed to other parties. This is to include where applicable the conditions of release, to whom the code was released, the date and under what circumstances such code was released.

II. IBM

In light of what the Court considers SCO's good faith
efforts to comply with the Court's prior order, the Court lifts
the discovery stay it previously imposed.

Rule 26(b)(1) of the Federal Rules of Civil Procedure states
in relevant part: "Parties may obtain discovery regarding any
matter, not privileged, which is relevant to the subject matter
involved in the pending action . . . . The information sought
need not be admissible at the trial if the information sought
appears reasonably calculated to lead to the discovery of
admissible evidence." Fed. R. Civ. P. 26(b)(1). This rule has
been interpreted broadly by the United States Supreme Court. See
Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351, 98 S. Ct.
2380 (1978). "[A]t the discovery stage, the concept of relevance
should be construed very broadly." Gohler, IRA, et al. v. Wood
et al., 162 F.R.D. 691, 695 (D. Utah 1995). However, a court may
limit discovery where "the discovery sought is . . . obtainable
from some other source that is more convenient, less burdensome,
or less expensive." Fed. R. Civ. P. 26(b)(2)(i). A court may
also limit discovery if "the burden or expense of the proposed
discovery outweighs its likely benefit." Fed. R. Civ. P.
26(b)(2)(iii).

Based on the Court's decision to lift the discovery stay and
because relevance should be construed broadly at the discovery

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stage, IBM is hereby ORDERED:

1. To provide the releases of AIX and Dynix consisting of "about 232 products" as was represented by Mr. Marriott at the February 6, 2004 hearing. The releases are to be provided within 45 days of the entry of this order. Following this production, SCO is to provide additional memoranda to the Court indicating if and how these files support its position and how they are relevant. The memorandum is to include with specificity, and to the extent possible, identification of additional files SCO requests and the reasons for such requests. The Court will then consider ordering IBM to produce more code from AIX and Dynix. See American Medical Systems, Inc. v. National Union Fire Ins. Co., 1999 WL 562738, p. 2-3 (ordering a party to first "procure relevant documents" and then reconsidering the discovery request for the production of more documents).

2. Pursuant to Rule 26(b), SCO should use its best efforts to obtain relevant discovery from the Linux contributions that are known to the public, including those contributions publicly known to be made by IBM. IBM, however, is hereby ordered to provide to SCO any and all non-public contributions it has made to Linux.

3. IBM is to provide documents and materials generated by, and in possession of employees that have been and that are

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currently involved in the Linux project.[1]   IBM is to include

materials and documents from executives including inter alia, Sam

Palmisano and Irving Wladawsky-Berger.   Such materials and

documents are to include any reports, materials or documents from

IBM's "ambitious Linux strategy."   Steve Lohr, A Mainstream Gian

Goes Countercultural; I.B.M.'s Embrace of Linux Is a Bet That It

Is the Software of the Future, N.Y. Times, March 20, 2000,

Business/Financial Desk.   The Court finds these materials are

relevant because they may contain information regarding the use

or alleged misuse of source code by IBM in its contributions to

Linux.

5.   IBM is ordered to provide further responses to SCO's

interrogatory numbers two, five and eleven.   These responses are

to include relevant information from all sources including top

level management.

6.   SCO seeks the proper identification of approximately

7,200 potential witness identified by IBM.   IBM in its memoranda

suggested that the parties might be able to reach some sort of an

agreement as to the most important prospective trial witnesses

and then IBM would provide the full contact information for these

individuals.   The Court orders IBM to properly identify a

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[1]   Although not part of SCO's official written motion, SCO
raised these discovery issues at oral argument and also alleged
in its written memoranda that IBM failed to adequately respond to
interrogatories and document requests that are the subject of
these discovery items.

representative sample of the potential witnesses that is to include a 1000 of the most important prospective trial witnesses as agreed upon by SCO and IBM. Following the production of this information, the Court will consider the need for the proper identification of additional witnesses.

III. Both Parties

At the hearing on February 6, 2004, SCO represented that IBM failed to provide source logs that identify how documents were kept in the ordinary course of business pursuant to Rule 34(b). The Court orders both SCO and IBM to provide source logs according to Rule 34(b) for those materials produced in discovery.

Both SCO and IBM are to provide to the Court an affidavit detailing their respective efforts in complying with this order. These affidavits should also contain a statement that the respective answers and materials provided are given to the best of each parties' knowledge and are complete, detailed and thorough.
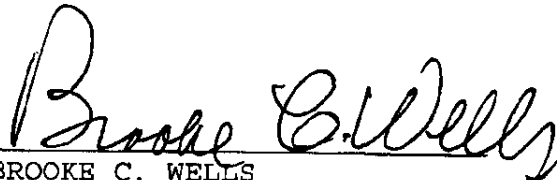
In light of the Court's order granting SCO's motion to file an amended complaint, and IBM's answer to SCO's second amended complaint, the Court hereby orders:

Both SCO and IBM are to file additional memoranda with the Court addressing the impact, if any, of the second amended

complaint and IBM's subsequent answer on IBM's Motion to Strike

the 5th, 15th, and 19th Affirmative Defenses asserted by the SCO

Group in its Answers to IBM' Amended Counterclaims. Because this

is IBM's motion, IBM is to file its initial memoranda with the

Court within 60 days of the entry of this order. SCO will then

have 15 days to respond after IBM's filing. IBM will have 7 days

following SCO's response to file a reply. Following the

additional briefing, the Court will contact the parties to

schedule a hearing regarding IBM's motion to strike SCO's

affirmative defenses.

DATED this ___3rd___ day of March, 2004.

BY THE COURT:

BROOKE C. WELLS
United States Magistrate Judge

United States District Court
for the
District of Utah
March 3, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cv-00294

True and correct copies of the attached were either mailed, faxed or e-mailed
by the clerk to the following:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RED HAT, INC., Plaintiff, v. THE SCO GROUP, INC. (formerly Caldera International, Inc.), Defendant.	)))))))))))))	Civil Action No.: __0 3 - 7 7 2__ **Jury Trial Requested**

COMPLAINT

I. *Introduction*

1.   The plaintiff, Red Hat, Inc. ("Red Hat"), has commenced this action in response

to the unfair, untrue and deceptive campaign now being waged by the defendant, The SCO

Group, Inc. ("SCO"), to harm the market for Red Hat's highly successful operating system based

on the open source LINUX kernel. As described in detail below, SCO's tactics have centered on

the use of highly publicized, but vague, general and unsupported claims that portions of the

LINUX kernel and operating system contain intellectual property allegedly owned by SCO, in

hopes that such unfair, untrue and deceptive statements will cause users and potential users of

LINUX to re-evaluate their plans to deploy LINUX as a primary component of their Information

Technology infrastructure.

2.   SCO's claims are not true, and are solely designed to create an atmosphere of

fear, uncertainty and doubt about LINUX. SCO's own conduct demonstrates this fact. For

example, beginning in or about March 2003, SCO made numerous public statements that

LINUX, in some unspecified way, contains SCO trade secrets, and that LINUX users might be

liable to SCO for using those trade secrets if they continue to use LINUX. Also at that time, SCO filed a lawsuit against IBM claiming that, among other things, IBM had improperly contributed UNIX software code trade secrets to LINUX. However, SCO never publicly identified a single line of the publicly available LINUX source code that allegedly contains even one SCO trade secret. In fact, at the same time that SCO was contending that the LINUX operating system included SCO's trade secrets without authorization, SCO itself continued to offer its own version of LINUX, thereby continuing to make publicly available the very computer source code that SCO was claiming to be "secret."

3. SCO apparently recognized that the supposed "secrets" that SCO itself was making publicly available through its own LINUX distribution do not qualify as trade secrets. Accordingly, SCO recently has changed the focus of its campaign against LINUX. SCO, which has itself developed and sold a version of LINUX for years, now claims to have suddenly discovered that LINUX contains computer software code that was copied from another, competing operating system that SCO claims to own – UNIX. Again, although the LINUX source code is publicly available, SCO repeatedly has refused to identify publicly even one line of SCO source code that was copied.

4. SCO's tactics are as obvious as they are unlawful. SCO makes grand public claims about the potential liability of anyone using LINUX because of alleged violations of SCO's purported intellectual property, but then refuses to support those claims with the detail that would exist if SCO's claims were true.

5. The reasons for SCO's unfair, untrue and deceptive campaign against LINUX are equally obvious. SCO is an unprofitable company that purports to have acquired certain rights to the UNIX operating system. In fact, SCO and its predecessor-in-interest to the UNIX code,

Santa Cruz Operation, Inc., have reported an annual operating profit only once in the nearly ten years since 1994. As SCO's own public filings with the U.S. Securities Exchange Commission state, its "revenue from the sale of Unix based products has declined since [SCO] acquired" rights to UNIX. By contrast, SCO has admitted that those "who embraced Unix years ago are adopting Linux today." According to SCO, LINUX "can be used to power many of the current and future internet and software needs of businesses, academics and technical institutions around the world" because of its "comprehensive internet functionality, flexibility, customizability and stability, interoperability with multiple systems and networks, low acquisition and maintenance costs, and compliance with technical and communication standards."

6.   In sum, SCO's campaign is designed both to slow the growth of LINUX, and to reverse its failing fortunes by convincing LINUX users that they need to pay SCO a license fee to use the lower-cost LINUX operating system. As SCO's own representatives have proclaimed, if SCO is successful at this effort, it can add "billions" of dollars in undeserved revenues to its declining bottom line. Additionally, SCO's campaign is designed to further what, upon information and belief, has been referred to as the "LINUX Lottery" – the ability to reap personal profit by carefully timed purchases and sales of SCO stock.

7.   SCO has specifically targeted Red Hat with its campaign by repeatedly meeting with financial analysts who cover Red Hat's stock and by, among other things, inviting certain of Red Hat's institutional investors to a briefing held on or about July 22, 2003. During the July 22 briefing, SCO presented information that it knew or should have known to be false and/or misleading about any possible infringement of SCO's UNIX code by Red Hat's LINUX distribution.

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8.   SCO's actions, including the climate of uncertainty fostered by SCO about

LINUX, have been carried out with the obvious goal of adversely affecting Red Hat's business.

Red Hat is, as recognized by SCO, one of the premier distributors of LINUX.

9.   In an effort to have SCO disclose the basis – if any – for its vague public claims

about LINUX, Red Hat wrote to SCO on July 18, 2003. In its letter, Red Hat noted that "[f]or

months now, officers of [SCO] have made public statements claiming that some portion of Red

Hat® LINUX contains code that infringes intellectual property rights of SCO," and have sent

letters to Red Hat business partners, customers and potential customers suggesting that they

cease using LINUX. Red Hat noted that SCO had "failed to provide any details" in support of its

allegations so that Red Hat could refute them, and that SCO's statements were therefore

"designed to disrupt and otherwise interfere with Red Hat's relations with its customers."

10.   Red Hat, in its letter, requested that SCO "fully explain the bases, if any, for its

public allegations concerning Red Hat Linux," including identifying allegedly infringing source

code, the SCO source code that is the basis for its claims, the author and date of authorship of the

SCO code, the specific rights claimed to have been violated, and the manner in which SCO

claims that Red Hat has violated those rights. Red Hat requested that SCO provide a complete

response by July 31, 2003. A copy of this letter is attached as Exhibit A.

11.   SCO did not respond to Red Hat's letter, except to make a telephone call seeking

to have Red Hat pay for an unneeded UNIX license. Neither in that telephone call nor in any

other written or oral communication to Red Hat, has SCO identified any basis whatsoever for its

public claims of infringement.

12.   SCO's lack of response to Red Hat is consistent with SCO's conduct in the

litigation SCO has filed against IBM directed to LINUX– posting pleadings on the Internet long

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before serving them, and taking a lackadaisical attitude toward pursuing its claims. All of their actions are inconsistent with actions that would be expected of a company that actually believes its intellectual property is being used by others without permission.

13.   In light of SCO's consistent refusal to identify any specific source code in the public LINUX kernel or operating system that SCO is currently claiming infringes its intellectual property rights, Red Hat brings this action. As more fully explained below, Red Hat seeks a declaratory judgment that Red Hat® LINUX does not infringe any copyright owned by SCO, and does not utilize any trade secret owned by SCO. Red Hat further seeks damages, trebled, as well as injunctive relief, attorneys' fees and costs, for harm caused by SCO's unfair competition and false advertising in violation of Section 43(a) of the Lanham Act, 15 U.S.C. §§ 1125(a), et seq., unfair and deceptive acts or practices in violation of the Delaware Deceptive Trade Practices Act, 6 Del. Code § 2532, as well as for violations of common law, including trade libel, unfair competition, and tortious interference with prospective economic advantage.

II.   *The Parties*

14.   Red Hat is a corporation organized and existing under the laws of the State of Delaware, with its principle place of business in Raleigh, North Carolina. Founded in 1993, Red Hat is the leading provider of the LINUX operating system, and the most recognized LINUX brand name in the world. Red Hat and its nearly 600 employees offer a broad range of technologies and services, including annual subscriptions to Red Hat Enterprise LINUX, consulting, and a global LINUX training program that operates in more than 60 locations worldwide. Red Hat's customers include well-known companies within the financial and information industries.

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15.   Upon information and belief, SCO is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Lindon, Utah. SCO was formerly known as Caldera International, Inc., but changed its name to The SCO Group, Inc. on or around May 16, 2003. SCO claims certain rights to the UNIX System V operating system source code, which was not developed by SCO engineers, but was purchased from other companies.

III.   *Jurisdiction and Venue*

16.   This Court has original jurisdiction under 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1338, and has supplemental jurisdiction under 28 U.S.C. § 1367 (a).

17.   Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391 (b) and (c).

IV.   *Background*

A.   *Proprietary and Open Source Operating Systems*

18.   Over the past few decades, a variety of computer operating systems have been developed, but most are proprietary systems that are expensive, plagued with problems, such as bugs in software, or are not readily adaptable by the user. For example, Microsoft's DOS and Windows operating systems are proprietary systems that have dominated the personal computer market, but they are not adaptable by users. The UNIX operating system, originally developed by AT&T in the 1960s, is another proprietary system commonly used in business. The inherent problems in proprietary operating systems have helped to spawn a movement toward what is known as open source programming.

19.   In open source programming, computer programmers and users can read, redistribute, and modify software source code, allowing the software to evolve and improve

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more quickly and efficiently and less expensively. Unlike proprietary operating systems or other software in which only a few programmers ever have access to the source code, thousands of unaffiliated open source programmers collaborate to improve and adapt the software.

20. Richard Stallman is largely credited with the taking the first important steps in developing an open source operating system. In 1985, he published what is known as the "GNU Manifesto." (GNU is a recursive acronym that stands for "GNU's Not UNIX.") Stallman's mission was to develop a UNIX-compatible software system that was free and that would remain free for anyone who wants to use it.

21. In 1987, Professor Andrew S. Tanenbaum developed MINIX, a UNIX clone, using the open source philosophy. MINIX, however, never became more than a teaching tool for aspiring programmers.

22. In 1991, using a book on operating systems published by Tanenbaum, Finnish college student Linus Torvalds created an operating system kernel for his own use. Torvald's system used inexpensive personal computer hardware, but generally provided the same capabilities as expensive UNIX systems that he used in college. This kernel became known as LINUX. Torvalds made both the kernel and its source code available on the Internet for anyone to use and improve upon. He protected its "open" features with the GNU General Public License ("GPL"). The GPL allows access to the software source code, and allows others to use, change and improve the software source code so long as modified versions of the software that are distributed to others are licensed on the same terms as the GPL. In other words, the software remains open, and not proprietary.

23. As information about LINUX spread and demand for it grew, the LINUX kernel was combined with various software from Stallman's GNU project to form the GNU/LINUX

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operating system, more frequently known simply as LINUX. LINUX quickly developed beyond

the version that was originally designed to operate in Torvald's personal computer. These rapid

advances were enabled by the many programmers throughout the world who were constantly

contributing to and improving LINUX. Within a few years, companies developed and sold

packaged versions of the operating system, including documentation and support, sufficiently

capable to operate on a wider range of computer hardware.

24.   Red Hat, founded in 1993, was one of these companies. Red Hat® Linux is

successful because it is less expensive to operate and is highly stable, and because Red Hat

provides excellent support and service – the traditional selling points of expensive and

cumbersome proprietary software. Red Hat® Linux soon gained widespread popularity for its

reputation as a stable, reliable operating system.

25.   In recent years, LINUX has become the world's fastest growing operating system.

It continues to be adopted by large enterprises for mission-critical roles. For example, a 2002

Merrill Lynch study found that 25% of Chief Information Officers claimed that LINUX is

strategic to their enterprises.

26.   Since its inception, the LINUX kernel was and still is licensed and distributed

under the GPL, which insures that the operating system remains free for copying and further

development. LINUX can be freely copied and modified by anyone who has the talent and

inclination to do so. It can, therefore, be customized or adapted easily to fit the specific needs of

its users.

27.   Over the years, the LINUX kernel has developed and been released in various

versions. LINUX 2.4 kernel was first released for use in January 2001. SCO claims, in its suit

against IBM and generally, that this version of the LINUX kernel is the first version that violated its intellectual property rights.

