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October 10, 2003

SALT LAKE CITY, UTAH

PHOENIX, ARIZONA

TUCSON, ARIZONA

IRVINE, CALIFORNIA

DENVER, COLORADO

LAS VEGAS, NEVADA

**VIA FACSIMILE  
AND U.S. MAIL**

Mark J. Heise  
BOIES, SCHILLER & FLEXNER, LLP  
One International Place  
100 SE Second Street, Suite 2800  
Miami, Florida 33131

Re: *SCO v. IBM / IBM v. SCO* – IBM's Discovery Responses

Dear Mark:

We have reviewed your letter of September 22, 2003, relating to our telephone call on September 18, 2003. This letter responds thereto.

In answer to your questions about when SCO can expect to receive documents responsive to specific requests, IBM has produced, and will continue to produce, responsive, non-privileged documents as they are collected, reviewed, and processed.

**I. General Objections**

**General Objection Nos. 1-3, 5, 7, 10.** I believe my September 15 letter to you, and your September 22 letter to me, are consistent. Please advise if you disagree.

**General Objection No. 4.** As stated in my September 15 letter to you, IBM has attempted to collect, where appropriate, documents dating as far back as January 1, 1985. If there are specific categories of documents for which you would like us to search for older documents than that we are producing, please let us know so that we can discuss. Our accompanying letter regarding SCO's discovery responses details the IBM document requests for which we request that SCO perform a broader search.

**General Objection No. 6.** As I made clear in subsequent telephone calls and correspondence, your identification of terms such as NUMA, RCU and SMP is insufficient to particularize the code and other alleged trade secrets which SCO alleges IBM has wrongfully contributed to Linux. As you know, we have moved to compel specific answers to IBM's interrogatories and we understand that SCO intends to

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supplement its answers to interrogatories. We do not believe this issue can be resolved until we have adequate answers to our interrogatories, and a detailed and specific list of the trade secrets or confidential information that SCO contends IBM has misappropriated.

**General Objection No. 8.** I believe my September 15 letter to you, and your September 22 letter to me, are consistent – as we discussed, IBM is not, as a general matter, attempting to collect documents that are generally available to the public, but to the extent they are among the documents we have collected, we are not withholding them on this basis.

**General Objection No. 10.** I believe my September 15 letter to you, and your September 22 letter to me, are consistent. Please advise if you disagree.

**General Objection No. 11.** As we discussed, and as my September 15 letter explains, IBM has attempted to discern the documents SCO seeks, and to locate those documents for production. As my letter also confirms, IBM will produce responsive, non-privileged documents despite this objection. The issue with respect to Intel processors is addressed in Response to Request Nos. 40-41 below.

**General Objection No. 15.** I believe my September 15 letter to you, and your September 22 letter to me, are consistent. Please advise if you disagree.

**General Objection No. 17.** This issue is resolved by entry of the Stipulated Protective Order.

**General Objection No. 18.** Agreed.

**General Objection No. 19.** During the telephone call, we confirmed that we were not withholding documents on the basis that the documents relate to prior versions, releases and updates of AIX or Dynix, or on the basis of code being a derivative of AIX or Dynix, rather than AIX or Dynix themselves. However, since SCO has not yet specified the code that it alleges IBM has wrongfully contributed to Linux, we remain unclear as to the scope and meaning of SCO's requests for "modifications", "methods", and "derivative works". As indicated in General Objection No. 6 above, we do not believe that this issue can be resolved until we have SCO's supplemental answers to interrogatories identifying with specificity the trade secrets or other confidential information at issue. With respect to the other issues you raise here, see our Response to Request Nos. 2 and 3 below.

**General Objection No. 20.** The definition of "IBM" for purposes of our responses includes officers. We are not aware of any directors who might have relevant

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information. We agree, for purposes of the discovery requests at issue, to interpret "IBM" to include Sequent, to the extent Sequent materials are in IBM's custody, possession, or control.

**General Objection Nos. 21-22.** See our response re General Objection Nos. 6, 19 above.

## **II. Document Responses**

**Response to Request No. 1.** Responsive, non-privileged documents are being produced, subject to our agreement on General Objection Nos. 1-3, 5, 7, and 10 set forth above.

**Response to Request Nos. 2 and 3.** My e-mail to you of October 8 addressed the open issues regarding these requests. As detailed in that note, IBM will commence production of source code for the AIX and Dynix base operating systems once the process for notification of third parties (as specified in Paragraph 10 of the Stipulated Protective Order) is exhausted.

