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SNELL & WILMER L.L.P.
Alan L. Sullivan (3152)
Todd M. Shaughnessy (6651)
Amy F. Sorenson (8947)
15 West South Temple
Gateway Tower West
Salt Lake City, Utah 84101-1004
Telephone: (801) 257-1900
Facsimile: (801) 257-1800

CRAVATH, SWAINE & MOORE LLP
Evan R. Chesler (admitted pro hac vice)
David R. Marriott (7572)
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
Telephone: (212) 474-1000
Facsimile: (212) 474-3700

Attorneys for Defendant/Counterclaim-Plaintiff
International Business Machines Corporation

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

THE SCO GROUP, INC., Plaintiff/Counterclaim-Defendant, -against- INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant/Counterclaim-Plaintiff.	**IBM'S MEMORANDUM IN SUPPORT OF MOTION TO LIMIT SCO'S CLAIMS RELATING TO ALLEGEDLY MISUSED MATERIAL** **(ORAL ARGUMENT REQUESTED)** Civil No. 2:03CV-0294 DAK Honorable Dale A. Kimball Magistrate Judge Brooke C. Wells

Defendant/counterclaim-plaintiff International Business Machines Corporation ("IBM") respectfully submits the following memorandum in support of its Motion to Limit SCO's Claims Relating to Allegedly Misused Material. By this motion, IBM seeks to limit the scope of SCO's claims to the Items of allegedly misused material disclosed with sufficient specificity in SCO's December 22, 2005 Disclosure of Material Allegedly Misused by IBM (the "Final Disclosures").

Preliminary Statement

As this Court has recognized, SCO has made a plethora of public statements accusing IBM of misconduct, while offering no support for its allegations. The Court deferred IBM's motions for summary judgment but ordered SCO to particularize its claims, once and for all, in the Final Disclosures. SCO has refused. Although all 294 Items identified in the Final Disclosures fail to provide the level of specificity sought by IBM and required by the Court, the lack of specificity for 201 of the 294 Items renders it impossible as a practical matter for IBM to defend itself. For those 201 Items, SCO fails to identify the allegedly misused material with the most basic detail. SCO's failure to provide even the most basic specificity for its claims is extraordinarily prejudicial to IBM and should not be allowed. Thus, IBM respectfully requests that the Court limit SCO's claims to the 93 Items for which SCO provides detail sufficient to identify the allegedly misused material.

Following SCO's repeated failure to respond to IBM's discovery requests, Magistrate Judge Wells twice ordered SCO to respond to the requests with specificity. In an order dated December 12, 2003, Magistrate Judge Wells ordered SCO to "identify and state with specificity the source code(s) that SCO is claiming form the basis of their action against IBM". (12/12/2003 Order ¶ 4.) Again, in an order dated March 3, 2004, Magistrate Judge Wells ordered SCO "to

provide and identify all specific lines of code that IBM is alleged to have contributed to Linux from either AIX or Dynix" and "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". (03/03/04 Order ¶¶ I.1-I.3.) SCO failed to comply, and IBM moved for summary judgment.

After deferring IBM's summary judgment motions, this Court likewise required SCO to particularize its claims. In an order dated July 1, 2005, the Court adopted (over SCO's objection) an IBM proposal to set interim and final deadlines for the disclosure of all allegedly misused material. The Court set October 28, 2005, as the "Interim Deadline for Parties to Disclose with Specificity All Allegedly Misused Material Identified to Date and to Update Interrogatory Responses Accordingly". (07/01/2005 Order ¶ III.) The Court set December 22, 2005, as the "Final Deadline for Parties to Identify with Specificity All Allegedly Misused Material". (Id.)

Although IBM had already produced hundreds of millions of lines of source code (which SCO could have used to comply with the Court's orders), SCO demanded that IBM produce hundreds of millions of lines of additional code, programmers' notes and design documents. IBM produced the equivalent of tens of millions of pages of these materials. As described in the May 3, 2005 Declaration of Todd M. Shaughnessy, the production involved more than 4,700 hours of work from more than 400 IBM employees, not including the time spent by IBM counsel and consultants. (05/03/2005 Shaughnessy Decl. ¶ 5 (attached as Exhibit A).)