B. *Red Hat's Business*

28.   Red Hat is the most well-known and trusted provider of LINUX software. In a June 2002 survey by CNET – in which more than 2,200 Information Technology ("IT") professionals were asked which software companies generally would be most relevant to their business in the next five years – Red Hat ranked second.

29.   Red Hat® Linux's success has enabled Red Hat to assemble the world's most talented group of open source engineers. They assemble the LINUX kernel with other user space open source software, compile it, and test it for performance and reliability. Then they add new features, and test them for compatibility – all while sharing the software with customers, partners, software vendors, and members of the open source community in a structured feedback cycle.

30.   Red Hat Enterprise Linux is the standard for LINUX used by a business enterprise, and features enhanced enterprise performance and an extended release cycle. Red Hat also offers a range of management services, training, global support, consulting and custom engineering. Red Hat has entered into partner arrangements with industry leaders such as Intel, Dell, Hewlett-Packard, IBM and Oracle.

31.   Red Hat's focus on open source software has been a financial success. Even during the last year – a challenging one for technology companies – Red Hat's gross profit rose approximately 18%.

32.   Red Hat's open source products have been developed and made available for licensing under the GPL and similar open source licenses. These licenses permit anyone to copy, modify and distribute the software, subject only to the restriction that any resulting or derivative

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work that is made available to the public be licensed under the same terms. Therefore, although Red Hat owns the copyright to the LINUX software code that it develops, anyone who complies with the GPL can freely copy or modify it, or create derivative works based on Red Hat-authored software code.

C. *SCO's Failing Business*

33. SCO is a provider of computer operating systems and business applications for small businesses. SCO sells both proprietary UNIX and open source LINUX operating systems.

34. SCO has not been financially successful. In its 2002 Annual Report, SCO stated that "[s]ales of Unix-based products and services have historically been declining" and that SCO OpenServer and SCO UnixWare products "will represent a decreasing percentage of total revenue."

35. SCO noted that "[i]f our revenue continues to decline or we are unable to efficiently further reduce operating expenses, we may not achieve profitability or generate positive cash flow.... If we are unable to achieve positive cash flow from operations, we will not be able to implement our business plan without additional funding, which may not be available to us."

36. SCO's business, including that of its predecessor Santa Cruz Operation, Inc., was already in sharp decline at the time the LINUX 2.4 kernel was first released for use in January 2001. Their revenues had fallen by more than a third from 1999 to 2000, producing an operating loss for the year ended September 30, 2000 of more than $50 million.

D. *SCO's Wrongful Actions*

37. It is in the context of the success of LINUX, the decline of UNIX, and the financial pressure generated by a declining business that SCO has recently embarked upon its campaign against LINUX.

38.   In particular, SCO has developed a licensing program that is based on unfounded

claims of violations of its purported intellectual property rights by LINUX users and developers.

Despite making claims to royalties that SCO proclaims could total in the "billions" of dollars and

that have caused industry analysts to issue cautionary reports about the deployment and use of

LINUX technology, SCO repeatedly has refused to articulate publicly any specific basis for its

claims that would allow the industry meaningfully to evaluate those claims. SCO also has

refused to provide such information in response to a direct written request by Red Hat sent on

July 18, 2003.

39.   On information and belief, SCO has intentionally and wrongfully done so to

create a cloud of uncertainty over LINUX and, thus, to further its own economic interests.

40.   In particular, SCO has claimed both that certain portions of the LINUX operating

system represent SCO "trade secrets" and that portions were copied from earlier versions of

UNIX, the rights to which SCO says it later acquired from others.

41.   In the first step of its campaign, SCO filed suit against IBM on March 7, 2003,

claiming approximately $1 billion in damages, alleging in part that "trade secrets" disclosed by

SCO to IBM were wrongly contributed by IBM to the LINUX operating system. Despite the

fact that the LINUX source code is publicly available for anyone, SCO has struggled for more

than four months to identify publicly even one line of LINUX source code that SCO claims to be

a misappropriated "trade secret."

42.   Subsequently, in May 2003, SCO sent approximately 1,500 letters to actual or

potential users of LINUX, claiming that those companies could be liable to SCO for using

LINUX. The letters stated that SCO "believe[s] that Linux infringes on [its] Unix intellectual

property and other rights." Further, the letter stated that SCO "intend[s] to aggressively protect

and enforce these rights" and that "[l]egal liability that may arise from the LINUX development process may also rest with the end user." Again, SCO's letter contained no information specifically identifying *any* aspect of the publicly available LINUX source code that would support SCO's vague claims.

43.   SCO itself, however, has been publicly distributing the LINUX operating system, including the LINUX source code, for at least five years. Recognizing the inconsistency between its claim of "trade secret" misappropriation and its public disclosures of the same allegedly secret information, in May 2003 SCO publicly stated that it would no longer distribute LINUX. However, that statement too is false. SCO continues to offer LINUX source code for public downloading today – more than four months after SCO sued IBM for disclosing UNIX "trade secrets" that SCO continues to disclose itself. For example, through a partnership with three other companies, SCO currently offers UnitedLinux Version 1.0.

44.   Such inconsistencies with SCO's ill-conceived theory of trade secret misappropriation have prompted SCO to expand its claims and pursue additional legal theories. Now, according to SCO, it is not SCO trade secrets that LINUX users are using, but SCO copyrighted code that has been improperly copied.

45.   Specifically, though SCO sued IBM in March 2003 on several legal theories, including misappropriation of trade secrets, SCO began publicly altering its legal theory at least by April 2003. In conjunction with an interview of Chris Sontag, SCO's Vice President and General Manager, one reporter noted that "[a]s you read through today's discussion, please notice how Chris Sontag's statements appear to be laying the groundwork for copyright infringement claims against Red Hat." As of late, the main focus of SCO's campaign is now claims of copyright infringement. SCO explicitly so stated during a recent conference call. SCO

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now publicly distances itself from its earlier broad statements regarding trade secret misappropriation, characterizing its dispute with IBM as a private "contract issue."

46.   SCO's copyright infringement claim fares no better than its earlier trade secret assertions. Once again, SCO hides behind a smokescreen of secrecy, refusing to identify with specificity the lines of code in LINUX that allegedly have been "copied" from UNIX.

47.   To identify the allegedly copied code, however, would enable those who created that code to demonstrate that it is not the property of SCO, was not copied from UNIX, and was developed independently by engineers – including those at Red Hat – who contribute to the open source software.

48.   There is nothing "confidential" about SCO's claims of copyright infringement. Inasmuch as the LINUX code is publicly and freely available for anyone in the world to see, there is no legitimate reason for SCO to hide behind a veil of secrecy in making its allegations about LINUX.

V.   *SCO's Assertion About Red Hat*

49.   Though SCO is engaged in a lawsuit with IBM, SCO's real target is LINUX, and therefore the developers and providers who improve and distribute it, support it, and help make it a success. Thus, SCO explicitly has claimed that Red Hat, in some unspecified way, has acted wrongfully with regard to SCO's alleged intellectual property rights, and has threatened to take legal action against Red Hat. Notably – once again – SCO makes general and highly publicized claims in the media against Red Hat, but cannot support these claims with specific facts.

50.   For example, Darl McBride, Chief Executive Officer of SCO, has stated that "[t]here will be a day of reckoning for Red Hat ... when this is done." Similarly, in an interview with CNET News.com, Chris Sontag, Vice President and General Manager of SCO, said that SCO "may bring subsequent actions against Linux software developers such as Red Hat...."

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51.   SCO also has falsely and explicitly claimed that Red Hat wrongfully misappropriates portions of SCO's proprietary UNIX software code for use in Red Hat's LINUX products. For example, Darl McBride stated that "IBM took chunks [of code] out of [Project] Monterey, and gave it away. You can find it in Red Hat ... Linux."

52.   Similarly, Chris Sontag also stated that "if SCO prevails in their lawsuit with IBM, companies like Red Hat ... may need to revisit their distributions and remove any Unix system code from their distributions and compensate SCO in some way for the software code that they benefited from by using our Unix code."

53.   SCO has been unable to articulate its claims in sufficient detail to give them even a modicum of credibility. For example, when asked what was copied from UNIX, Chris Sontag generally replied, "[w]e're not talking about the Linux kernel that Linus and others have helped develop. We're talking about what's on the periphery of the Linux kernel." However, when pushed for more detail about where the allegedly stolen code is, Sontag replied, "I really can't go any further from what I've commented on."

54.   Tellingly, SCO has not been consistent in even its vague allegations of wrongdoing. For example, contrary to the statement set forth in the preceding paragraph, SCO's subsequent statements indicated that the offending software is associated with the LINUX kernel. Recently, when asked whether "there is offending code in the Linux kernel," Darl McBride of SCO answered "Yeah. That one is a no-brainer."

55.   In the face of SCO's refusal – or inability – to identify any real factual basis for its varying assertions, others in the computer industry have attempted to investigate them. For example, the Open Source Initiative has published a position paper concluding that the public evidence does not support a claim for misappropriation, because not one of the five key

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technologies present in LINUX can be traced through IBM from the UNIX software code to which SCO claims to have obtained legal rights.

56.   In an attempt to resolve this issue and remove the uncertainty that SCO has intentionally cast on LINUX and open source software in general, Red Hat sent a letter to SCO on July 18, 2003, requesting that SCO specifically identify the bases for its vague claims. In its letter, Red Hat noted that "[f]or months now, officers of [SCO] have made public statements claiming that some portion of Red Hat® Linux contains code that infringes intellectual property rights of SCO" and noted that SCO had "failed to provide any details" in support of its allegations so that Red Hat could refute them.

57.   Red Hat, in its letter, requested that, no later than July 31, 2003, SCO "fully explain the bases, if any, for its public allegations concerning Red Hat Linux."

58.   As of the filing of this complaint, SCO has not identified any such factual basis.

59.   SCO's illicit strategy is transparent – make loud public claims about alleged intellectual property rights, provide no detail (since it does not exist), and hope to use the time-honored technique of creating fear, uncertainty and doubt to slow the growth and use of LINUX, damage the business of LINUX providers such as Red Hat, coerce unwarranted fees from LINUX users by threats of litigation, and, upon information and belief, even create enough nuisance value to be acquired while running up the price of SCO's stock in the short term, thereby creating various financial opportunities to wrongfully enrich the originators of this scheme.

60.   For example, on July 21, 2003, SCO announced that it would launch a licensing program for LINUX end users, in which end users would pay a license fee to SCO in order to continue using LINUX. In the same announcement, SCO stated that "[s]ince the year 2001

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commercial Linux customers have been purchasing and receiving software that includes

misappropriated Unix software owned by SCO."

61.   According to SCO, its licensing program will be "very targeted" towards the

people who are using the product. SCO will offer a runtime-only license – a license that

provides the end user with only the right to operate or run the software – targeted to end users of

LINUX. Contrary to the principles of open source programming upon which LINUX is based,

SCO's proposed license would not allow the users to modify the source code. Further, SCO does

not intend to offer a license to distributors of LINUX, such as Red Hat, that would allow the

distributors to then license the end-users. SCO's licensing program is an attempt to wrongfully

disrupt Red Hat's business and its relationships with its customers. In fact, while explaining its

licensing program at is recent conference call on July 21, 2003, SCO specifically stated that it

anticipated such a result: "And so I'm guessing that those end users are going to be looking

around to the vendor or vendors involved in supplying [LINUX software] to them whether it's

Red Hat or IBM and saying, 'What's up, guys? You know what's happening here?' But, you

know, that is going to be their beef with their particular vendor."

62.   Additionally, SCO has stated that it intends to license LINUX only in conjunction

with its own products. At its press conference, SCO stated that it would "hold its licensees

harmless and will covenant not to sue such licensees for running LINUX in binary format on any

CPU licensed under a valid SCO UnixWare 7.1.3. license." In other words, SCO does not intend

to merely license its intellectual property rights. It intends to tie that license to the use of its own

UNIX product. Thus, SCO is wrongfully attempting to both interfere with and disrupt Red Hat's

business as well as employ its alleged intellectual property rights to force current and prospective

LINUX users to purchase SCO's UNIX products– or at least to license those products.

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63.   Overall, SCO's illicit campaign has had a negative impact on the LINUX

industry. For example, several industry analysts have issued cautions against large-scale

deployments of LINUX until SCO's claims are either resolved or at least better understood.

64.   Gartner analyst George Weiss advised in a May note that "[a]lthough Gartner has

reservations on the merits of (SCO's claims), don't take them lightly." He recommended that

users "[m]inimize Linux in complex, mission-critical systems until the merits of SCO's claims or

any resulting judgments become clear."

65.   Further, even SCO stated during its recent telephone conference on July 21 that it

is aware of customers that were in the process of implementing LINUX but that are now in a

"hold pattern."

66.   SCO also has attempted to buttress its own declining business and to affect

negatively the business of its competitors by making the same untrue and unsubstantiated

statements to stock analysts. For example, in a July 22, 2003 meeting with investors, SCO

continued to make its unsubstantiated claims of infringement. Following this meeting, Deutsche

Bank issued a report indicating that open source software may have been created wrongfully by

copying proprietary software. Notably, in the face of SCO's wrongful comments and the

resulting statements from various industry analysts, Red Hat's stock price has decreased

approximately 20% between June 30, 2003 and July 30, 2003.

67.   Industry analysts also have noted that SCO's actions have an ulterior economic

purpose of forcing an acquisition of SCO, which would be on terms that SCO's poor financial

condition would not otherwise justify. Industry Analyst Gordon Haff of Illuminata stated that

"suing IBM wasn't enough to get them acquired, so this [sending 1500 letters] is the next stage."

Another industry analyst, George Weiss of Gartner, agreed, stating "SCO is really attempting to

create a fairly large disruption of Linux, and will attempt to take the Linux community with them in the defense of their intellectual property, regardless of how poorly it goes off in the Linux community." Concurring, Gordon Haff stated "[t]he only rational explanation for this is it's a plea for money, essentially, from IBM and others that can't afford to let Linux be derailed."

68. In addition to the prospective benefit of forcing its acquisition at an inflated price, SCO's wrongful campaign has already enriched its owners. Despite its bleak financial picture, SCO's stock price has risen to approximately ten times what it was six months ago before SCO began making its meritless and unsupported claims. Analogizing SCO's combination of a weakening business and rising stock price to the irrational stock valuations of the "dot-com bubble," Frank Haynes of Computerworld noted that "every time SCO makes a new wilder set of legal threats, speculators bid up the price of SCO stock – starting in March, with the IBM law suit, then in May, when the threatening letters were sent, then again in June, when SCO tried to make IBM users pull the plug, and again last week [when SCO unveiled its new copyright theories]."

69. SCO, in conjunction with its holding company, The Canopy Group ("Canopy"), has already used its wrongfully inflated stock price to transfer millions of dollars to Canopy. Thus, SCO has no incentive to resolve its unsupported and apparently baseless legal threats in the near future. Again according to Frank Haynes, "[i]f it all sounds like a shell game, well, that's the way Canopy likes to move its companies around. But in effect, Canopy used SCO's stock price, boosted by Linux threats, to rake in a couple of million dollars in cash behind the scenes. And apparently it worked. Which means we can expect that as long as Canopy can find ways of cashing in on SCO's threats against Linux users, those threats will keep coming – no matter how little sense they make."

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COUNT I

(For Declaratory Judgment of Noninfringement of Copyrights, 28 U.S.C. § 2201)

70.   Red Hat repeats the allegations of the preceding paragraphs as if set forth here in full.

71.   No LINUX version sold, used or distributed by Red Hat, or used by Red Hat's customers, infringes any right SCO may have pursuant to Section 106 of the Copyright Act, 17 U.S.C. § 106.

72.   On information and belief, any alleged SCO copyright covering LINUX software is unenforceable.

73.   An actual controversy exists between SCO and Red Hat as to the non-infringement and unenforceability of SCO's copyrights. To afford relief from the uncertainty and controversy raised by this dispute, Red Hat is entitled to a declaratory judgment pursuant to 28 U.S.C. § 2201 that it does not infringe any SCO copyright, that any SCO copyright claimed to cover LINUX software is unenforceable, and that SCO is equitably estopped from asserting any SCO copyright with respect to any LINUX software.

COUNT II

(For Declaratory Judgment of No Misappropriation of Trade Secrets, 28 U.S.C. § 2201)

74.   Red Hat repeats the allegations of the preceding paragraphs as if set forth here in full.

75.   The source code for the LINUX kernel and operating system are public and cannot constitute a trade secret.

76.   The use and sale of LINUX by Red Hat and the use of LINUX by Red Hat customers do not misappropriate any SCO trade secret.

77.   An actual controversy exists between SCO and Red Hat as to the non-misappropriation and the validity and the enforceability of SCO's trade secrets. To afford relief from the uncertainty and controversy raised by this dispute, Red Hat is entitled to a declaratory judgment pursuant to 28 U.S.C. § 2201 that it has not misappropriated any SCO trade secret, that any SCO trade secret claimed to cover UNIX software found in LINUX is invalid, that the source code for the LINUX kernel and operating system are public and cannot constitute a trade secret, and that SCO is equitably estopped from asserting any SCO trade secret with respect to any LINUX software.

COUNT III

(False Advertising in Violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a))

78.   Red Hat repeats the allegations of the preceding paragraphs as if set forth here in full.

79.   SCO is selling, advertising and promoting UNIX products and services, as well as other products and services, in interstate commerce.