**Response to Request Nos. 4-6, 7-9.** Agreed; subject to General Objection Nos. 22 and 6, responsive, non-privileged documents will be produced.

**Response to Request No. 10.** I believe my September 15 letter to you, and your September 22 letter to me, are consistent. Please advise if you disagree.

**Response to Request No. 11.** Your request, even as narrowed, remains overly broad and unduly burdensome. Until SCO specifies the wrongful contributions IBM has allegedly made to Linux in violation of SCO's alleged confidentiality rights, it is very difficult to make a reasonable assessment as to the proper scope of discovery in this case. In the absence of that clarification, we have nevertheless attempted to conduct a reasonable search for documents that relate to IBM's open-source contributions to Linux. The vast majority of those contributions are made through the LTC; the OSSC is the corporate clearinghouse for those contributions. Our searches to date have thus included individuals in both of those groups, as well other potential sources of documents relating to IBM's contributions to Linux that have come to our attention. We are not limiting our searches to any particular geographic area--indeed, they have already included individuals residing in Beaverton, OR, Austin, TX, and a variety of other IBM locations. Our efforts to identify and collect documents responsive to this request are continuing, and we believe will be facilitated by adequate answers to our interrogatories.

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**Response to Request Nos. 12-14.** IBM stands by its objections to these requests. We agreed that we will provide documents sufficient to identify the third parties, if any, to whom IBM provided UNIX, AIX, or Dynix source code.

**Response to Requests Nos. 15-17.** Both parties have agreed to exchange supplemental answers containing names of employees and general subject matter of knowledge on October 10, 2003.

**Response to Request No. 18.** We have agreed to produce documents, subject to our agreement concerning General Objection Nos. 1-3, 5, 7, and 10 set forth above, and with the understanding that Mr. Palmisano is among those whose files were reviewed. I believe that resolves this issue. If not, please advise.

**Response to Request Nos. 19-25.** I believe my September 15 letter to you, and your September 22 letter to me, are consistent. Please advise if you disagree.

**Response to Request Nos. 26-27.** As we discussed, IBM stands by its objection that these requests, as phrased, are overbroad and unduly burdensome. We have agreed, however, to provide supplemental answers to interrogatories identifying the names of employees and general subject matter of knowledge on October 10, 2003.

**Response to Request No. 28.** We have agreed that IBM will search for responsive, non-privileged documents from IBM employees with significant involvement in technical, business development, and contractual aspects of Project Monterey. During our call, we agreed that it would be unduly burdensome to require IBM to search for this information from every employee who had any involvement in Project Monterey.

**Response to Request Nos. 29-31.** With respect to these requests, General Objection Nos. 6 and 19 remain unresolved. We have agreed, however, to produce non-privileged documents identified through a reasonable search sufficient to identify Unix, AIX, or Dynix source code disclosed by IBM to a third party or the public.

**Response to Request Nos. 32-34.** Agreed.

**Response to Request No. 35.** We confirmed that we will conduct a reasonable search and produce, from the files of LTC, OSSC, or other personnel who may have relevant information, responsive, non-privileged documents relating to Unix, AIX or Dynix source code contributed by IBM to open source, or relating to open source contributions by IBM to Linux.

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**Response to Request No. 36.** We had previously agreed to provide organizational and/or personnel charts for particular units involved in AIX, Dynix, and Linux development or maintenance. Historical organizational and/or personnel charts for Project Monterey, to the extent such documents still exist, will be captured in our production in response to your Request No. 28. We are not familiar with the "Project Gemini" referenced in your letter; please provide clarification.

**Response to Request No. 37.** Agreed.

**Response to Request Nos. 38-39.** With your clarification and limitations, I believe we are in agreement concerning the documents IBM has agreed to produce.

**Response to Request Nos. 40-41.** These requests remain overbroad and unduly burdensome despite your proposed limitation. For example, the Dynix/ptx operating system ran only on Intel processors. Your request for "all documents concerning IBM's use of [Dynix] on Intel processors" would literally call for the production of nearly every single document in the company relating to Dynix/ptx. Please clarify the types of documents you are looking for so that we can have a meaningful discussion about how to narrow these requests.

**Response to Request No. 42.** See Response to Request No. 11 above.

**Response to Request Nos. 43-52.** Agreed.

**III. Interrogatory Responses**

We agreed to exchange supplemental answers to interrogatories identifying the names of employees, including officers, with a general description of the subject matter of their knowledge on October 10.

Very truly yours,



Todd Shaughnessy

cc: Brent Hatch  
David Marriott  
Peter Ligh