SCO's interim disclosures nevertheless fell far short of the specificity required by the Court. SCO failed, for example, to describe all of the allegedly misused material by version, file and line of code. SCO refused to disclose versions, files and/or line numbers for the code at

issue with respect to the 201 Items in dispute on this motion. IBM promptly brought these deficiencies to SCO's attention and asked that SCO correct them in its Final Disclosures. (See 12/5/05 Letter from T. Shaughnessy to T. Normand, a true and correct copy of which is attached as Exhibit B.) Because it is practically impossible to defend against imprecise allegations, IBM advised SCO it would ask the Court to preclude SCO from pursuing any claims regarding allegedly misused material not properly disclosed in the Final Disclosures, which we asked SCO to provide in an electronic format that would allow efficient analysis by IBM. (See id. at p. 2.) SCO did not respond to that letter, or otherwise object to IBM's request.

Rather than correct the shortcomings in SCO's interim disclosures, the Final Disclosures (which SCO declined to provide in an electronic form, hindering IBM's analysis) merely compound them, by challenging even more items without specifically describing them. None of the 294 Items in the Final Disclosures provide the level of detail sought by IBM and required by the Court. Remarkably, for 201 of the 294 Items, SCO does not provide enough particularity even to identify the versions or line numbers for the allegedly misused material. (See Item Nos. 2-112, 143-149, 165-182, 186-193, 204, 232-271, 279-294.)[1] In fact, no versions, files or lines of Unix System V code are identified; no versions, files or lines of Dynix or AIX code are identified as misused; and no specific versions or lines of Linux code are identified.[2] For these

[1] Although SCO does provide versions and line numbers for the files identified in Item No. 204, SCO makes no claim as to any misuse of the code identified in Item No. 204. Under the heading "Improperly Disclosed Code, Method, or Concept", SCO states: "N/A". (See infra note 4.)

[2] Although SCO identifies certain Linux files (but not specific versions or lines of code) as to the 201 Items in dispute, a number of the files are identified unclearly and inconsistently. In some cases, SCO seems simply to refer IBM to a website. (See, e.g., Item Nos. 9, 11, 18, 98, 178.)

201 Items, SCO comes nowhere close to providing the information that IBM needs to defend itself and that the Court ordered SCO to provide.[3]

As is further discussed below, SCO should now finally be precluded from proceeding any further on those 201 Items for which it has not provided even the most basic identifying information.

Argument

I. THE FINAL DISCLOSURES LACK THE REQUISITE SPECIFICITY.

At this point, IBM has been asking SCO for nearly three years to identify with specificity the material that IBM is alleged to have misused. Specifically, IBM has requested SCO to specify the versions, files and line numbers of the allegedly misused material. The Court has ordered SCO no less than three times to do so. Yet, as described above, SCO has refused. While the sheer magnitude of the materials provided with the Final Disclosures gives the false impression of detail, the 201 Items at issue on this motion fail to identify any versions, files or lines of any Unix System V, AIX or Dynix code as being misused. The Items at issue identify Linux files in most cases (albeit inconsistently and confusingly) but nowhere specifically identify any versions or lines of Linux code; in some cases IBM simply is referred to a website. (See, e.g., Item Nos. 9, 11, 18, 98, 178.)

[3] The shortcomings in the Final Disclosures are not limited to failing properly to identify the versions, files and lines of code of the relevant UNIX System V, AIX, Dynix and Linux material. SCO also fails to provide, for example, adequate information as to when and how the allegedly misused material was ever disclosed, by SCO or anyone else; details as to the origin of the material, including when, where and by whom the material was created; and all products in which the material is included, or on which the material is based.

Item Nos. 271 and 294 of the Final Disclosures illustrate the problem. Item No. 271 claims that "AIX and Dynix/ptx patented technologies, based on UNIX System V, were improperly released for the benefit of, and use by, the Linux development community in developing Linux." SCO does not identify a single version, file or line of Unix System V, AIX, Dynix or Linux technology that IBM is alleged to have misused. Instead, SCO merely attaches 34 patents. None of these 34 patents lists any versions, files or lines of code. There is, therefore, no way of telling what, if any, Unix System V, AIX, Dynix or Linux technology SCO contends was misused. Similarly, SCO's Item No. 294 alleges that IBM has engaged in "[e]xtensive use of ptx programming experience (and a fortiori exposure to UNIX System V) in creating numerous Linux kernel patches". In support of this claim, SCO attaches a computer disk containing 33,000 single-spaced pages of proposed code contributions. Nowhere does SCO identify with specificity a single version, file or line of Unix System V, AIX, Dynix or Linux code. Here again, IBM is left to guess as to SCO's claim.