80.   By virtue of the conduct described above, SCO has made false and misleading statements and misrepresentations of fact in commerce in press releases, interviews, in presentations to investors, and otherwise.

81.   SCO statements as described above, have a tendency to deceive and have deceived Red Hat's customers, potential users and other users of LINUX software.

82.   SCO's statements are material and affect the decision as to whether a customer would purchase LINUX software or services.

83.   SCO's activities as set forth above constitute a violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

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84. On information and belief, SCO has acted willfully, intentionally and in bad faith.

85. SCO's actions have caused and are causing irreparable harm to Red Hat, and unless permanently restrained and enjoined by this Court, such irreparable harm will continue.

86. Red Hat is entitled to actual damages for injuries sustained as a result of SCO's violations of 15 U.S.C. § 1125(a).

COUNT IV
(Deceptive Trade Practices in Violation of 6 Del. C. § 2532)

87. Red Hat repeats the allegations of the preceding paragraphs as if set forth here in full.

88. By virtue of the conduct described above, SCO has represented that its products and services have qualities that they do not have, has disparaged Red Hat's goods and services by making false and misleading representations of fact, and has otherwise engaged in conduct that has caused and is likely to cause confusion and misunderstanding in violation of the Delaware Deceptive Trade Practices Act, 6 Del. C. § 2532.

89. SCO's actions have caused and are causing irreparable harm to Red Hat, and unless permanently restrained and enjoined by this Court, such irreparable harm will continue.

90. Red Hat is entitled to actual damages, trebled, for injuries sustained as a result of SCO's violations of the Delaware Deceptive Trade Practices Act.

COUNT V
(Unfair Competition)

91. Red Hat repeats the allegations of the preceding paragraphs as if set forth here in full.

92. By virtue of the statements made in commerce set forth above, SCO has engaged in unfair competition prohibited by the common law.

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93.   SCO's actions have caused and are causing irreparable harm to Red Hat, and

unless permanently restrained and enjoined by this Court, such irreparable harm will continue.

94.   Red Hat is entitled to actual damages for injuries sustained as a result of SCO's

violations of the common law prohibiting unfair competition.

COUNT VI

(Tortious Interference with Prospective Business Opportunities)

95.   Red Hat repeats the allegations of the preceding paragraphs as if set forth here in

full.

96.   Red Hat has relationships and contracts with its customers, business partners and

investors and it is reasonably probable that those contracts and/or business opportunities will

continue.

97.   By virtue of its conduct described above, SCO tortiously interfered with Red

Hat's relationships, contracts and business opportunities with its customers, partners and

business investors.

98.   As a direct and proximate result of SCO's actions, Red Hat has suffered harm and

will continue to suffer harm.

99.   SCO's actions have caused and are causing irreparable harm to Red Hat, and

unless permanently restrained and enjoined by this Court, such irreparable harm will continue.

100.   Red Hat is entitled to actual damages for harm sustained as a result of SCO's

tortuous interference with Red Hat's prospective business opportunities.

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COUNT VII
(Trade Libel And Disparagement)

101.   Red Hat repeats the preceding allegations of the Complaint as if set forth here in full.

102.   By virtue of the statements outlined above, SCO has published or caused to be published oral and written false and/or disparaging statements regarding Red Hat's products, services and business practices.

103.   As a direct and proximate result of SCO's actions, Red Hat has suffered harm and will continue to suffer harm.

104.   SCO's actions have caused and are causing irreparable harm to Red Hat, and unless permanently restrained and enjoined by this Court, such irreparable harm will continue.

105.   Red Hat is entitled to actual damages for harm sustained as a result of SCO's trade libel and disparagement.

REQUEST FOR RELIEF

WHEREFORE, Red Hat respectfully requests:

A.   A permanent injunction restraining SCO and its officers, directors, partners, agents, servants, employees and attorneys, and those persons in active concert or participation with SCO from representing by any means whatsoever, directly or indirectly, or doing any other acts or things calculated or likely to cause confusion, mistake or to deceive purchasers, business partners and/or investors into believing that Red Hat's LINUX products and/or the LINUX products used by Red Hat's customers and partners violates any of SCO's intellectual property or trade secret rights;

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B.   Under Count I, a Declaratory Judgment pursuant to 28 U.S.C. §§ 2201 et seq. that

Red Hat's and its customers' actions in providing, creating, maintaining, debugging, developing,

copying, selling, transferring, installing, operating, or otherwise using any of Red Hat's LINUX

products and services do not violate any SCO rights under Section 106 of the Copyright Act, 17

U.S.C. §§ 101 et seq., and a Declaratory Judgment that any SCO copyright claimed to be

infringed by Red Hat or its customers in conjunction with any of Red Hat's products is

unenforceable;

C.   Under Count II, a Declaratory Judgment pursuant to 28 U.S.C. §§ 2201 et seq.

that Red Hat's and its customers' actions in providing, creating, maintaining, debugging,

developing, copying, selling, transferring, installing, operating, or otherwise using any of Red

Hat's products and services do not constitute a misappropriation of any SCO trade secret, a

Declaratory Judgment that the LINUX kernel and operating system are public and therefore

cannot constitute a trade secret; and a Declaratory Judgment that any SCO trade secret claimed

to be misappropriated by Red Hat or its customers in conjunction with any of Red Hat's products

is unenforceable;

D.   Under Counts III-VII, an award of actual damages to Red Hat by reason of SCO's

actions in an amount to be established at trial;

E.   An order and judgment that Red Hat's actual damages be trebled pursuant to the

Delaware Deceptive Trade Practices Act;
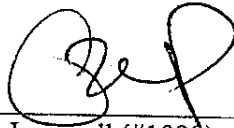
J.   An award of Red Hat's attorneys' fees and costs incurred in connection with this

matter pursuant to the Delaware Deceptive Trade Practices Act; and

K.   Such further relief as the Court may deem just and proper.

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Red Hat requests a trial by jury on all issues so triable.

RED HAT, INC.

By its attorneys

_____

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Dated: August 4, 2003

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July 18, 2003

VIA CERTIFIED MAIL
RETURN RECEIPT

Mr. Darl C. McBride
President and CEO
The SCO Group, Inc.
355 South 520 West, Suite 100
Lindon, UT 84042

Dear Mr. McBride:

As you are aware, Red Hat, Inc. ("Red Hat") distributes a "Red Hat"-branded Linux® operating system ("Red Hat Linux"). For months now, officers of The SCO Group, Inc. ("SCO") have made public statements claiming that some portion of Red Hat® Linux contains code that infringes intellectual property rights of SCO. In conjunction with these public statements, SCO has sent letters to certain of Red Hat's business partners, customers and potential customers ("third-parties") suggesting that these third-parties should cease using Linux because it is an "unauthorized derivative" of SCO's System V UNIX®.

We have no basis to believe that Red Hat has copied any SCO software, used any SCO trade secrets, or otherwise violated any SCO intellectual property rights. SCO notably has failed to provide any details in support of its allegation that would permit Red Hat to refute them, and, as such, SCO's public statements can only be designed to disrupt and otherwise interfere with Red Hat's relations with its customers.

Red Hat requests that SCO fully explain the bases, if any, for its public allegations concerning Red Hat Linux. At the very least, Red Hat requests that SCO specifically identify any source code in any Red Hat distribution to which SCO claims intellectual property rights, the specific SCO source code that is the basis for such intellectual property rights, the author and date of authorship of the SCO code, the specific rights that SCO claims have been violated, and the manner in which SCO claims that Red Hat has violated those rights.

Please provide a complete response to this letter no later than July 31, 2003. In the absence of a complete response from SCO by that date, we will be left to conclude there is no basis for the referenced statements.

Sincerely,

Mark H. Webbink
Sr. Vice President and General Counsel
Red Hat, Inc.

cc: Donald Steinberg, Esq., Hale and Dorr LLP

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RED HAT, INC.   )
)
            Plaintiff,   )
)
      v.   )
)
THE SCO GROUP, INC.   )   Civil Action No. 03-772-SLR
)
            Defendant.   ·   )

DEFENDANT THE SCO GROUP, INC.'S
OPENING BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

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Dated: September 15, 2003

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OTHER AUTHORITIES

NATURE AND STAGE OF PROCEEDINGS

Red Hat, Inc. ("Red Hat") filed suit against The SCO Group, Inc. ("SCO") on August 4, 2003. Red Hat seeks a declaratory judgment that Linux software distributed by it does not infringe or violate certain of SCO's intellectual property rights in a software product known as UNIX. Red Hat also seeks damages and injunctive relief against SCO under the Lanham Act and related state law claims, alleging deceptive trade practices, unfair competition, tortious interference with prospective business opportunities and trade libel and disparagement arising out of certain public statements made by SCO.

Pursuant to a stipulation entered by the parties and signed by the Court, SCO's response to Red Hat's Complaint is due on September 15, 2003. This Motion to Dismiss, pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure, is SCO's response to Red Hat's Complaint.

In a separate but related case, SCO has sued International Business Machines Corporation ("IBM") in the U.S. District Court, District of Utah (the "SCO v. IBM Case"). In that action, which was filed five months before this case, SCO contends that IBM has breached its UNIX license with SCO by improperly using UNIX software code and methods to enhance the functionality of Linux.

SUMMARY OF ARGUMENT

1. Red Hat's claims under Counts I and II of the Complaint seek declaratory relief that a software product distributed by Red Hat known as "Linux" software does not infringe or violate any of SCO's intellectual property rights in UNIX. These claims fail for lack of subject matter jurisdiction under the Declaratory Judgment Act, 28 U.S.C. § 2201, because Red Hat cannot satisfy its burden of establishing an "actual controversy" as required by the Declaratory Judgment Act. Specifically, Red Hat cannot identify any express or.

implied threats to enforce SCO's intellectual property rights against Red Hat. In fact, SCO has never threatened to sue Red Hat. Based on its wholesale failure to establish "reasonable apprehension" of being sued, Red Hat fails to meet the core jurisdictional requirement for an action under the Declaratory Judgment Act. Red Hat's legal action does nothing more than seek general guidance for the marketplace as to the legal rights SCO has with respect to Linux software. This is an impermissible use of the Declaratory Judgment Act.

2. Additionally, even if Red Hat were able to successfully establish the jurisdictional requirements for declaratory relief, this Court should decline to exercise jurisdiction because there is no practical reason to do so. The infringement and misappropriation issues Red Hat seeks to adjudicate in this case are currently before U.S. District Judge Dale A. Kimball in the SCO v. IBM Case pending in Utah Federal District Court.

3. Red Hat's claims under Counts III through VII seeking tort damages and injunctive relief based upon SCO's so-called "campaign" of filing suit against IBM and publicly discussing that case and other potential legal liabilities are barred by the First Amendment to the U.S. Constitution and by the common law doctrine of litigation immunity. The nature of SCO's statements complained of by Red Hat do not give rise to liability under the Lanham Act or the associated state law claims. Further, any governmental interest served under the Lanham Act is heavily outweighed by fundamental governmental interests in protecting copyright interests, ensuring full and free access to courts, providing litigation immunity, promoting judicial economy and fairness in litigation, and safeguarding freedom of speech and the press. Therefore, Counts III through VII must be dismissed with prejudice.

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STATEMENT OF MATERIAL FACTS

The following facts are taken from Red Hat's Complaint, documents to which it refers, documents that the Complaint incorporates by reference, and other materials on which this Court may properly rely. SCO accepts as true the allegations in Red Hat's Complaint only for the purposes of the present motion. Facts also are presented from the Amended Complaint in the SCO v. IBM Case and from IBM's Answer and Counterclaim to supplement the record in ways consistent with the standard of review on a motion to dismiss.

The Parties

Red Hat and SCO are companies that provide computer software to large and mid-size corporations. Red Hat Complaint, ¶¶ 24, 25, 30, 33.[1] SCO owns all right, title and interest in and to computer software known as UNIX System V and UnixWare, together with related copyrights ("UNIX"). ¶¶ 5, 18, 33; *see also* SCO v. IBM Amended Complaint ¶¶ 1, 2, 60-63.[2] SCO licenses UNIX software to its corporate customers for a fee. SCO also licenses UNIX software to other software companies, who then modify UNIX to their own needs and sublicense UNIX to their own corporate customers, also for a fee. ¶ 18; SCO ¶¶ 2, 4. IBM is one of the major licensees of UNIX. IBM licenses UNIX from SCO, modifies it to its own needs, and sublicenses UNIX under its own brand known as AIX. SCO ¶ 26.

Red Hat is one of many companies that distributes a software program called "Linux." ¶ 28. Linux was developed under an "open source development model"[3] that prohibits proprietary

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[1] Hereinafter, all references to the Red Hat Complaint will be designated as "¶ __."
[2] Hereinafter, all references to the SCO v. IBM Amended Complaint will be designated as "SCO ¶ __." The SCO v. IBM Amended Complaint is attached as Exhibit A. All exhibits described herein are attached to the Declaration of Mark J. Heise filed contemporaneously herewith.
[3] Under the open source development model numerous, perhaps hundreds, of different software developers each contribute parts of the software code base. These code contributions are assembled into a single working software product. Open source development is traditionally done as a hobby, without compensation to the software developers. Its goal is to make free software that everyone can use and share without restriction and without paying a licensing fee.

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ownership or control by anyone. ¶¶ 22, 26, 32. Therefore, Red Hat has no ownership or proprietary interest in Linux. ¶ 32.

The SCO v. IBM Litigation

IBM has implemented a program to "exploit its expertise in AIX to bring Linux up to par with UNIX." SCO ¶ 97. SCO contends that these efforts are contrary to IBM's obligations under its UNIX licensing agreements. SCO filed suit to vindicate its rights on March 7, 2003. ¶ 41. SCO filed an Amended Complaint on July 22, 2003. As an additional step to protect its rights, SCO terminated IBM's UNIX rights under the authority of SCO's UNIX agreements with IBM. SCO ¶¶ 119-121. IBM requested two extensions of time to answer SCO's Amended Complaint, and in its August 6, 2003, Answer it denied SCO's allegations and in turn counterclaimed against SCO for breach of contract, Lanham Act violations, unfair competition, intentional interference with prospective economic relations, unfair and deceptive trade practices, breach of the General Public License ("GPL") under which Linux is licensed, and four patent infringement claims. IBM Answer and Counterclaim in SCO v. IBM's Exhibit B.

The issues in the SCO v. IBM litigation involve many companies in the software and computing industry. Competing principles of open source versus proprietary software have come into focus and have attracted a great deal of attention from news media, industry analysts, and numerous companies. In response to this interest, SCO tried to provide substantial information, while remaining true to its contractual obligations to keep UNIX code confidential. ¶¶ 1, 2, 7, 37, 42, 45, 49-54, 66. To this end, SCO representatives have given interviews and made public statements about the case, and in several of those interviews and statements they have mentioned, or have been asked about, Red Hat and other Linux distributors. On May 12, 2003, SCO took an additional step to educate the Global 1,500 companies through a direct

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mailing discussing SCO's intellectual property rights. ¶ 42; May 12, 2003, Letter.[4] This letter refers to the SCO v. IBM Case and names IBM and Linux, but does not mention Red Hat or any other Linux distributor, nor does it propose any commercial transaction. *See*, May 12, 2003, Letter, Exhibit C. In addition, in order to provide end users with the ability to run Linux without violating any of SCO's intellectual property rights, SCO announced a licensing program in July 2003.

The Red Hat v. SCO Dispute

Red Hat has not been satisfied to await the outcome of the SCO v. IBM Case. ¶ 56. Instead, it sent SCO a letter on July 18, 2003, asking SCO to "fully explain the bases, if any, for its public allegations concerning Red Hat Linux." July 18, 2003, Letter. SCO CEO Darl McBride telephoned Red Hat CEO Matthew Szulick on July 31 to discuss Red Hat's letter. According to Red Hat's Complaint, on July 31, 2003, SCO merely offered it an "unneeded Unix license." ¶ 11. Then, on August 4, 2003, Red Hat filed its Complaint against SCO in the instant action. Concurrent with filing the Complaint, Red Hat issued a press release announcing its lawsuit against SCO and explaining the reason for the lawsuit.[5] Red Hat claimed in the August 4, 2003 press release that "in its role as an industry leader," to fulfill its responsibility to "ensure [that] the legal rights of users are protected," and to defend "the worldwide Linux industry,"[6] it had filed the present Complaint against SCO. ¶ 13. No reference was made to any threat or apprehension of threat of being sued by SCO

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[4] The May 12, 2002 letter is attached as Exhibit C.
[5] The Press Release is attached as Exhibit D.

[6] http://www.redhat.com/about/presscenter/2003/press_sco.html

ARGUMENT

A complaint will not withstand attack under Federal Rule of Civil Procedure 12(b)(6) unless the material facts, as alleged, in addition to inferences drawn from those allegations, provide a basis for recovery. *Emerson v. Thiel College*, 296 F.3d 184, 188 (3d Cir. 2002). While all of the allegations in the complaint must be taken as true, the Court "need not accept as true unsupported conclusions and unwarranted inferences." *Doug Grant, Inc. v. Greate Bay Casino Corp.*, 232 F.3d 173, 183-84 (3d Cir. 2000). As the Third Circuit has observed "[c]ourts have an obligation in matters before them to view the complaint as a whole and to base rulings not upon the presence of mere words but, rather, upon the presence of a factual situation which is or is not justiciable. [Courts are to] draw on the allegations of the complaint, but in a realistic, rather than a slavish, manner." *Id.*, quoting *City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 263 n.13 (3d Cir. 1998). Based on the facts Red Hat alleges in its Complaint, dismissing this case on a 12(b) motion is particularly appropriate for the reasons set forth in this Memorandum.

