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June 10, 2004

Via Hand Delivery

Honorable Dale A. Kimball
United States District Court for the District of Utah
350 South Main Street, Room 220
Salt Lake City, UT 84101

Re: *The SCO Group v. International Business Machines Corporation,*
Civil No. 2:303cv0294

Dear Judge Kimball:

We write in response to David Marriott's June 9 letter to the Court regarding IBM's Tenth Counterclaim in the above-captioned matter, submitted to the Court and received by us this morning. In that letter, Mr. Marriott contends that IBM's Tenth Counterclaim is compulsory. This distinction bears on SCO's pending Motion to Dismiss or Stay the Tenth Counterclaim as well as on the Motion to Amend the Scheduling Order. Although SCO will brief the issue in detail in support of the Motion to Dismiss to be argued on August 4, the pendency of the motion to revise the scheduling order requires us to respond to Mr. Marriott's letter here. The position Mr. Marriott has taken assumes a substantially inaccurate view as to what SCO's case is (and is not) about, and this issue directly affects the efficient organization of the case -- a matter directly before the Court on the pending motion to amend the scheduling order.

We submit that IBM's Tenth Counterclaim is permissive. A counterclaim is compulsory only if the resolution of the plaintiff's claim would preclude the defendant from bringing its claim. See Driver Music Co. v. Commercial Union Ins. Cos., 94 F.3d 1428, 1435-36 (10th Cir. 1996). None of the claims in SCO's complaint could operate in that manner with respect to the Tenth Counterclaim, including because that counterclaim would add to the case a broad new range of issues about the improper contributions to Linux by many entities *other* than IBM. Those issues plainly do not arise out of the same transaction or occurrence as SCO's claims.

SCO has asserted claims against IBM based on IBM's own conduct. The principal, although not exclusive, claims are contractual. All claims address *IBM's* improper contributions to Linux, in violation of SCO's contract and other rights. All of SCO's claims address *only IBM's* improper contributions, and have nothing to do with the improper contributions (known or unknown) of any *other* entity.

If IBM's Tenth Counterclaim sought nothing more than a declaration that IBM had no liability with respect to these claims advanced by SCO, it would not unmanageably broaden the case -- and it would also be essentially irrelevant.

IBM's *own contributions* to Linux are at the center of the lawsuit SCO brought. By contrast, IBM's new focus would sweep in the wide range of new issues involving potential IBM liability *as an end-user of a program* which contains infringing contributions to Linux *made by others*. (Linux was developed by the contributions of thousands of programmers operating without any screen or check.).

SCO has not brought into this action these issues concerning the contributions of *others*, and SCO has no obligation to do so. These issues are plainly separate from what IBM *itself* is responsible for having done, and the forced addition of these issues here would slow down and encumber the process of reaching a decision on the merits of the propriety of what IBM has done.[1]

For example, adjudicating these wholly separate and new issues would require one mini-litigation after another to determine the nature and circumstances of each third party's contribution to Linux (as distinct from IBM's contributions). As SCO establishes each such improper contribution, each such third-party contributor will contest that showing, effectively creating the need for one litigation after another (within the sweeping scope of IBM's new claim), based on one instance of improper contribution after another.

Given these facts, IBM's Tenth Counterclaim cannot be compulsory. The "activities relating to Linux" that it seeks to place in issue have nothing to do with the conduct unique to IBM that SCO challenges in this lawsuit. They do not arise out of the same transaction or factual nexus, because they do not involve improper contributions to Linux by IBM. If IBM were correct, then SCO would have to add claims relating to the conduct of third parties here simply because it has sued IBM based on conduct unique to IBM. According to IBM's logic, if SCO does not do this, SCO would lose those unrelated claims forever. Similarly, according to IBM's logic, if IBM does not add the encumbrance of its Tenth Counterclaim, and SCO wins as to IBM's own conduct, then IBM would also automatically be liable for the actions of many unrelated third parties in improperly contributing to Linux merely because IBM -- like numerous other entities -- uses Linux. These positions cannot withstand analysis and do not remotely satisfy the black-letter test governing what constitutes a compulsory counterclaim.

The same sweeping breadth of IBM's Tenth Counterclaim that establishes its non-compulsory character reinforces a point of critical importance to the scheduling amendment motion. The addition of all of these new and unrelated issues to the present case would unavoidably encumber its progress and impede its efficient adjudication on the merits of the propriety of IBM's own, challenged conduct. IBM's efforts on March 29 of this year to sweep into this case all of the issues relating to all of the contributions of *others* to Linux could not help but preclude efficient and orderly progress toward the resolution on the merits of the propriety of IBM's *own* contributions to Linux. (See SCO's Reply Memorandum in Support of Its Motion to Amend the Scheduling Order dated May 28, 2004, at 16 & n.20.)
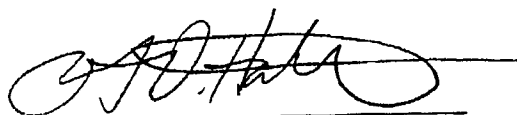
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[1]   IBM asserted otherwise during the June 8 hearing via their chart enumerating claims and counterclaims – where it stated that its counterclaims correlated to what it called a SCO "Theory No. 2." The chart was simply mistaken. In asserting that the breadth of IBM's Tenth Counterclaim matched and was justified by any SCO theory, IBM was asserting that SCO had a theory other than a theory addressed to IBM's own improper contributions to Linux. IBM did not offer any basis for that claim, there is no such basis, and the claim is simply inaccurate.

HATCH, JAMES & DODGE

For the reasons set forth above and in support of the pending Motion to Amend the Scheduling Order, IBM's Tenth Counterclaim is permissive.

Respectfully submitted,

By: _____

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c: Todd Shaughnessy