SCO's failure to specify its claims is especially egregious because it has had the information necessary to do so since nearly the beginning of this lawsuit. SCO was founded as a Linux company, and Linux source code has been available for download from the internet since the inception of Linux—long before the commencement of this lawsuit. SCO purports to own all Unix System V code and, thus, has ready access to all of the System V code. Further, IBM produced millions of lines of AIX and Dynix source code to SCO almost two years ago and supplemented the production nearly nine months ago with hundreds of millions of additional lines of code, including all iterations and versions of such code maintained by IBM, and thousands of programmers' notes and design documents. Despite requiring IBM to devote

considerable resources to providing SCO with this information, SCO identifies lines of AIX or Dynix code for only one of the 201 Items at issue and fails to make any allegation of misuse in relation to that code.[4]

II. SCO'S GAMESMANSHIP IS EXTREMELY PREJUDICIAL TO IBM.

The shortcomings in the Final Disclosures are not only pervasive, but they also result in extraordinary prejudice to IBM. The lack of particularity in the Final Disclosures cloaks SCO's claims in uncertainty and makes it practically impossible for IBM to defend itself.

SCO contends generally that IBM misused the Unix System V code (which SCO purports to own) and the AIX and Dynix code (which IBM owns, but SCO purports to control). According to SCO, IBM improperly "dumped" Unix System V, AIX and Dynix into Linux. Given the scope of the code implicated by SCO's claims, however, it is practically impossible to assess and defend against them without knowing exactly which versions, files and lines of code SCO contends are at issue. As the Court will recall, there are numerous versions of Unix System V, AIX, Dynix and Linux, and each version consists of thousands of files and millions of lines of code. For example, Unix System V R4.2 ES/MP consists of 22,222 files and 7,339,157 lines of code; AIX 4.3.3 for Power consists of 111,964 files and 138,420,329 lines of code; and Linux 2.6.15 consists of 18,811 files and 7,290,070 lines of code.

[4] In Item No. 204, SCO provides a comparison of System V source code and Dynix source code to support the unremarkable, and uncontested, proposition that the Dynix operating system contains certain code modified or derived from System V source code; neither party contests the fact that IBM (through Sequent) had a valid license to include System V source code in Dynix. In fact, as noted above, SCO makes no claim of misuse of the material identified in Item No. 204. (See supra note 1.)

SCO's failure to specify its claims leaves IBM no way to defend itself except by undertaking a massive analysis, potentially of every single version, file and line of Unix System V code, every single version, file and line of code in AIX and Dynix, and every single version, file and line of code in Linux.[5] As SCO well knows, there is no way IBM could conduct this analysis in several years, let alone in the several months afforded by the scheduling order. Unlike SCO, IBM does not know what SCO claims. If tolerated, SCO's gamesmanship would give IBM and its experts no meaningful opportunity to evaluate in advance the claims SCO may choose to trot out in its expert reports, in opposition to IBM's summary judgment motions and/or at trial.

III. THE ONLY APPROPRIATE REMEDY FOR SCO'S GAMESMANSHIP IS TO LIMIT ITS CLAIMS TO THE DISCLOSED ITEMS FOR WHICH SCO PROVIDED SUFFICIENT SPECIFICITY.

SCO's failings regarding the Final Disclosures do not occur on an empty set. They come following repeated discovery requests by IBM and three separate orders of this Court. Indeed, they come in derogation of this Court's orders. The appropriate remedy for a party's failure to comply with an order requiring the disclosure of the party's claim is an order precluding the party from pursuing undisclosed elements of the claim.

Many courts have held that a party's claim must be limited to exclude elements of the claim for which the party has failed to provide appropriate, court-ordered discovery. See Imax

[5] Based on SCO's claims, the investigation would have to include, among other things, an inquiry into the origin of the code, the value of the code, whether SCO distributed the code under the terms of the General Public License, whether the code was developed to comply with publicly known standards, whether the code is dictated by externalities, whether the code is merely an unprotectable idea, whether the code ever shipped without a required copyright notice, and whether the code is otherwise in the public domain.