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION UNDER THE DECLARATORY JUDGMENT ACT.

In Counts I and II of their Complaint, Red Hat seeks declaratory judgments. In Count I, Red Hat begins by requesting a declaratory judgment that "it does not infringe any SCO copyright." Then, in a sweeping effort to obtain a declaratory judgment on behalf of the entire Linux industry, Red Hat seeks a declaration that "any SCO copyright to cover Linux software is unenforceable." Finally, again on behalf of the entire Linux industry, Red Hat requests the declaration that "SCO is equitably estopped from asserting any SCO copyright with respect to any Linux software."[7] These broad claims for declaratory relief far exceed the scope and

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[7] These requests are consistent with Red Hat's stated intentions in its press release filed on the date suit was filed: "Red Hat today made two significant announcements to protect Red Hat Linux customers and the worldwide Linux community," *i.e.*, the filing of the lawsuit and pledging a fund to pay the legal expenses of anyone who actually may be sued for infringement by SCO under specified conditions.

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purpose of the Declaratory Judgment Act. More importantly, Red Hat fails to establish the existence of an "actual controversy" as required by the Declaratory Judgment Act, and therefore this Court lacks subject matter jurisdiction to adjudicate these claims.

In Count II, entitled "Declaratory Judgment of No Misappropriation of Trade Secrets," Red Hat seeks similarly sweeping declarations. Specifically, Red Hat seeks a declaration "that it has not misappropriated any SCO trade secret, that any SCO trade secret claimed to cover UNIX software found in Linux is invalid, that the source code for the Linux kernel and operating system are public and cannot constitute a trade secret and that SCO is equitably estopped from asserting any SCO trade secret with respect to any Linux software." Red Hat, however, has never had any license from SCO providing access to SCO's trade secrets or other confidential information and, to SCO's knowledge, has not stolen or otherwise misappropriated any of SCO's trade secrets or confidential information. Therefore, unlike companies that have contractual obligations to SCO, Red Hat has no legal or factual basis for apprehension of suit by SCO with respect to trade secrets or confidential information it has licensed from SCO, and its claims in Count II can be summarily dismissed.

A. **Red Hat Cannot Establish an "Actual Controversy" as Required by 28 U.S.C. § 2201.**

The Declaratory Judgment Act limits the use of declaratory judgments to cases of "actual controversy." 28 U.S.C. § 2201; *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40 (1937). Generally, the presence of an "actual controversy" within the Act depends on "whether the facts alleged, under all circumstances, show that there is a substantial controversy between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). The plaintiff, as the party seeking to invoke the court's jurisdiction, bears the burden of proving

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by a preponderance of evidence that an "actual controversy" existed not only at the time of the complaint's filing but also throughout the pendency of the action." *CAE Screenplates Inc. v. Beloit Corp.*, 957 F.Supp. 784, 788 (E.D. Va. 1997); *International Med. Prosthetics Research Assoc. v. Gore Entrp. Holdings*, 787 F.2d. 572, 575 (Fed. Cir. 1986). When factual questions concerning jurisdiction have been raised, the court need not accept the allegations of the complaint as true, but may look behind the complaint and view the evidence to determine whether a controversy actually exists. *International Harvester v. Deere & Co.*, 623 F.2d 1207, 1210 (7th Cir. 1980). Significantly, even when it is determined that an actual controversy exists, federal courts may decline to exercise that discretionary jurisdiction. *Public Affair Assoc. v. Rickover*, 369 U.S. 111, 112 (1962) ("The Declaratory Judgment Act was an authorization, not a command. It gave federal courts competence to make a declaration of rights; it did not impose a duty to do so.").

In deciding whether to allow a claim for declaratory relief to proceed in patent and copyright cases, federal courts have widely used a two-step analysis in determining whether an "actual controversy" exists. *See, e.g., Diagnostic Unit Inmate Council v. Films Inc.*, 88 F.3d. 651, 653 (8th Cir. 1996); ("In patent and copyright cases, there is an actual controversy if defendant in a declaratory judgment lawsuit has either expressly or impliedly charged defendant with infringement.") *B.P. Chemicals, Ltd. v. Union Carbide Corp.*, 4 F.3d. 975, 978 (5th Cir. 1993); *Interdynamics, Inc. v. Firma Wolf*, 698 F.2d 157, 166-70 (3d Cir. 1983); *International Harvester, supra.* First, defendant's conduct must have created a reasonable apprehension on the plaintiff's part that it will face a suit for infringement. This test is an objective one, focusing on whether the defendant's conduct rose to a level sufficient to indicate an intent to enforce its patent or copyright. *See Shell Oil Co. v. Amoco Corp.*, 970 F.2d 885, 888 (5th Cir. 1992);

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Diagnostic Unit, 88 F.3d at 653. To assess the defendant's conduct, courts look initially for a specific and express charge of infringement and, if none is found, then to the "totality of the circumstances." *Shell Oil,* 970 F.2d at 888 ("We must look for any express charges of infringement, and if none, then to the totality of the circumstances."). Second, plaintiff must have engaged in allegedly infringing acts or possessed the capability and definite intention to engage immediately in such acts. *CAE Screenplates,* 957 F.Supp. at 789; *Diagnostic Unit,* 88 F.3d at 653. This second prong, in essence, prohibits declaratory judgment plaintiffs from seeking advisory opinions on their potential liability for initiating some future activities.

> 1. **Counts I and II must be dismissed because Red Hat cannot establish a "reasonable apprehension" that SCO will sue it for copyright infringement or misappropriation.**

Stripped of its rhetoric, Red Hat's Complaint fails to establish a "reasonable apprehension" that it will be sued by SCO for copyright infringement or misappropriation. SCO has not threatened Red Hat with a claim for copyright infringement or misappropriation. Further, Red Hat has not identified facts supporting such a threat. The inquiry consequently becomes whether Red Hat's allegations of the "totality of circumstances" provide a "reasonable apprehension" that it will face such a suit. The answer to that question is a resounding "no."

As a preliminary observation, its August 4, 2003 press release (see, footnote 5, *supra.*) reveals that Red Hat's real motive for filing suit against SCO was to somehow vindicate the entire Linux industry. Further, in paragraph 13 of the Complaint, Red Hat alleges:

> In light of SCO's consistent refusal to identify any specific source code in the public LINUX kernel or operating system that SCO is currently claiming infringes its intellectual property rights, Red Hat brings this action.

This allegation reveals that Red Hat's action does nothing more than seek an advisory opinion of

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this Court regarding SCO's intellectual property rights, something that is clearly prohibited under the Declaratory Judgment Act.

The examples Red Hat uses to claim apprehension of suit belie its assertion. As detailed below, when the entire quotes, not the biased excerpts that have been placed out of context, are carefully examined, the conclusion is undeniable that Red Hat has no reasonable apprehension that it will be sued for copyright infringement or misappropriation.

In paragraph 50, for example, Red Hat identifies a quote from Darl McBride, the Chief Executive Officer of SCO, in which he says simply "[t]here will be a day of reckoning for Red Hat ...*when this is done.*" ¶ 50 (emphasis added). On its face, this quote makes clear that any action against Red Hat would take place only when litigation against IBM is completed. Moreover, when this quote is read in the context of the very next sentence, which Red Hat failed to provide, there is no doubt as to SCO's intentions: "But we are focused on the IBM situation." CRN article attached as Exhibit E. With the quote presented in context there can be no legitimate claim by Red Hat of "reasonable apprehension" of suit by SCO. Lest there be any doubt about Red Hat's complete lack of a "reasonable apprehension" of being sued, SCO's Vice President Chris Sontag was asked in an interview to explain Mr. McBride's comment about "a day of reckoning:"

> What he meant was that if SCO prevails in their lawsuit with IBM, companies like Red Hat and SuSE may need to revisit their distributions and remove any UNIX system code from their distributions and compensate SCO in some way for the software code that they benefited from by using our UNIX code."

Mozilla Article attached as Exhibit F. Nothing in that statement indicates that SCO is intending to sue Red Hat for infringement or misappropriation. Instead, it makes the rather unremarkable observation that *if* SCO prevails in its litigation against IBM, there will be ramifications to other

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companies in the Linux industry.

Red Hat apparently was aware that Mr. McBride's statement had been clarified. Indeed, when Red Hat presented the foregoing quote of Mr. Sontag, it intentionally deleted the reference showing that the comment was an explanation of Mr. McBride's statement about a "day of reckoning." ¶ 52. Whatever Red Hat's motivation for its selective editing, it remains clear that nothing in any of these quotes gives rise to a "reasonable apprehension" of suit by SCO.

In its quest for claiming a "reasonable apprehension," Red Hat next incorrectly attributes a quote to Chris Sontag. Specifically, in paragraph 50, Red Hat claims Mr. Sontag said that SCO "may bring subsequent actions against Linux software developers such as Red Hat ...." There are two significant flaws with Red Hat's use of this "quote." First, it is not a statement that Chris Sontag made. According to the CNETnews.com article from which the quote came, the quote was the reporter's interpretation of Mr. Sontag's statement.[8] More importantly, when the statement and Mr. Sontag's actual statements are read together, it is clear that Mr. Sontag's comments do not give rise to "reasonable apprehension" on the part of Red Hat:

> SCO may also amend its complaint to bring additional causes of action against IBM, he added, and bring subsequent actions against Linux software developers such as Red Hat and SuSE.

> "The fact that there are other companies infringing our contract ...(means) there could be other complaints," Sontag said.

> In particular, Sontag said that a "major" hardware vendor inserted code protected by SCO's UNIX intellectual-property rights into a Linux product.

Article attached as Exhibit G.

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[8]Nonetheless, even if Mr. Sontag did make such a statement or one similar to it, it is merely consistent with the earlier comments that *if* SCO *is* successful against IBM, it *may* bring subsequent actions against Red Hat and SuSE. Again, such comments do not give rise to an immediate need for declaratory relief.

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The actual quotes attributed to Mr. Sontag indicate that at least one other company (besides IBM) with whom SCO has a license agreement is in violation of that license agreement. Red Hat does not have any such license agreement and it has not alleged that it has any such license agreement with SCO. Under these circumstances, Red Hat is well aware it is not the unidentified "major" hardware vendor. Thus, there is nothing in this article presented by Red Hat to provide Red Hat with a "reasonable apprehension" of being sued for infringement or misappropriation.

In paragraphs 56 through 58 of its Complaint, Red Hat points to the pre-suit letter it wrote to SCO. This letter and SCO's response certainly do not provide a "reasonable apprehension" that Red Hat may be sued. In its Complaint, Red Hat outlines the letter it sent to SCO in which Red Hat demanded that SCO identify the infringing code "and noted that SCO had 'failed to provide any details' in support of its allegations *so that Red Hat could refute them.*" ¶ 56 (emphasis added). While Red Hat identified its desire to refute SCO's allegations, it never mentioned either in its letter or in reaction to SCO's response to its letter any fear that it would be sued. Rather, according to its allegations, Red Hat received "a telephone call seeking to have Red Hat pay for an unneeded UNIX license." ¶11. Two business days later, Red Hat filed suit. "The unavoidable inference is that plaintiff, recognizing that it did not have a reasonable basis for apprehension of suit, intentionally attempted to goad defendant's counsel into threatening a lawsuit." *BASF Corp. v. PPG Industries,* 1991 WL 354884 *9 (D N.J. February 11, 1991)[9].

Courts confronted with far more compelling examples of purported "reasonable apprehension" have rejected such claims. In *Bonterra America v. Bestmann,* 907 F.Supp. 4, 7 (D.D.C. 1995), for example, the "totality of circumstances" was (1) an offer from the defendant

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[9] Opinion attached as Exhibit H.

patent holder of a non-exclusive license; (2) statements allegedly made to plaintiff's customer and/or marketing representative that certain of plaintiff's products violated defendant's patent; and (3) a letter to the same person from defendant's attorney in which the attorney declined to answer legal questions about defendant's patent and directed the person to seek his own counsel regarding such questions. *Id.* The court further noted the absence of allegations that may have supported jurisdiction: .

> No allegations have been made by [plaintiff] that [defendant] has contacted [plaintiff] and informed it that its products are in violation of the patent. No allegations have been made that [defendant] has conveyed to [plaintiff] either expressly or implicitly that it intends to sue to enforce its patent, and no allegations have been made that [defendant] has ever before sued another entity for infringement.

Id.

Red Hat's Complaint suffers from the same infirmities found by the court in *Bonterra America* to preclude subject matter jurisdiction. There are no allegations that SCO has contacted Red Hat and informed it that its product violates SCO's copyrights. Nor has SCO done so. There are no allegations that SCO has conveyed to Red Hat either expressly or implicitly that it intends to sue Red Hat to enforce its copyrights. Nor has SCO done so. There are no allegations that SCO has sued any other entity for infringement. Nor has SCO done so. Under these circumstances, the declaratory judgment claims fail for lack of subject matter jurisdiction. *See also CAE Screenplates*, 957 F.Supp. at 790 (series of letters between patentee's counsel and putative infringer's counsel concerning putative infringer's demands for license, fears of putative infringer's customers about patent, and patentee's history of patent litigation did *not* give putative infringer objective, reasonable apprehension of infringement suit, as required for subject matter jurisdiction and declaratory judgment action for a non-infringement, unenforceability and

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invalidity of patent); *Phillips Plastics Corp. v. Kaisha,* 57 F.3d 1051, 1053 (Fed. Cir. 1995) ("The offer of a patent license does not create an actual controversy").

Red Hat's allegations directed solely to its claim for a declaratory judgment for "no misappropriation of trade secrets" also do not provide proof of an "actual controversy." Red Hat certainly has not alleged it has been threatened with such an action. Similarly, the "totality of circumstances" do not imply such a threatened action. As to any threats by SCO, real or perceived, they are found in paragraph 51 of its Complaint. There, Red Hat claims SCO has asserted Red Hat wrongfully misappropriated portions of SCO's proprietary UNIX software. However, the purported factual support for this proposition incorporated in Plaintiff's allegations eviscerates this pronouncement. Specifically, Red Hat notes that Darl McBride stated that *"IBM took chunks [of code] out of [Project] Monterey, and gave it away. You can find it in Red Hat ...Linux."* ¶ 51 (emphasis added). As this quote makes clear, any claim for misappropriation asserted by SCO would not be made against Red Hat, but instead would be made against IBM, as SCO has done in the litigation pending in federal court in Utah.

In addition to this lack of a threat, there is a simple factual hurdle that precludes any "reasonable apprehension" of suit against Red Hat. Red Hat, unlike IBM, has never signed a license agreement giving it access to SCO's confidential trade secrets in System V source code. A fundamental principle of trade secret law is that "[t]he protection accorded the trade secret holder is against the disclosure or unauthorized use of the trade secret *by those to whom the secret has been confided under the express or implied restriction of nondisclosure or nonuse."* *Kewanee Oil Co. v. Bicron Corp.,* 416 U.S. 470, 475 (1974) (emphasis added). In the absence of access to the confidential UNIX System V source code or the improper taking of that source code Red Hat cannot legally be in a position of "reasonable apprehension" that it may be sued

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for misappropriation of trade secrets.

      B.   **Even if the Court Determines Subject Matter Jurisdiction Exists, the Court Should Exercise its Discretion and Decline to Consider the Case.**

It is clear that Red Hat has not established (and cannot establish) a reasonable apprehension of suit by SCO for infringement or misappropriation. Nonetheless, even if Red Hat could satisfy the prerequisites, this Court has the discretion to decline to exercise its jurisdiction. *Rickover, supra; International Harvester*, 623 F.2d at 1217. The previously filed SCO v. IBM Case addresses most, if not all, of the issues of copyright infringement and misappropriation. If these issues are decided against SCO in that case, then Red Hat's lawsuit becomes unnecessary. Certainly, Red Hat's "need for declaratory relief does not outweigh the interests in judicial expediency and in avoiding unnecessary federal court decisions." *International Harvester*, 623 F.2d at 1218. This Court, therefore, should decline jurisdiction, if it exists, in this case and dismiss Counts I and II of the case.

II. RED HAT'S CLAIMS FALL OUTSIDE THE SCOPE OF THE LANHAM ACT AND RELATED STATE LAW CLAIMS AND ARE FULLY PROTECTED SPEECH UNDER THE FIRST AMENDMENT.

Red Hat's claims for relief under the Lanham Act and related state law claims, as set forth in Counts III through VII of the Complaint, contain only legal conclusions in the body of each count, without reference to specific averments of fact. Therefore, it is necessary to glean factual support for each of these claims from the Background Facts contained in paragraphs 1 through 69 of the Complaint. A complicating factor is that many of the "Background Facts" are argument and *ad hominem* attacks, rather than averments of factual conduct.