Corp. v. Cinema Tech., Inc., 152 F.3d 1161, 1167 (9th Cir. 1998) (affirming district court's decision "refusing [under Fed. R. Civ. P. 26(e)] to consider any trade secret material that was not specifically listed in haec verba in [plaintiff's] Fourth Supplemental Responses", because defendant "could not be expected to prepare its rebuttal to [plaintiff's] trade secrets claim without some concrete identification of exactly which [elements] alleged were incorporated into [defendant's] own projector system"); Kang v. Lee, No. 96 Civ. 1145, 1997 WL 669787, at *3 (S.D.N.Y. Oct. 27, 1997) (ruling that "[a]s a result of Defendant's failure to comply with Plaintiff's discovery demands, even after this Court directed him to do so, he has been precluded from offering any evidence at trial relating to matters raised in Plaintiff's unanswered interrogatories and unsatisfied document requests").

Modifying the Scheduling Order either to afford IBM more time to evaluate SCO's claims or to provide SCO an opportunity to amend its disclosures would not be an adequate solution to the lack of specificity in the Final Disclosures. It would require years for IBM to chase all of the facts relating to the hundreds of millions of lines of code implicated by SCO's claims. As described above, in spite of the benefit of almost three years time and numerous requests from IBM and instructions from the Court, SCO has repeatedly refused to identify with specificity the basis of its claims. The resolution of this case should not be delayed further to provide SCO yet another opportunity. It has had more than enough opportunity to comply with the Court's orders. As IBM has previously advised the Court, we believe it is in IBM's interest and in the public interest to bring this case to a close as soon as possible.

In short: enough is enough. SCO should now finally be precluded from proceeding any further on those 201 Items for which it has not provided even the most basic identifying information. (See Item Nos. 2-112, 143-149, 165-182, 186-193, 204, 232-271, 279-294.)

Conclusion

For the foregoing reasons, IBM respectfully requests that the Court enter an order limiting the scope of SCO's claims relating to allegedly misused material to the following Items in SCO's Final Disclosures: Item Nos. 1, 113-142, 150-164, 183-185, 194-203, 205-231, and 272-278.

DATED this 13th day of February, 2006

SNELL & WILMER L.L.P.

/s/ Todd M. Shaughnessy
Alan L. Sullivan
Todd M. Shaughnessy
Amy F. Sorenson

CRAVATH, SWAINE & MOORE LLP
Evan R. Chesler
David R. Marriott

Attorneys for Defendant/Counterclaim-Plaintiff International Business Machines Corporation

Of counsel:

INTERNATIONAL BUSINESS MACHINES CORPORATION
Jennifer M. Daniels
Alec S. Berman
1133 Westchester Avenue
White Plains, New York 10604
(914) 642-3000

Attorneys for Defendant/Counterclaim-Plaintiff International Business Machines Corporation

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of February, 2006, a true and correct copy of the foregoing was hand-delivered to the following:

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

and a true and correct copy of the foregoing was sent by U.S. Mail, postage prepaid, to the following:

Robert Silver
Edward Normand
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504

Stephen N. Zack
Mark J. Heise
BOIES, SCHILLER & FLEXNER LLP
100 Southeast Second Street, Suite 2800
Miami, Florida 33131

/s/ Todd M. Shaughnessy

EXHIBIT A

SNELL & WILMER L.L.P.
Alan L. Sullivan (3152)
Todd M. Shaughnessy (6651)
Amy F. Sorenson (8947)
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101-1004
Telephone: (801) 257-1900
Facsimile: (801) 257-1800

CRAVATH, SWAINE & MOORE LLP
Evan R. Chesler (admitted pro hac vice)
David R. Marriott (7572)
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
Telephone: (212) 474-1000
Facsimile: (212) 474-3700

Attorneys for Defendant/Counterclaim-Plaintiff International Business Machines Corporation

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

THE SCO GROUP, INC.,

Plaintiff/Counterclaim-Defendant,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant/Counterclaim-Plaintiff.