Nevertheless, the Background Facts generally condense into five public statements made by SCO that relate to Red Hat's claims: (1) Linux software versions 2.4 and 2.5 contain intellectual property owned or controlled by SCO,[10] (2) IBM has improperly contributed UNIX intellectual property into Linux,[11] (3) SCO intends to protect and defend its intellectual property rights,[12] (4) legal liability for use of infringing versions of Linux may rest with end users,[13] and (5) corporate end users can avoid potential legal liability to SCO by acquiring a right-to-use license[14] (collectively, the "Public Statements").

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[10] ¶¶ 1, 40, 59 and 66.
[11] ¶¶ 2, 41 and 51.
[12] ¶¶ 42 and 52.
[13] ¶¶ 2, 4 and 42.
[14] ¶¶ 38 and 60.

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SCO's Public Statements fall outside the scope of the Lanham Act and related state law claims and are protected under the First Amendment to the U.S. Constitution. The Public Statements also address or relate to pending or potential litigation and are privileged under the common law doctrine of litigation immunity. Therefore, Counts III through VII of Red Hat's Complaint fail to state claims upon which relief may be granted and must be dismissed with prejudice.

A. The Public Statements are Fully Protected Speech Under the First Amendment.

Red Hat's claims under the Lanham Act and related state laws are based on the Public Statements summarized above. The question on this Motion to Dismiss is whether the Public Statements could legitimately be considered "False Advertising in Violation of § 43(a) of the Lanham Act," as pled by Red Hat in the Complaint. For the reasons detailed below, the answer to this question must be "no."

For a representation to be actionable under the Lanham Act, it must be made "in commercial advertising or promotion." 15 U.S.C. § 1125(a)(1)(B). Congress intended § 43(a) of the Lanham Act to extend only to false and misleading speech that is encompassed within the "commercial speech" doctrine developed by the United States Supreme Court. *Gordon and Breach Science Publishers, S.A. v. American Institute of Physics*, 859 F.Supp. 1521, 1535-36 (S.D.N.Y. 1994). "Commercial speech" is protected under a lesser standard than other forms of constitutionally guaranteed speech. *See, e.g., United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993); *Board of Trustees v. Fox*, 492 U.S. 469 (1989). As a result, the government may regulate commercial speech in ways that it may not regulate other forms of speech. *See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel*, 425 U.S. 748, 770-73·

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(1976).

One definition of "commercial speech" set forth by the U.S. Supreme Court is "speech proposing a commercial transaction." *Edge Broadcasting, supra,* at 426. An alternative definition, also set forth by the U.S. Supreme Court, is "expression related solely to the economic interests of the speaker and its audience." *City of Cincinnati v. Discovery Network, Inc.* 507 U.S. 410, 422 (1993). Notwithstanding these different definitions of "commercial speech," the Supreme Court cautions that distinguishing between commercial and noncommercial speech is not susceptible to the drawing of bright lines. *Id. See also Gordon and Breach,* 859 F. Supp. at 1537-38. "The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Bolger v. Youngs Drug Products Corp,* 463 U.S. 60, 68 (1983), quoting *Central Hudson Gas & Electric Corp. v. Public Service Comm'n.,* 447 U.S. 557, 563 (1980). The prohibition against use of a bright-line test ensures that restrictions on speech are carefully evaluated and that speech deserving of greater constitutional protection is not inadvertently suppressed: .

> We conclude that...the articles' commercial or noncommercial nature cannot be determined simply through the application of the bright-line test of whether they "propose a commercial transaction" (or alternatively, whether they "do no more than propose a commercial transaction" [citation omitted]. In cases such as this where commercial and noncommercial speech are closely intertwined, our task is not to apply bright-line tests but rather to "examine restrictions on speech carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed."

Gordon and Breach, 859 F.Supp. at 1540 n. 7, *quoting Discovery Network,* 507 U.S. at 423. . Thus, the inquiry to determine whether speech is "commercial" under the Lanham Act requires an analysis of both the nature of the particular speech in question, and the governmental interest served by regulating that type of speech.

1. Nature of the Speech.

In the instant case, the speech in question is set out in SCO's Public Statements. The nature of the Public Statements concerns (a) rights under the Copyright Act, 17 U.S.C. § 101 *et seq.*, (b) contract and copyright claims against IBM, (c) potential copyright liability of corporate end users of Linux versions 2.4 and 2.5, and (d) licensing options for corporate end users to avoid potential copyright liability.[15] The nature of this particular speech can be generally categorized as follows: ownership of intellectual property rights, violation of those rights by others, pending and potential litigation, ways to avoid intellectual property infringement claims without litigation, and a licensing offer that is compatible with, not competitive to, Red Hat products.

On the issues of ownership of intellectual property rights, public statements of ownership in those rights and infringement by others, this Court's decision in *Symbol Technologies, Inc. v. Proxim Inc.*, 2003 WL 21840774 (D. Del. July 30, 2003)[16] clearly demonstrates the protections afforded to such speech. *Symbol Technologies* involved the filing of a patent infringement case. The plaintiff filed its complaint for infringement, and also issued a press release in connection with the complaint, publicly asserting patent infringement claims against the defendant. In response, the defendant filed a counterclaim for, *inter alia*, Lanham Act violations, together with unfair competition and tortious interference claims under Delaware law. This Court reviewed these alleged violations on a summary judgment motion, summarized as follows:

> In its counterclaims, defendant first asserts that this press release
> constituted unfair competition under § 43(a) of the Lanham Act, 15
> U.S.C. S 1125 (a). (D.I. 6 at 11) It alleges that the press release
> contains materially false and misleading statements stating that
> defendant infringed four patents owned by plaintiff and that
> plaintiff would obtain injunctive relief against Proxim's Home-RF
> products. (Id. at 12) Defendant also alleges that plaintiff's press
> release was made in bad faith because plaintiff knew that

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[15] SCO has never asserted in any statement that individual, non-corporate users of Linux may be liable to SCO, or otherwise would need to purchase a right to-use-license.

[16] Case attached as Exhibit I.

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defendant's products did not infringe the asserted patents. Rather, the press release was meant to mislead and deceive defendant's investors, suppliers, distributors, retailers and other business partners. (Id. at 13) Finally, defendant asserts that ultimately, plaintiff's press release caused the failure of defendant's Home-RF product line and caused defendant substantial financial loss. Defendant next asserts that plaintiff's press release also violates Delaware's common laws governing unfair competition and tortious interference with actual and prospective contractual relations, (Id. at 14) Again, defendant alleges that plaintiff's press release was intended to dissuade defendant's business partners from doing business with it and to push defendant's Home-RF products out of the market.

Id at * 3.

These facts are remarkably similar to those alleged in the instant case, with the significant

difference that SCO has not accused Red Hat of infringement. This Court entered summary

judgment in *Symbol Technologies*, dismissing the Lanham Act and state law claims and adopting

the test for evaluating public statements to the industry about pending patent infringement

matters set forth by the Federal Circuit in *Mikohn Gaming Corp. v. Acres Gaming, Inc.*, 165 F.3d

891, 897 (Fed Cir. 1998). The *Mikohn Gaming* case similarly dealt with public statements about

patent infringement allegations issued by a party prior to full and final resolution of the

infringement claims at issue. The Federal Circuit ruled:

Communication to possible infringers concerning patent rights is not improper if the patent holder has a good faith belief in the accuracy of the communication. Although "bad faith" may encompass subjective as well as objective considerations, and the patent holder's notice is not irrelevant to a determination of bad faith, a competitive commercial purpose is not of itself improper, and bad faith is not supported when the information is objectively accurate. In general, a threshold showing of incorrectness or falsity, or disregard for either, is required in order to find bad faith in the communication of information about the existence or pendency of patent rights. Indeed, a patentee, acting in good faith on its belief as to the nature and scope of its rights, is fully permitted to press those rights even though he may misconceive what those rights are. Consequently, patentees do not violate the

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rules of fair competition by making accurate representations, and are allowed to make representations that turn out to be inaccurate provided they make them in good faith.

Id. at * 4.

Under the *Mikohn Gaming* rule adopted by this Court, the only threshold SCO faces with respect to the SCO Public Statements is the threshold of good faith. The question of good faith pleading regarding SCO's intellectual property rights with respect to Linux, and attendant infringement of the Linux 2.4 kernel software, is squarely before the Utah Court in the SCO v. IBM Case. This issue should not be allowed to go forward as a collateral attack against SCO in the instant case.

Public statements that discuss pending or potential litigation in direct communication to customers are not in the nature of a "proposal for a commercial transaction" under the Lanham Act. In a factually similar case, the court in *Avery Dennison Corp. v. Acco Brands, Inc.*, 2000 U.S. Dist. LEXIS 3938 (C.D. Cal. February 22, 2000)[17] found that demand letters to customers which contained allegedly false and misleading statements about the nature of the defendant's legal claims failed to give rise to a Lanham Act claim, as a matter of law. The court reasoned:

> The Letters did not ask the recipients not to buy Acco's products; rather they asked the recipients not to use the allegedly infringing packaging in their catalogs...From a reading of the content of the Bohrer Letters, it is clear that these letters consisted of "cease and desist" language rather than any marketing or sales pitch.
>
> As such, this Court concludes that the Bohrer Letters do not constitute an advertisement as a matter of law. Furthermore, in examining the disputed communication in light of its surrounding circumstances, this Court concludes that the Letters do not constitute commercial speech. As Avery argues, the central message of the Letters was that Avery believed its legal rights were being violated and that it did not want the recipients of the letters to continue that violation.

Id. at *23-24

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[17] Case attached as Exhibit J.

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Avery Dennison is persuasive in the instant case. Here, as in *Avery Dennison*, the speech in question includes statements of legal rights and alleged violations of those rights by others. These statements are not a "marketing or sales pitch" they are in the nature of legal demands. Legal demands and assertions do not rise to the level of an "advertisement" or "commercial speech" under the Lanham Act. The *Avery Dennison* court entered a ruling to this effect as a matter of law. This Court should reach the same conclusion and rule that the SCO Public Statements related to legal rights and violation of those rights by others do not, as a matter of law, give rise to Lanham Act claims.[18]

SCO's statements about the right-to-use intellectual property license offered by SCO to large corporations ("RTU License") involves additional inquiry. The RTU License has the following characteristics: it is offered for simultaneous use with any Linux 2.4 operating system, not a replacement for Linux; it releases the licensee from any past or future liability it may have to SCO for infringing use of any Linux product; it covenants not to sue the licensee for any infringement of SCO's intellectual property rights that might otherwise arise from running Linux. ¶¶ 61, 62. This RTU License does not fall within the Lanham Act for three distinct reasons: first, it is a reasonable extension of SCO's legal claims involving current or potential litigation, and therefore should be treated under the rationale of *Mikohn Gaming, supra*, and *Avery Dennison, supra*; second, its salient features are a release of liability and covenant not to sue customers who run Linux, which are distinctly protected legal statements; and third, it does not compete with Linux, but rather depends entirely on the acceptance and licensing of Linux by customers. Because SCO's RTU License depends on the continued licensing of Linux by customers for its ongoing success, and because the RTU License principally involves a legal release and covenant not to sue, this Court should rule that it falls outside of Lanham Act

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[18] SCO recognizes that *Symbol Technologies, Mikohn Gaming* and *Avery Dennison* were decided on motions for summary judgment. However, based on the facts as presented in Red Hat's Complaint in the instant case, this Court is likewise in a position to rule on the issues of the protected speech as a matter of law on this Motion to Dismiss.

coverage.

For the above reasons, the Public Statements made by SCO do not have the fundamental characteristics of commercial speech required to support a Lanham Act claim. This is particularly apparent when the Public Statements are evaluated in context of the governmental interests that relate thereto. When evaluated against the relevant governmental interests, it is clear that the Lanham Act coverage does not extend to the Public Statements under the fundamental test for commercial speech articulated in *Bolger v. Youngs*, 463 U.S. at 68; and explained in *Gordon and Breach*, 859 F.Supp. at 1535-40.

2. Governmental Interests Served by Regulating the Speech in Question.

The governmental interests in regulating speech under the Lanham Act must be balanced against the weight of other governmental regulations that already exist with respect to that speech. Clearly, the governmental interest in regulating commercial speech under the Lanham Act is to prevent false and misleading advertisement. So long as other governmental regulations do not counterbalance this interest, commercial speech that otherwise meets the required elements of proof will be subject to the Lanham Act. However, when speech has some commercial characteristics but is also directly implicated by other significant governmental regulations, the elements of commercial speech are "inextricably intertwined" with protected speech, and therefore fall outside Lanham Act coverage. *See e.g., Riley v. National Fed'n of the Blind, Inc.*, 487 U.S. 781, 796 (1988) (theological component of speech was "inextricably intertwined" with its commercial nature and therefore not subject to Lanham Act); and *Village of Schaumburg v. Citizens for a Better Env't.*, 444 U.S. 620 631-37 (1980) (mandated disclosure of administrative costs was "inextricably intertwined" with noncommercial charitable solicitation and therefore subject to heightened First Amendment scrutiny). Thus, when speech with commercial characteristics is "inextricably intertwined" with otherwise fully protected speech, courts are to treat all aspects of the subject speech as fully protected expression. *Riley v.*

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National Federation of the Blind, 487 U.S. at 795-96.

There are four primary governmental interests implicated by regulating the speech in question (the SCO Public Statements). These governmental interests are compelling in their own right and are inextricably intertwined throughout the entirety of the SCO Public Statements. Individually and collectively these governmental interests require treatment of SCO's Public Statements as fully protected speech under the First Amendment, falling outside of the Lanham Act.

The first governmental interest implicated by regulating the SCO Public Statements is the exclusive set of rights granted to copyright holders under the Copyright Act, 17 U.S.C. § 101 *et seq.* The Copyright Act grants certain exclusive rights to owners of copyrights, including the right to reproduce the copyrighted works, prepare derivative works thereof and authorize reproduction and derivative works by others. 17 U.S.C. § 106. The Copyright Act authorizes such acts as public registration and notice (17 U.S.C. § 401-412), legal action for damages (17 U.S.C. § 503) and injunctive relief (17 U.S.C. § 502). It would be anathema for copyright holders to be prohibited from speaking about the nature and extent of their rights under the Copyright Act. Therefore, the Copyright Act provides a significant governmental interest that weighs against Lanham Act relief with respect to statements made about the nature and extent of SCO's copyrights.

The second governmental interest implicated by regulating the SCO Public Statements is the constitutional guarantee to free and uninhibited access to courts. This governmental interest is embodied in the litigation privilege recognized at common law. The Restatement of Law, Second, Torts §587 recognizes this principle as follows:

> A party to a private litigation or a private prosecutor or defendant in a criminal prosecution is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of, a judicial proceeding in

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which he participates, if the matter has some relation to the proceeding.

Under the Restatement position, the only condition to absolute immunity for parties involved in pending or potential litigation is that published statements must bear "some relation to the proceeding." Various versions of the Restatement position on litigation immunity have been widely adopted by state and federal courts throughout the United States, including Delaware. *See, e.g., Shearin v. Baldwin*, 1988 De. Super. LEXIS 243 (July 5, 1988)[19]. *Shearin v. Baldwin* involved attorney litigation immunity under Restatement (Second) §586, which appears to be identical in principle to Restatement §587 that extends to litigants. In *Shearin v. Baldwin*, the Delaware Superior Court found that:

> Delaware law recognizes the common law rule, protecting "statements of judges, parties, witnesses and attorneys offered in the course of judicial proceedings from a cause of action in defamation." Nix v. Sawyer, Del. Super. 466 A.2d 407, 410 (1983) and cases there cited; Hoover v. Van Stone, 540 F. Supp. 1118, 1121 (D. De. 1982). "The privilege affords absolute protection upon a showing that: (1) statements issued as part of a judicial proceeding; (2) the alleged defamation is relevant to a matter at issue in the case." Id at 410; Restatement (Second) of Torts §586 (1977) n.2 Comment (a) of the official comment to this section of the Restatement explains that this absolute privilege is founded on a public policy of providing attorneys with a great degree of freedom in their efforts to obtain justice for their clients and, therefore, applies to communications incident to the institution and conduct of litigation, and to conferences and other communications preliminary to the formal commencement of judicial proceedings.

Id. at p. 3 (emphasis added). *See also Avery Dennison*, at p. 5 (applying California law, the principal purpose of litigation immunity is to afford litigants the "utmost freedom of access to the courts without fear of being harassed subsequently be derivative tort actions. . . .If this Court were to impose tort liability based on the Letters, then it would inhibit trademark holders from attempting to protect the rights granted it under the Lanham Act.") SCO's Public Statements fall

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[19] Case attached as Exhibit K.

squarely in the rule of *Shearin v. Baldwin* and the rationale of *Avery Dennison:* SCO has an absolute privilege to make statements related to litigation, both inside and outside the courtroom. All of SCO's Public Statements relate to pending or potential litigation, or matters related thereto. Even the RTU Licensing offer to customers was related to actual and potential legal proceedings. SCO is entitled to an absolute privilege to have made the Public Statements. The governmental interest in protecting the litigation privilege and allowing free and unfettered access to courts without the fear of being harassed subsequently in derivative tort actions overrides any governmental interest in the Lanham Act with respect to SCO's Public Statements. Here, without any allegation that SCO's Public Statements are defamatory, it is even more compelling that the absolute litigation privilege applies.

The third governmental interest implicated by regulating the SCO Public Statements is the Judicial Code set forth in Title 28 of the United States Code. This governmental interest relates to regulation of litigation and court proceedings in an efficient and fair manner. The U.S. Court for the District of Utah already has before it the question of whether Linux software infringes SCO's intellectual property rights. SCO's allegations in the SCO v. IBM Case are subject to the normal standards of good faith pleading that govern litigation proceedings and are within the jurisdiction of the Utah Federal District Court. As noted above, this Court has already adopted the decision of the Federal Circuit in *Mikohn Gaming.* Under *Mikohn Gaming,* the only threshold SCO faces with respect to the SCO Public Statements is the threshold of good faith. Because the question of good faith pleading regarding SCO's intellectual property rights is pending before the Utah Court in the SCO v. IBM Case, no governmental interest is served by exercising jurisdiction over SCO's Public Statements in the instant case. Rather, in the interest of judicial economy and fair litigation, Red Hat should be precluded from bringing its Lanham Act claims and related state law claims in this action.
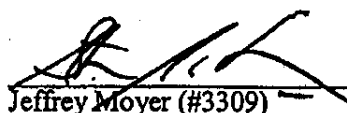
The fourth governmental interest implicated by regulating the SCO Public Statements is

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the constitutional guarantee of a free and impartial press under the First Amendment. As noted in Red Hat's Complaint, the press has taken a keen interest in the issues raised in the SCO v. IBM Case. Indeed, SCO's Public Statements are also part of a wider debate in the technology and music industries about the scope of intellectual property protection in a digital age. As open source software development becomes prevalent and digital music can be downloaded for free, many people are simply ignoring copyright and patent laws. Many public commentators recognize this disintegration of property rights as a danger to our economic system. In a small way, SCO's Public Statements are part of this debate. This is an additional factor that weighs in favor of holding SCO's Public Statements as fully-protected speech, not subject to the Lanham Act or associated state law claims. It would pervert the First Amendment to allow the Lanham Act to chill broad debate about the relative merits, and problems, with open source software.

CONCLUSION

Red Hat is not in reasonable apprehension of being sued by SCO for infringement or misappropriation. In fact, Red Hat's stated purpose for its declaratory relief claims is to seek an advisory opinion from this Court regarding SCO's intellectual property claims. This is an entirely impermissible use of the Declaratory Judgment Act. Red Hat cannot establish subject matter jurisdiction to support its claims for declaratory relief, and Counts I and II of the Complaint must be dismissed for lack of jurisdiction.

Red Hat's claims under Counts III through VII seek to impose liability for actions and expression that do not give rise to liability under the Lanham Act or the associated state law claims. Further, any governmental interest served under the Lanham Act is heavily outweighed by fundamental governmental interests in protecting copyright interests, ensuring full and free access to courts, providing litigation immunity, promoting judicial economy and fairness in litigation, and safeguarding freedom of speech and the press. Therefore, Counts III through VII must be dismissed, with prejudice.

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Dated: September 15, 2003

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2003 true and correct copies of the foregoing were

caused to be served on counsel of record at the following addresses in the manner indicated:

BY HAND DELIVERY

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

THE SCO GROUP, INC., a Delaware corporation,	
Plaintiff,	**AMENDED COMPLAINT**
vs.	(Jury Trial Demanded)
INTERNATIONAL BUSINESS MACHINES CORPORATION, a New York corporation,	Case No. 03-CV-0294
Defendant.	Hon: Dale A. Kimball

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Plaintiff, The SCO Group, Inc., a Delaware corporation, f/k/a Caldera Systems, Inc. ("SCO"), sues Defendant International Business Machines Corporation ("IBM") and alleges as follows:

Nature of This Action

1. UNIX is a computer operating system program and related software originally developed by AT&T Bell Laboratories ("AT&T"). UNIX is widely used in the corporate, or "enterprise," computing environment.

2. Through a series of corporate acquisitions, SCO presently owns all right, title and interest in and to UNIX and UnixWare operating system source code, software and sublicensing agreements, together with copyrights, additional licensing rights in and to UNIX and UnixWare, and claims against all parties breaching such agreements. Through agreements with UNIX vendors, SCO controls the right of all UNIX vendors to use and distribute UNIX. These restrictions on the use and distribution of UNIX are designed to protect the economic value of UNIX.

3. A variant or clone of UNIX currently exists in the computer marketplace called "Linux." Linux is, in material part, based upon UNIX source code and methods, particularly as related to enterprise computing methods found in Linux 2.4.x releases and the current development kernel, Linux 2.5.x. Significantly, Linux is distributed without a licensing fee and without proprietary rights of ownership or confidentiality.

4. The UNIX software distribution vendors, such as IBM, are contractually and legally prohibited from giving away or disclosing proprietary UNIX source code and methods for external business purposes, such as contributions to the Linux community or otherwise using UNIX for the benefit of others. This prohibition extends to derivative work products that are

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modifications of, or based on, UNIX System V source code or technology. IBM and certain other UNIX software distributors are violating this prohibition, *en masse*, as though no prohibition or proprietary restrictions exist at all with respect to the UNIX technology. As a result of IBM's wholesale disregard of its contractual and legal obligations to SCO, Linux 2.4.x and the development Linux kernel, 2.5.x, are filled with UNIX source code, derivative works and methods. As such, Linux 2.4.x and Linux 2.5.x are unauthorized derivatives of UNIX System V.

5. As set forth in more detail below, IBM has breached its obligations to SCO, induced and encouraged others to breach their obligations to SCO, interfered with SCO's business, and engaged in unfair competition with SCO, including by:

    a) misusing UNIX software licensed by SCO to IBM and Sequent;

    b) inducing, encouraging, and enabling others to misuse and misappropriate SCO's proprietary software; and

    c) incorporating (and inducing, encouraging, and enabling others to incorporate) SCO's proprietary software into Linux open source software offerings.

6. As a result of these breaches, SCO sent a notice of termination to Mr. Sam Palmisano, the Chief Executive Officer of IBM on March 6, 2003. The termination notice specified that, pursuant to SCO's contractual rights under controlling agreements, IBM's right to use or distribute any software product based on UNIX System V technology, including its own version of UNIX known as "AIX," would be terminated on June 13, 2003, unless such breaches were reasonably cured prior to that time.

7. The termination notice was based, in part, on IBM's self-proclaimed contributions of AIX source code to Linux, and use of UNIX/AIX methods for accelerating the development of Linux in contravention of IBM's contractual obligations to SCO.

8. Pursuant to its rights under the controlling agreements, IBM was entitled to 100 days to cure its underlying contractual breaches, provided it was willing and able to do so. Both parties were contractually required to "exert their mutual good faith best efforts to resolve any alleged breach short of termination."

9. To that end, SCO did everything reasonably in its power to exert a good faith effort to resolve the termination of IBM's UNIX contract rights. Conversely, during the 100-day period, IBM did not set forth a single proposal or idea for cure.

10. SCO has therefore terminated IBM's right to use any part of the UNIX System V source code, including its derivative AIX, effective as of June 13, 2003 (the "AIX Termination Date").

11. As of the AIX Termination Date, IBM is contractually obligated to discontinue use of and return or destroy any and all copies of the Software Products defined in the controlling agreements, which include UNIX System V source code and all its derivatives, including AIX.

Parties, Jurisdiction and Venue

12. Plaintiff SCO is a Delaware corporation with its principal place of business in Utah County, State of Utah.

13. Defendant IBM is a New York corporation with its principal place of business in the State of New York.

14. Sequent Computer Systems, Inc. ("Sequent") was formerly an Oregon corporation that contracted with SCO's predecessor in interest, AT&T. Sequent was subsequently merged into IBM in a stock transaction.

15. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §1332 in that diversity of citizenship exists between the parties and the amount in controversy exceeds $75,000, exclusive of interest and costs.

16. This Court has *in personam* jurisdiction over IBM pursuant to *Utah Code Ann.* §78-27-24 on the bases that IBM is (a) transacting business within this State, (b) contracting to provide goods and services within this State and (c) causing tortious injury and breach of contract within this State.

17. Venue is properly situated in this District pursuant to 28 U.S.C. §1391 in that IBM maintains a general business office in this District and a substantial part of the events giving rise to the claims alleged herein occurred in this District.

Background Facts

The UNIX Operating System

18. UNIX is a computer software operating system. Operating systems serve as the link between computer hardware and the various software programs ("applications") that run on the computer. Operating systems allow multiple software programs to run at the same time and generally function as a "traffic control" system for the different software programs that run on a computer.

19. By way of example, in the personal computing market, Microsoft Windows is the best-known operating system. The Windows operating system was designed to operate on

computer processors ("chips") built by Intel. Thus, Windows serves as the link between Intel-based processors and the various software applications that run on personal computers.

20. In the business computing environment for the Fortune 1000 and other large corporations (often called the "enterprise" environment), UNIX is widely used.

21. The UNIX operating system was originally built by Dennis Ritchie, Ken Thompson and other software engineers at AT&T Bell Laboratories. After successful in-house use of the UNIX software, AT&T began to license UNIX as a commercial product for use in enterprise applications by other large companies.

22. Over the years, AT&T Technologies, Inc., a wholly owned subsidiary of AT&T, and its related companies licensed UNIX for widespread enterprise use. IBM, Hewlett-Packard, Inc. ("HP"), Sun Microsystems, Inc. ("Sun"), Silicon Graphics, Inc. ("SGI") and Sequent became some of the principal United States-based UNIX licensees, among many others.

23. IBM, HP, Sun, SGI and the other major UNIX vendors each modified UNIX to operate on their own processors. Thus, for example, the operating system known as "HP-UX" is HP's version of UNIX. HP-UX is a modification of and derivative work based on UNIX System V source code.

24. Similarly, the operating system known as Solaris is Sun's version of UNIX. Solaris is a modification of, and derivative work based on, UNIX System V source code.

25. SGI's UNIX-based operating system is known as "IRIX." IRIX is a modification of, and derivative work based on, UNIX System V source code.

26. IBM's UNIX-based operating system is known as "AIX." AIX is a modification of, and derivative work based on, UNIX System V source code.

27. Sequent's UNIX-based operating system is known as "DYNIX/ptx." DYNIX/ptx is a modification of, and derivative work based on, UNIX System V source code.

28. The various identified versions of UNIX are sometimes referred to as UNIX "flavors." All commercial UNIX "flavors" in use today are modifications of and derivative works based on the UNIX System V Technology ("System V Technology"). Were it not for UNIX System V, there would be no UNIX technology or derivative works available for IBM and others to copy into Linux.

29. SCO is the sole and exclusive owner of all Software and Sublicensing Agreements that control use, distribution and sublicensing of UNIX System V and all modifications thereof and derivative works based thereon. SCO is also the sole and exclusive owner of copyrights related to UNIX System V source code and documentation and peripheral code and systems related thereto.

30. During the 1990s the enterprise computing market for high-performance workstation computers came to be dominated by UNIX and the primary UNIX vendors identified above, each supplying its own version of the UNIX operating system based on UNIX System V Technology. UNIX became synonymous with "workstation" computers that typically operated on a RISC processing platform.

31. The RISC processing platform provides high-power computing capabilities at a relatively higher price for "workstation" computing. The alternative to "workstation" computing is commonly known as "desktop" computing on personal computers. The operating system market for "desktop" personal computers is dominated by Microsoft Corporation and its various Windows-based operating system products. The reason for this distinction is that most desktop computers (PC's) are designed to operate on Intel and Intel-compatible

computing platforms. Most workstations are designed to operate on variants of RISC processing platforms and RISC-compatible computing platforms. PC systems and RISC systems are not compatible with each other. Thus, most versions of UNIX will not operate on Intel-based PC's for desktop computing; and Windows will not operate on RISC-based workstations for enterprise computing.

32. Most of the primary UNIX vendors identified above did not attempt to develop a UNIX "flavor" to operate on an Intel-based processor chip set. This is because the earlier Intel processors were considered to have inadequate processing power for use in the more demanding enterprise market applications.

SCO's Creation of a Market for Intel – The Genesis of SCO OpenServer

33. As computers grew in popularity to perform business functions, the processing power of Intel-based processor chips also began to increase dramatically. Consistent with Intel founder Gordon Moore's prediction, computer chips remained inexpensive while exponentially increasing in power and performance.

34. Seeing this emerging trend, it became evident to SCO that Intel chips would gradually gain widespread acceptance for use in the enterprise marketplace.

35. Therefore, while other major UNIX vendors modified UNIX for their own respective RISC-based computing platforms, SCO developed and licensed the UNIX-based operating system for Intel-based processors for enterprise use that is now known as "SCO OpenServer."

36. SCO's early engineers faced difficult design challenges in modifying UNIX for effective use on an Intel processing platform. The principal design constraint centered around the limited processing power the Intel chip possessed in the early 1980's. The Intel chip (designed as it

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was for personal computers) was not nearly as powerful as the enterprise chips used by IBM, Sun, SGI and others in their respective UNIX offerings.

37. Based on the early design constraint of Intel's limited processing power, SCO found an appropriate enterprise market niche for the early versions of SCO OpenServer—single-purpose applications such as point-of-sale control, inventory control and transactions processing, with the highest possible reliability. Intel processors were fully capable of performing these relatively simple, repetitive tasks, and could do so at a lower cost and as reliably as the more powerful enterprise processing platforms sold by the other UNIX vendors, such as Sun and IBM.

38. One example of a customer well suited to the earlier version of SCO OpenServer software is McDonald's Corp. McDonald's has thousands of stores worldwide and needs all stores to operate on an integrated computing platform for ease of use, immediate access to information and uniformity. However, the actual computing requirements for each individual McDonald's location are functionally simple—sales need to be tracked and recorded, and inventory functions need to be linked to sales. SCO OpenServer reliably fulfills McDonald's computing requirements at reduced cost.

39. SCO's business model for SCO OpenServer provides enterprise customers the reliability, extensibility (ease of adding or changing functionality), scalability (ease of adding processors or servers to increase processing power) and security of UNIX—but on inexpensive Intel processor chips. This combination allowed customers to perform an extremely high number of transactions and, at the same time, gather and present the information from those transactions in an economical and useful way for enterprise decision makers.

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40. The simplicity and power of this "UNIX on Intel" business model helped SCO grow rapidly. SCO gained other large enterprise customers such as CitiGroup, K-Mart, Cendant, Target Stores, Texas Instruments, Walgreens, Merck, Sherwin Williams, Radio Shack, Auto Zone, British Petroleum, Papa John's Pizza, Costco and many others.

41. As Intel's prominence grew in the enterprise computing market, SCO's early version of OpenServer also grew into the operating system of choice for enterprise customers who wanted an Intel-based computing solution for a high volume of repetitive, simple computing transactions.

42. SCO OpenServer is based on the original UNIX Software Code developed by AT&T, but was modified by SCO for the functionality described above. Thus, while performing single-function applications, SCO OpenServer did so, and continues to do so, with the 99.999% reliability of UNIX.

43. Over 4,000 separate applications have been written by developers around the world specifically for SCO OpenServer. Most of these applications are vertical applications for targeted functions, such as point-of-sale control for specific industries, inventory control for specific industries, and related functions.

The SCO OpenServer Libraries

44. Much of the functionality of an operating system is made available to application developers by means of "libraries" of code that are supplied by the operating system vendor. These libraries contain many "functions" or "routines" which can be used by application developers to perform various common tasks such as reading or writing a file or opening a new window on the screen.

45. SCO OpenServer, as with many other operating systems such as Microsoft Windows, makes use of a special kind of library called a "shared library." The code for all of the routines in a particular shared library is stored in a separate file, and this code is loaded into memory "on demand" when an application needs to make use of it. There are several benefits that come from using "shared libraries" - applications can be smaller and use less memory because a single copy of the library code is "shared" by all of the applications that make use of it, and system vendors can easily update the library code in order to fix problems or provide enhanced functionality. A side effect of this is that it is also very easy to make a copy of a shared library.

46. In creating the thousands of SCO OpenServer Applications, each designed for a specialized function in a vertical industry, software developers wrote software code which specifically made use of the SCO OpenServer shared libraries (hereinafter the "SCO OpenServer Shared Libraries"), and thus the presence of the SCO OpenServer Shared Libraries on a particular system is required in order for these applications to be able to run and function correctly.

47. Linux offers a "SCO emulation module," originally called "iBCS" and now known as "linux-abi" which enables applications which were originally developed to run on SCO OpenServer to be run on Linux. However, in order for these applications to function, the SCO OpenServer Shared Libraries must also be copied onto the Linux system. The SCO OpenServer Shared Libraries are the proprietary and confidential property of SCO. SCO OpenServer has been licensed to numerous customers subject to restrictions on use that prohibit unauthorized use of any of its software code, including without limitation, the SCO OpenServer Shared Libraries. SCO does not give permission for copying of the Shared Libraries for use outside OpenServer without payment of separate licensing fees.

SCO's Development of UnixWare on Intel

48. While the original SCO OpenServer operating system performs with all the reliability and dependability of other UNIX systems, it was originally designed for the initially low processing power of Intel chips. Therefore, SCO OpenServer does not offer the same level of multiprocessor capabilities that other versions of UNIX offer.