DECLARATION OF TODD M. SHAUGHNESSY

Civil No. 2:03CV-0294 DAK

Honorable Dale A. Kimball

Magistrate Judge Brooke C. Wells

I, Todd M. Shaughnessy, declare as follows:

1. I represent International Business Machines Corporation ("IBM") in the above-entitled action brought by The SCO Group, Inc. ("SCO"). This declaration is submitted pursuant to the Court's January 18, 2005 Order Concerning SCO's Renewed Motion to Compel (the "Order").

2. The Court ordered IBM to produce CMVC and RCS data relating to IBM's AIX and Dynix operating systems, including "all versions and changes to AIX and Dynix" (Order at 9-10), and to produce information regarding the 3,000 AIX and Dynix developers who "made the most contributions and changes to the development of AIX and Dynix". (Order at 16.) With respect to the source code produced from CMVC and RCS, the Court ordered IBM to submit an affidavit "specifying the efforts it took to deliver the code from the CMVC and RCS systems". (Order at 10.) With respect to information about the 3,000 AIX and Dynix programmers who "made the most contributions and changes to the development of AIX and Dynix" the Court ordered IBM to submit an affidavit "detailing the process by which the 3,000 were chosen". (Order at 17.)

3. As described in more detail below, IBM has complied with the Court's Order, and has produced all responsive, non-privileged information located after an extensive search. As ordered by the Court, IBM produced from CMVC and from RCS all source code relating to the AIX and Dynix operating systems, including all versions and changes to the code. IBM also produced from CMVC and RCS all documentation related to the AIX and Dynix operating systems, including all programmer's notes, design documents, and white papers. IBM identified all the individuals who created or made changes to AIX or Dynix source code, as recorded by CMVC and RCS, prepared a list of those individuals, together with their login identifiers and contact information (for every person for whom IBM had that information), and provided that

list to counsel for SCO on May 3, 2005. As explained below, the number of individuals who contributed source code to AIX and Dynix (as recorded by CMVC and RCS) is less than 3,000; therefore, the individuals identified for SCO constitute all of the individuals that are identified in CMVC and RCS as having made changes to AIX or Dynix. IBM has produced, in the form of CMVC and RCS data, information that shows what changes to the source code were specifically made by each of these individuals. As provided for by the Court in its April 20, 2005 Order Concerning IBM's Motion for Reconsideration, IBM has not searched for and through the files of 3,000 individuals. In accordance with that April 20 Order, IBM will produce, by July 19, 2005, documents from the files of the 100 individuals who made the most contributions and changes to AIX and Dynix source code.

4. IBM also undertook a reasonable search for programmer's notes, design documents, white papers and source code related to the AIX and Dynix operating systems that are not stored in CMVC or RCS and has completed its production of these documents to SCO.

5. Complying with the Court's Order involved more than 4,700 hours of work from more than 400 IBM employees. This does not include the time spent by IBM's counsel and consultants on this project, which was likewise considerable. IBM produced a total of more than 80 GB of source code and other electronic data to SCO, and more than 900,000 pages of paper (which were scanned and produced in electronic form on CDs).

6. Section I describes the steps IBM took to produce AIX source code, documentation (including programmer's notes, design documents, and white papers), and other information related to the AIX operating system from IBM's CMVC system. Section II describes the steps IBM took to produce Dynix source code, documentation (including programmer's notes, design documents, and white papers), and other information related to the Dynix operating system from IBM's RCS system. Section III describes the steps IBM took to

search for, collect, and produce AIX source code, programmer's notes, design documents, and white papers outside of IBM's CMVC system. Section IV describes the steps IBM took to search for, collect, and produce Dynix source code, programmer's notes, design documents, and white papers outside of IBM's RCS system. Section V describes IBM's production of information concerning each of the individuals who made changes to AIX or Dynix, including the names and contact information for these individuals, and what changes each individual specifically made.

I. Production of AIX Code and Documents from CMVC

7. CMVC is the source code revision system currently used by IBM's AIX development organization. CMVC has been used in AIX development since 1991. Other than the AIX source code stored in CMVC, IBM does not maintain revision control information for AIX prior to 1991. CMVC does not contain any source code or other information for the Dynix operating system.

8. CMVC provides shared access to source files used in the development of the AIX operating system, allows IBM to keep track of changes that are made to source code files, and ensures that the files are available for viewing or updating only by those with the proper authorization.