49. During or about 1992, SCO's predecessor in interest, Novell, Inc. ("Novell"), acquired from AT&T all right, title and interest in and to the UNIX software code, the AT&T Software and Sublicensing Agreements, the copyrights and related and ancillary products for $750 million in Novell stock. For branding purposes, Novell renamed UNIX as "UnixWare."

50. On or about September 19, 1995 the Santa Cruz Operation acquired all right, title and interest in and to UNIX and UnixWare source code, the AT&T Software and Sublicensing Agreements, the copyrights, claims arising after the closing date against any party and all related and ancillary products and rights from Novell, excepting only the right to certain existing ongoing royalty payments which was retained by Novell.

51. From and after September 1995, SCO dedicated significant amounts of funding and a large number of UNIX software engineers, many of whom were original AT&T UNIX software engineers, to upgrade UnixWare for high-performance computing on Intel processors.

52. By approximately 1998, SCO had completed the majority of this task. That is to say, UnixWare had largely been modified, tested and "enterprise hardened" to use Intel-based processors in direct competition against IBM and Power PC chips, the Sun SPARC chip and all other high-performance computing UNIX platforms for all complex computing demands. The term "enterprise hardened" means to assure that a software product is fully capable of performing under the rigorous demands of enterprise use.

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53. SCO was ready to offer large enterprise customers a high-end UNIX computing platform based on inexpensive Intel processors. Given the rapid growth of Intel's performance capabilities and Intel's popularity in the marketplace, SCO found itself in a highly desirable market position. In addition, SCO still had its SCO OpenServer business for retail and inventory-targeted functions, with its 4,000 applications in support.

54. Prior to the events complained of in this action, SCO was the undisputed global leader in the design and distribution of UNIX-based operating systems on Intel-based processing platforms.

Project Monterey

55. As SCO was poised and ready to expand its market and market share for UnixWare targeted to high-performance enterprise customers, 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.

56. Prior to this time, IBM had not developed any expertise to run UNIX on an Intel processor and instead was confined to its Power PC processor.

57. 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, 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 information and trade

secrets with respect to architecture, schematics, and design of UnixWare and the UNIX source code for both 32- and 64-bit Intel-based processors.

58. 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.

59. On or about May 2001, IBM notified plaintiff that it refused to proceed with Project Monterey, and that IBM considered Project Monterey to be "dead."

The AT&T UNIX Agreements

60. AT&T Technologies originally licensed the UNIX operating system software code to hundreds of software licensees, including defendant IBM, for the UNIX operating system software source code, object code and related schematics, documentation and derivative works (collectively, the "UNIX Source Code"). To protect the confidential and proprietary source code information, these license agreements, as detailed below, contained strict limitations on use and distribution of UNIX source and binary code.

61. When SCO acquired the UNIX assets from Novell in 1995, it acquired all right, title and interest in and to the UNIX operating system technology, including all claims against any parties relating to any right, property or asset used in the business of developing UNIX and UnixWare. As a result of this acquisition, SCO became the authorized successor in interest to the original position of AT&T Technologies with respect to all licensed UNIX software products.

62. There are two primary types of software licensing agreements between AT&T Technologies and its various licensees:

a) The AT&T-related software agreements are collectively referred to hereinafter as the "AT&T UNIX Software Agreements."

b) The AT&T-related sublicensing agreements are collectively referred to hereinafter as the "AT&T UNIX Sublicensing Agreements."

The AT&T UNIX Software Agreements and the AT&T UNIX Sublicensing Agreements are sometimes collectively referred to hereinafter as the "AT&T UNIX Agreements."

63. Plaintiff is successor in interest to, and owner of, all contractual rights arising from and related to the AT&T UNIX Agreements.

The IBM Related Agreements

64. On February 1, 1985, AT&T and IBM entered into certain AT&T UNIX Agreements:

a) Software Agreement Number Soft-00015 ("AT&T / IBM Software Agreement" attached hereto and incorporated herein as Exhibit A);

b) Sublicensing Agreement Number Sub-00015A ("AT&T / IBM Sublicensing Agreement" attached hereto and incorporated herein as Exhibit B).

65. AT&T and IBM have entered into a side letter on that date ("AT&T / IBM Side Letter" attached hereto and incorporated herein as Exhibit C).

66. In addition, AT&T and IBM have entered into nearly 400 supplemental agreements over the years, including Supplement No. 170 (Supplement No. 170 is attached hereto and incorporated herein as Exhibit D). Supplement No. 170 is the document that specifies the royalty amounts and computer CPUs upon which royalty amounts were due to be paid by IBM.

67. Thereafter, Amendment X to Software Agreement SOFT-00015, as amended, was executed on or about October 16, 1996 by and among IBM, The Santa Cruz Operation, Inc. ("SCO")

and Novell, Inc. ("IBM Amendment X" attached hereto and incorporated herein as Exhibit E). Among other things, Amendment X effectuated a royalty buy-out by IBM pursuant to the royalty terms and amounts specified in Supplement No. 170.

68. Collectively these agreements, side letter and amendment are referred to hereinafter as the "IBM Related Agreements."

The Sequent Agreements

69. On January 28, 1986, AT&T and Sequent (now an operating division of IBM) entered into certain AT&T UNIX Agreements:

   a) Software Agreement Number SOFT-000321 ("Sequent Software Agreement" attached hereto and incorporated herein as Exhibit F);

   b) Sublicensing Agreement Number SUB-000321A ("Sequent Sublicensing Agreement" attached hereto and incorporated herein as Exhibit G).

70. The Sequent Software Agreement and the Sequent Sublicensing Agreement are sometimes collectively referred to hereinafter as the "Sequent Agreements."

Marketplace Value of UNIX

71. UNIX's value in the enterprise marketplace is largely a function of its reliability, extensibility, and robust performance capability. That is to say, it virtually never needs repair, it performs well under a wide variety of adverse circumstances, and it can be extended throughout an enterprise and across multiple processors to perform unified or disparate tasks in a seamless computing environment. Because of these features, UNIX-based equipment has replaced mainframe computers for all but the most demanding computing tasks. And, because UNIX-based equipment is far cheaper than mainframe computing equipment, a

customer who cannot otherwise justify the cost of mainframe computers can otherwise gain the advantages of "supercomputing" operations through use of UNIX-based equipment.

72. One or more of the different versions of UNIX-based operating systems sold by Sun, IBM, SCO, SGI, and others, is the operating system of choice for large enterprise computing operations in virtually 100% of the Fortune 1000 companies.

73. UNIX gained this prominence in the computing marketplace because of twenty years of development and over one billion dollars invested by plaintiff and its predecessors to create a stable, reliable operating system to perform the mission critical work required by large enterprises.

74. The recent rise of the global technology economy has been powered in large part by UNIX. Virtually every mission critical financial application in the world is powered by UNIX, including electronic transfers of funds. Real time stock trades are powered by UNIX. Inventory controls and distributions are powered by UNIX. All major power grids and all major telecommunications systems are powered by UNIX. Many satellite control and defense control systems are powered by UNIX. Virtually every large corporation in the world currently operates part or all of its information technology systems on a UNIX operating system.

75. Based on its value in the marketplace, UNIX has become the most widely used and widely accepted operating system for enterprise, institutional and manufacturing applications throughout the world.

Linux

76. Linux, or "GNU/Linux," is an operating system variant or clone of UNIX System V Technology. According to leaders within the Linux community, Linux is not just a "clone,"

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but is intended to be a successor to UNIX System V. Linux, unlike UNIX, is distributed without a fee to its users.

77. As long as the Linux development process lacked central coordination, its direction was primarily aimed at meeting the computing needs of the Linux programmers themselves. As such, it posed little or no practical threat to SCO or to other UNIX vendors since the Linux developers did not have access to sophisticated high-end enterprise class multiprocessor systems, nor did they have any particular interest in supporting such systems.

78. The entire direction of Linux development changed with IBM's entry into the open source community and its concerted efforts to control the community for its own economic benefit.

79. In furtherance of its plan to destroy its UNIX competitors, IBM has 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.

80. However, as IBM executives know, 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.

81. As a result, a very significant amount of UNIX protected code is currently found in Linux 2.4.x and Linux 2.5.x releases in violation of SCO's contractual rights and copyrights.

The Functional Limitations of Linux Before IBM's Involvement

82. The first versions of Linux evolved through bits and pieces of various contributions by numerous software developers using single processor computers. Virtually none of these

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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.

83. As long as the Linux development process remained uncoordinated and random, it posed little or no practical threat to SCO or to other UNIX vendors since the original Linux developers did not have access to multiprocessor code or multi-processor development methods needed to achieve high-end enterprise functionality.

84. To make Linux of necessary quality for use by enterprise customers, it needed to be re-designed and upgraded to accommodate complex multi-processor functionality that has taken UNIX nearly 20 years to achieve. This re-design is not technologically 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.

IBM's Scheme

85. 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 the combined capabilities of SCO OpenServer, SCO UnixWare and SCO's unique position as UNIX on Intel;

a) Free Linux had carved a niche in not-for-profit and non-business uses; and

b) IBM was in the process of evolving its business model from products to services.

86. In the process of moving from product offerings 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.

87. 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.*

88. 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.

89. Among other actions, IBM misappropriated the confidential and proprietary information from SCO in Project Monterey. IBM thereafter misused its access to the UNIX source code.

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90. On or about August 17, 2000, IBM and Red Hat Inc. 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.*

91. 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.*

92. 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 and methods.

93. 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.

94. 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

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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.*

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

96. 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.

97. Continuing with its "happy and comfortable" idea that Linux succeeds at the expense of UNIX, 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.

98. The only way that the pathway is 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.

99. 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.

IBM's Coordination of Linux Development Efforts

100. On information and belief, IBM has knowingly induced, encouraged, and enabled others to distribute proprietary information in an attempt to conceal its own legal liability for such distributions:

> What is wrong about this [Linux] distribution, is basically the millions of lines of code that we never have seen. We don't know if there are any patent infringements [in this code] with somebody we don't know. *We don't want to take the risk of being sued for a patent infringement. That is why we don't do distributions, and that's why we have distributors.* Because distributors are not so much exposed as we are. So that's the basic deal as I understand it.

> Karl-Heinz Strassemeyer, IBM The Register, 11/19/2002, www.theregister.co.uk/content/4/28183.html

101. IBM is affirmatively taking steps to destroy all value of UNIX by improperly extracting and using the confidential and proprietary information it acquired from UNIX and dumping that information into the open source community. As part of this effort, IBM has heavily invested in the following projects to further eliminate the viability of UNIX:

a) The Linux Technology Center was launched in 2001 with the advertised intent and foreseeable purpose of transferring and otherwise disposing of all or part of UNIX, including its derivative works, modifications and methods, into an open source Linux environment;

b) The IBM Linux Center of Competency was launched to assist and train financial services companies in an accelerated transfer of UNIX to Linux with the advertised intent and foreseeable purpose of transferring and otherwise disposing of all or part of UNIX, including its derivative works, modifications and methods into open source.

c) A carrier-grade Linux project has been undertaken to use UNIX source code, derivative works, modifications and methods for the unlawful purpose of transforming Linux into an enterprise-hardened operating system;

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d) A data center Linux project has been undertaken to use UNIX source code, derivative works, modifications and methods for the unlawful purpose of transforming Linux into an enterprise-hardened operating system; and

e) Other projects and initiatives have been undertaken or supported that further evidence the improper motive and means exercised by IBM in its efforts to eliminate UNIX and replace it with free Linux.

102. But for IBM's coordination of the development of enterprise Linux, and the misappropriation of UNIX to accomplish that objective, the Linux development community would not have timely developed enterprise quality software or customer support necessary for widespread use in the enterprise market.

FIRST CAUSE OF ACTION
(Breach of IBM Software Agreement)

103. Plaintiff incorporates and re-alleges paragraphs No. 1-102, above.

104. As set forth above, SCO is the successor to AT&T under that certain Software Agreement originally executed by and between AT&T and IBM designated as SOFT-00015. The Software Agreement specifies the terms and conditions for *use of UNIX System V source code* by IBM.

105. With respect to the scope of rights granted for use of the System V source code 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. 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

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are *treated hereunder as part of the original Software Product.*
[Emphasis added.]

106. IBM has violated its grant of rights under §2.01 of the Software Agreement by, *inter alia,*

modifying and assisting others to modify the Software Products (including System V source

code, derivative works and methods based thereon) for purposes *other than* IBM's own

internal business purposes. By actively supporting, assisting and promoting the transfer from

UNIX to Linux, and using its access to UNIX technology to accomplish this objective, IBM

is (a) using the Software Product for *external business purposes,* which include use for the

benefit of Linus Torvalds, the general Linux community and IBM's Linux distribution

partners, Red Hat, Inc. and SuSE Linux AG and its subsidiaries; and is (b) directly and

indirectly preparing *unauthorized derivative works* based on the Software Product and

unauthorized modifications thereto in violation of §2.01 of the Software Agreement.

107. IBM agreed in §2.05 of the Software Agreement to the following restrictions on *use* of

the Software Product (including System V source code, derivative works and methods based

thereon):

> 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.*

108. IBM has breached §2.05 of the Software Agreement by, *inter alia,* actively promoting

and allowing use of the Software Products and development methods related thereto in an

open and hostile attempt to destroy the entire economic value of the Software Products and

plaintiff's rights to protect the proprietary nature of the Software Products. By way of

example and not limitation, IBM has used protected UNIX methods for others in accelerating

development of the 2.4.x kernel and 2.5.x Linux kernel in, among others, the following areas:

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(a) scalability improvements, (b) performance measurement and improvements, (c) serviceability and error logging improvements, (d) NUMA scheduler and other scheduler improvements, (e) Linux PPC 32- and 64-bit support, (f) AIX Journaling File System, (g) enterprise volume management system to other Linux components, (h) clusters and cluster installation, including distributed lock manager and other lock management technologies, (i) threading, (j) general systems management functions, and (k) other areas. But for the use by IBM of these protected UNIX methods in Linux development, the Linux 2.4.x kernel and 2.5.x kernel capacity to perform high-end enterprise computing functions would be severely limited.

109. IBM agreed in §7.10 of the Software Agreement to the following restrictions on *transfer* of the Software Product, including AIX as a derivative work of 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.

110. IBM has breached §7.10 of the Software Agreement by, *inter alia*, transferring portions of the Software Product (including System V source code, derivative works and methods based thereon), 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.

111. 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 Software Agreement.

112. IBM agreed in Side Letter ¶9, a substitute provision to §7.06(a) of the Software Agreement, to the following restrictions on *confidentiality* of the Software Product, including AIX as a derivative work of 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.

113. In recognition of SCO's right of confidentiality of the Software Products, IBM directs all customers who need to view AIX source code to first obtain a "read only" source code license from SCO as a condition to viewing *any part* of the AIX source code. 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 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 Licenses, Para.2.2).
>
> <p style="text-align:center">* * *</p>
>
> 2.2 <u>Prerequisite Source License</u>. *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 System 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) or *equivalent SCO Group License.*

114. IBM has breached its obligation of confidentiality by contributing portions of the Software Product (including System V source code, derivative works and methods based thereon) to open source development of Linux and by using UNIX development methods in making modifications to Linux 2.4.x and 2.5.x, which are in material part, unauthorized derivative works of the Software Product. These include, among others, (a) scalability improvements, (b) performance measurement and improvements, (c) serviceability and error logging improvements, (d) NUMA scheduler and other scheduler improvements, (e) Linux PPC 32- and 64-bit support, (f) AIX Journaling File System, (g) enterprise volume management system to other Linux components, (h) clusters and cluster installation, including distributed lock manager and other lock management technologies, (i) threading, (j) general systems management functions, and (k) others.

115. IBM has further stated its intention to transfer the entirety of AIX into open source in anticipatory violation of its obligations under §7.06 (a) of the Software Agreement.

116. Export of UNIX technology is controlled by the United States government. Thus, SCO, IBM and all other UNIX vendors are subject to strict export control regulations with respect to any UNIX-based customer distribution. To this end, IBM agreed in §4.01 of the Software Agreement to restrictions on *export* of the Software Product (including System V source code, derivative works and methods based thereon), 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.

This provision was later modified to allow export rights to several countries outside the

United States. However, no permission has ever been granted by SCO or its predecessors to

IBM to allow it to indirectly make available all or portions of the Software Product to

countries outside the United States that are subject to strict technology export control by the

United States government: *viz.*, Cuba, Iran, Syria, North Korea and Libya. IBM is ignoring

and attempting to circumvent the export control restrictions that apply to UNIX as it

accelerates development of Linux for enterprise use.

117.   Thus, IBM has breached §4.01 of the Software Agreement by, *inter alia*, making

extensive, advanced multiprocessor scaling functions of the Software Product, including

derivative works and methods based thereon, available for free distribution to anyone in the

world with a computer. As it relates to Linux 2.4.x and 2.5.x releases, IBM is indirectly

making the Software Product and operating system modifications available to countries and

organizations in those countries for scaling single processor computers into multi-processor

supercomputers that can be used for encryption, scientific research and weapons research.

118.   SCO has the self-executing contractual right to terminate IBM's right to use and

distribute the Software Product, including derivative works and methods based thereon, if

IBM fails to fulfill one or more of its obligations under the Software Agreement. This

authority is contractually granted under the following provisions of the IBM Related

Agreements:

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

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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. [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]

119. Consistent with these rights, on March 6, 2003, plaintiff 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.

120. Following delivery of the AIX Termination Notice, plaintiff took every reasonable step to meet and confer with IBM regarding IBM's breach of the Software Agreement and Related Agreements.

121. IBM has disregarded SCO's rights under the AT&T / IBM Agreement by failing to undertake any efforts to cure its numerous and flagrant violations thereunder. As a result,

effective June 13, 2003, the AT&T / IBM UNIX Agreement is terminated and IBM has no further rights thereunder.

122. IBM nonetheless continues to operate under the AT&T / IBM Agreement, and use the Software Products and Source Code thereunder as though its rights under the Agreement have not been terminated.

123. 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."

124. As a result of IBM's breaches before termination, SCO has been damaged in the marketplace for violations by IBM in an amount to be proven at trial, but not less than $1 billion.

125. In addition, and to the extent that IBM continues to completely repudiate its obligations regarding the Software Product, plaintiff will sustain substantial continuing and ongoing damages. SCO is entitled to damages in an amount measured by the benefits conferred upon IBM by its ongoing, improper use of the Software Products. These damages include the full amount IBM receives as a result of its ongoing sales of AIX, including software, services and hardware.

126. Moreover, if IBM does not return or destroy all source and binary copies of the Software Products and/or continues to contribute some or all of these protected materials to open source, SCO will be irreparably harmed. As a result, SCO is entitled to a permanent injunction requiring IBM to return or destroy all source code and binary copies of the

Software Products and/or prohibiting IBM from further contributions of the protected Software Products into open source.

SECOND CAUSE OF ACTION
(Breach of IBM Sublicensing Agreement)

127. Plaintiff incorporates and re-alleges paragraphs No. 1-126, above.

128. As set forth above, 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 Sublicensing Agreement grants the right to *distribute object-based code* of UNIX System V and modifications thereto and derivative works based thereon.

129. SCO has terminated IBM's right to use and distribute the Software Product, including derivative works and methods based thereon as of the AIX Termination Date, June 13, 2003.

130. From and after the AIX Termination Date, any and all distributions of AIX by IBM is in violation of the Sublicensing Agreement.

131. To the extent that IBM continues to completely repudiate its obligations under the Sublicensing Agreement, plaintiff will sustain substantial continuing and ongoing damages. SCO is entitled to damages in an amount measured by the benefits conferred upon IBM by its ongoing, improper use of the Software Products. These damages include the full amount IBM receives as a result of its ongoing sales of AIX, including software, services and hardware.

132. Moreover, if IBM does not return or destroy all source and binary copies of the Software Products and/or continues to contribute some or all of these protected materials to open source, SCO will be irreparably harmed. As a result, SCO is entitled to a permanent injunction requiring IBM to return or destroy all source code and binary copies of the

Software Products and/or prohibiting IBM from further contributions of the protected

Software Products into open source.

THIRD CAUSE OF ACTION
(Breach of Sequent Software Agreement)

133. Plaintiff incorporates and re-alleges paragraphs No. 1-132, above.

134. As set forth above, SCO is the successor to AT&T under that certain Software

Agreement originally executed by and between AT&T and Sequent designated as SOFT-

000321. The Software Agreement specifies the terms and conditions for *use of UNIX*

System V source code by Sequent.

135. With respect to the scope of rights granted for use of the System V source code under

Section 2.01 of the 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 CPUs
> 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.]

136. IBM has violated the grant of rights to Sequent under §2.01 of the Sequent Software

Agreement by, *inter alia*, modifying and assisting others to modify the Software Products

(including System V source code, derivative works and methods based thereon) for purposes

other than Sequent and/or IBM's own internal business purposes. By actively supporting,

assisting and promoting the transfer from UNIX to Linux, and using its access to UNIX

technology to accomplish this objective, IBM is (a) using the Software Product for *external

business purposes*, which include use for the benefit of Linus Torvalds, the general Linux

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community and IBM's Linux distribution partners, Red Hat, Inc. and SuSE Linux AG and its subsidiaries; and is (b) directly and indirectly preparing **unauthorized derivative works** based on the Software Product and **unauthorized modifications thereto** in violation of §2.01 of the Sequent Software Agreement.

137.   Sequent agreed in §2.05 of the Software Agreement to the following restrictions on **use** of the Software Product (including System V source code, derivative works and methods based thereon):

> 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.**

138.   IBM has breached Sequent's obligations under §2.05 of the Sequent Software Agreement by, *inter alia*, actively promoting and allowing use of the Software Products and development methods related thereto in an open and hostile attempt to destroy the entire economic value of the Software Products and plaintiff's rights to protect the proprietary nature of the Software Products. Particularly, IBM has caused all or materially all of DYNIX/ptx-based NUMA source code and methods, and RCU source code and methods, to be used for the benefit of Linux. But for the use by IBM of these protected UNIX methods in Linux development, the Linux 2.4.x kernel and 2.5.x kernel capacity to perform high-end enterprise computing functions would be severely limited.

139.   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 2.4.x:

> Copyright (c) International Business Machines Corp., 2001   This program is free software; you can redistribute it and/or modify it

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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 will be 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.

140. 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 Sequent Software Agreement.

141. Sequent agreed in §7.10 of the Sequent Software Agreement to the following restrictions on *transfer* of the Software Product, including DYNIX/ptx as a derivative work of 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.

142. IBM has breached Sequent's obligations under §7.10 of the Sequent Software Agreement by, *inter alia*, transferring portions of the Software Product (including System V source code, derivative works and methods based thereon), including DYNIX/ptx source code, documentation and methods for NUMA, RCU and SMP technologies, 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.

143. Sequent agreed under §7.06(a) of the Sequent Software Agreement, to the following restrictions on *confidentiality* of the Software Product, including DYNIX/ptx as a derivative work of 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.

144.   IBM has breached Sequent's obligation of confidentiality by contributing portions of the Software Product (including System V source code, derivative works and methods based thereon) to open source development of Linux and by using UNIX development methods in making modifications to Linux 2.4.x and 2.5.x, which are in material part, unauthorized derivative works of the Software Product, including but not limited to DYNIX/ptx-based NUMA technology, source code and methods, RCU source code and methods, and SMP source code and methods.

145.   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 Software Agreement to restrictions on *export* of the Software Product (including System V source code, derivative works and methods based thereon), 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.

This provision was later modified to allow export rights to several countries outside the United States. However, no permission has ever been granted by SCO or its predecessors to Sequent or IBM to allow either company to directly or indirectly make available all or

portions of the Software Product to countries outside the United States that are subject to strict technology export control by the United States government: *viz.*, Cuba, Iran, Syria, North Korea and Libya. IBM is ignoring and attempting to circumvent the export control restrictions that apply to UNIX as it accelerates development of Linux for enterprise use.

146. Thus, IBM has breached §4.01 of the Sequent Software Agreement by, *inter alia*, making extensive, advanced multiprocessor scaling functions of the Software Product, including NUMA technology, RCU technology, SMP technology and other derivative works and methods based thereon, available for free distribution to anyone in the world with a computer. As it relates to Linux 2.4.x and 2.5.x releases, IBM is indirectly making the Software Product and operating system modifications, particularly NUMA technology, RCU technology and SMP technology, available to countries and organizations in those countries for scaling single processor computers into multi-processor supercomputers that can be used for encryption, scientific research and weapons research.

FOURTH CAUSE OF ACTION
(Unfair Competition)

147. Plaintiff incorporates and re-alleges paragraphs No. 1-146, above.

148. Plaintiff and its predecessors have built the UNIX System V Technology, the Unix Software Code, SCO OpenServer, UnixWare and their derivatives through very substantial efforts over a time span in excess of 20 years and expenditure of money in excess of $1 billion.

149. IBM has engaged in a course of conduct that is intentionally and foreseeably calculated to undermine and/or destroy the economic value of UNIX anywhere and everywhere in the world, and to undermine and/or destroy plaintiff's rights to fully exploit and benefit from its

ownership rights in and to UNIX System V Technology, the Unix Software Code, SCO OpenServer, UnixWare and their derivatives, and thereby seize the value of UNIX System V Technology, the Unix Software Code, SCO OpenServer, UnixWare and their derivatives directly for its own benefit and indirectly for the benefit of its Linux distribution partners.

150. In furtherance of its scheme of unfair competition, IBM has engaged in the following conduct:

a) Misappropriation of source code, methods, trade secrets and confidential information of plaintiff;

b) Breach of contract;

c) Violation of confidentiality provisions running to the benefit of plaintiff;

d) Inducing and encouraging others to violate confidentiality provisions and to misappropriate trade secrets and confidential information of plaintiff;

e) Contribution of protected source code and methods for incorporation into one or more Linux software releases, intended for transfer of ownership to the general public;

f) Use of deceptive means and practices in dealing with plaintiff with respect to its software development efforts; and

g) Other methods of unlawful and/or unfair competition.

151. IBM's unfair competition has directly and/or proximately caused significant foreseeable and consequential harm to plaintiff in the following particulars:

a) Plaintiff's revenue stream from UNIX licenses for Intel-based processing platforms has decreased substantially;

b) As Intel-based processors have now become the processing platform of choice for a rapidly-increasing customer base of enterprise software users, plaintiff has been

deprived of the opportunity to fairly exploit its market-leading position for UNIX on Intel-based processors, which revenue opportunity would have been very substantial on a recurring, annual basis but for IBM's unfairly competitive practices;

c) Plaintiff stands at imminent risk of being deprived of its entire stream of all UNIX licensing revenue in the foreseeably near future;

d) Plaintiff has been deprived of the effective ability to market and sell its new UNIX-related improvements, including a 32-bit version of UNIX for Intel processors developed prior to Project Monterey, a 64-bit version of UNIX for Intel processors based on Project Monterey, and its new web-based UNIX-related products, including UNIX System VI;

e) Plaintiff has been deprived of the effective revenue licensing opportunity to transfer its existing UNIX System V customer base to UNIX System VI; and

f) Plaintiff has been deprived of the effective ability to otherwise fully and fairly exploit UNIX's market-leading position in enterprise software market, which deprivation is highly significant given the inability of Microsoft Windows NT to properly support large-scale enterprise applications.

152.   As a result of IBM's unfair competition and the marketplace injury sustained by plaintiff as set forth above, plaintiff has suffered damages in an amount to be proven at trial, but no less than $1 billion, together with additional damages through and after the time of trial foreseeably and consequentially resulting from IBM's unfair competition in an amount to be proven at the time of trial.

153.   IBM's unfairly competitive conduct was also intentionally and maliciously designed to destroy plaintiff's business livelihood and all opportunities of plaintiff to derive value from

its UNIX-based assets in the marketplace. As such, IBM's wrongful acts and course of conduct has created a profoundly adverse effect on UNIX business worldwide. As such, this Court should impose an award of punitive damages against IBM in an amount to be proven and supported at trial.

FIFTH CAUSE OF ACTION
(Interference with Contract)

154. Plaintiff incorporates and re-alleges by reference paragraphs 1-153, above.

155. SCO has contracts with customers around the world for licensing of SCO OpenServer and UnixWare.

156. IBM knew and should have known of these corporate software licensing agreements between SCO and its customers, including the fact that such agreements contain confidentiality provisions and provisions limiting use of the licensed object-based code.

157. IBM, directly and through its Linux distribution partners, has intentionally and without justification induced SCO's customers and licensees to breach their corporate licensing agreements, including but not limited to, inducing the customers to reverse engineer, decompile, translate, create derivative works, modify or otherwise use the UNIX software in ways in violation of the license agreements. These customers include Sherwin Williams, Papa John's Pizza, and Auto Zone, among others.

158. IBM's tortious interference has directly and/or proximately caused significant foreseeable damages to SCO, including a substantial loss of revenues.

159. IBM's tortious conduct was also intentionally and maliciously designed to destroy plaintiff's business livelihood and all opportunities of plaintiff to derive value from its UNIX-based assets in the marketplace. As such, this Court should impose an award of punitive damages against IBM in an amount to be proven and supported at trial.

SIXTH CAUSE OF ACTION
(Misappropriation of Trade Secrets—*Utah Code Ann.* §13-24-1 *et seq.*)

160.   Plaintiff incorporates and re-alleges paragraphs No. 1-159, above.

161.   Plaintiff is the owner of unique know how, concepts, ideas, methodologies, standards, specifications, programming, techniques, UNIX Software Code, object code, architecture, design and schematics that allow UNIX to operate with unmatched extensibility, scalability, reliability and security (hereinafter defined as "SCO's Trade Secrets"). SCO's Trade Secrets provide SCO with an advantage over its competitors.

162.   SCO's Trade Secrets are embodied within SCO's proprietary SCO OpenServer and its related shared libraries and SCO's UnixWare and its related shared libraries.

163.   SCO and its predecessors in interest have expended over one billion dollars to develop SCO's Trade Secrets.

164.   IBM, through improper means acquired and misappropriated SCO's Trade Secrets for its own use and benefit, for use in competition with SCO and in an effort to destroy SCO.

165.   At the time that IBM acquired access to SCO's Trade Secrets, IBM knew that it had a duty to maintain the secrecy of SCO's Trade Secrets or limit their use.

166.   SCO's Trade Secrets derive independent economic value, are not generally known to third persons, are not readily ascertainable by proper means by other persons who can obtain economic value from their disclosure and use, and are subject to reasonable efforts by SCO and its predecessors to maintain secrecy.

167.   The acts and conduct of IBM in misappropriating and encouraging, inducing and causing others to commit material misappropriation of SCO's Trade Secrets are the direct and proximate cause of a near-complete devaluation and destruction of the market value of SCO

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OpenServer and SCO UnixWare that would not have otherwise occurred but for the conduct of IBM.

168. Pursuant to *Utah Code Ann.* §13-24-4, plaintiff is entitled to an award of damages against IBM in the following amounts:

    a) Actual damages as a result of the theft of trade secrets; together with

    b) Profits from IBM's Linux-related business on account of its misappropriation through the time of trial; together with

    c) Additional foreseeable profits for future years from IBM's Linux-related business on account of its misappropriation in an amount to be proven at the time of trial.

169. Because IBM's misappropriation was willful, malicious, and in reckless disregard of plaintiff's rights, SCO is entitled to an award of exemplary damages against IBM in an amount equal to two times the amount of damages, pursuant to *Utah Code Ann.* §13-24-4(2).

170. Plaintiff is also entitled to an award of attorneys' fees and costs in an amount to be proven at the time of trial pursuant to *Utah Code Ann.* §13-24-5.

Prayer for Relief

WHEREFORE, having fully set forth its complaint, plaintiff prays for relief from this Court as follows:

1. For damages under the First Cause of Action for breach of the IBM Software Agreement in an amount not less than $1 billion, together with additional damages through and after the time of trial foreseeably and consequentially resulting from IBM's breach, in an amount to be proven at the time of trial;

2. For a permanent injunction under the First and Second Causes of Action requiring IBM to return or destroy all source code and binary copies of the Software Products and/or

prohibiting IBM from further contributions of the protected Software Products into open source;
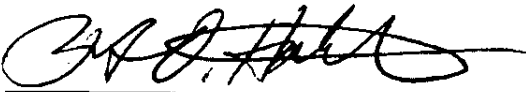
3. For restitution under the First and Second Causes of Action in an amount measured by the benefits conferred upon IBM by its ongoing, improper use of the Software Products, including the full amount IBM receives as a result of its ongoing sales of AIX, including software, services and hardware;

4. For damages under the Third Cause of Action for breach of the Sequent Software Agreement in an amount not less than $1 billion, together with additional damages through and after the time of trial foreseeably and consequentially resulting from IBM's breach, in an amount to be proven at the time of trial;

5. For relief under the Fourth Cause of Action in an amount not less than $1 billion, for unfair competition arising from common law, and damages for violations thereof, together with additional damages through and after the time of trial;

6. For relief under the Fifth Cause of Action in an amount to be proven at trial for tortious interference, together with additional damages through and after the time of trial;

7. For relief under the Sixth Cause of Action in an amount to be proven at trial for misappropriation of trade secrets arising from *Utah Code Ann.* §13-24-1 et seq., together with additional damages through and after the time of trial;

8. For a permanent injunction under the Third Cause of Action to prohibit IBM from further contributions of the protected Software Products into open source;

9. For punitive damages under the Fourth and Fifth Causes of Action for IBM's malicious and willful conduct, in an amount to be proven at trial;

10. For exemplary damages pursuant to *Utah Code Ann.* § 13-24-1 under the Sixth Cause of Action in an amount equal to twice the award under the Sixth Cause of Action for misappropriation of trade secrets;

11. For attorneys' fees and costs as provided by *Utah Code Ann.* §13-24-5 and/or by contract in an amount to be proven at trial; and

12. For attorneys' fees, costs, pre- and post-judgment interest, and all other legal and equitable relief deemed just and proper by this Court.

Jury Trial Demand

SCO demands trial by jury on all issues so triable.

DATED this 22nd day of July, 2003.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 22 day of July, 2003, I caused a true and correct copy of

the forgoing AMENDED COMPLAINT to be served on the following counsel of record as

indicated below:

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