9. In accordance with the Court's January 18, 2005 Order, IBM identified and extracted from CMVC all of the source code, documentation, and other information related to the AIX operating system, built an AIX server loaded with the appropriate version of CMVC along with the source code and documentation related to the AIX operating system, tested the system to ensure it was functional, and delivered and installed the server to allow access by SCO.

10. The server contained a fully functional version of the CMVC tool, one hundred percent (100%) of the source code in CMVC that is part of or related to AIX (including the

operating system itself, development tools, documentation, and test programs) and one hundred percent (100%) of the documentation in CMVC that is related to AIX, including programmer's notes and design documents. One CMVC design document was redacted to protect attorney-client privileged information. After redaction, IBM was unable to restore the document into the database in electronic form. IBM produced the redacted version of the document along with the CMVC server. The code and documentation that IBM produced from CMVC represent more than 62 GB of data.

11. The particular CMVC server at IBM that contains source code and information related to AIX also contains a large amount of source code and material that is neither part of, nor related to, AIX. IBM did not produce source code or material in CMVC for components that are unrelated to AIX or its code, internal design, or methods. IBM excluded components containing design, manufacturing, and test information specific to IBM hardware products, such as hardware system designs, hardware test exercisers and other hardware test programs, and hardware manufacturing-related components. IBM also excluded firmware source code (machine-level code, distinct from the operating system, that is embedded into a computer hardware device or placed on a computer system to function at a level below the computer's operating system) and other software programs that are distinct from the operating system, such as middleware (software that provides support functions for software applications, such as application-to-application exchange of data, data storage management, and other services) and other applications.

12. The source code that is part of or related to the AIX operating system is not segregated in a single location within CMVC, but rather is commingled with hundreds of thousands of other source code files that are not part of or related to the AIX operating system. A thorough review of the contents of the CMVC system was undertaken to determine which of

the thousands of separate "components" within CMVC are part of or related to the AIX operating system.

13. A script—a small computer program—was written and executed to map each of the responsive components to the specific source code file names within CMVC. Using the list of file names and identifiers that had been generated, IBM then matched those file names and identifiers to corresponding Source Code Control System ("SCCS") files. These SCCS files are the files maintained by IBM that provide the file development history since 1991 (or the inception of the file) for the particular corresponding source code file in the AIX operating system or related source code. These SCCS files were produced by IBM and allow SCO to reconstruct every version and iteration of AIX since 1991.

14. After all of the source code components for the AIX operating system were identified, the non-source code materials in CMVC that are related to the AIX operating system source code were similarly identified. This included programmer's notes, design documents, and data about version control, users, and change histories.

15. CMVC programmer's notes reflect developer commentary concerning defects and enhancements to AIX, and sometimes contain confidential information from IBM's customers and vendors, or information covered by the attorney-client or work product privileges. If a CMVC programmer's note contained third-party confidential information, the name of the third party (or other information that would identify the third party) was redacted from the copy of the programmer's note to be produced to SCO. Reviewers also redacted privileged information from the copy of the note to be produced to SCO. All redacted information was marked with an appropriate legend. Out of 304,398 programmer's notes produced from CMVC, approximately 100 contain a redaction of customer names or privileged information.

16. CMVC also contains more than 2,500 design documents related to AIX. These design documents were also produced to SCO. As noted above in paragraph 10, one design document was redacted to protect attorney-client privileged information and produced to SCO in redacted form.

17. For each source code file produced to SCO, IBM reviewed the origin codes or copyright notices in the code to identify potentially confidential third-party material. IBM located a copy of the relevant confidentiality terms and notified the third party prior to production, when required.

18. IBM obtained an AIX server with the hardware components necessary to produce the data from CMVC. An IBM team created a working copy of the CMVC source code revision system on the server. In order to retain CMVC database functionality that would allow SCO to search and query the code and documentation being produced, IBM copied the entire contents of the CMVC families that contained AIX-related content, and then removed the contents of the source files and programmer's notes that did not relate to AIX.

19. The server, which contained all the information described above, was made available to SCO at the offices of Snell & Wilmer in Salt Lake City, Utah on March 18, 2005. SCO's outside counsel took possession of this server. Along with the server, IBM also has made available to SCO general AIX and CMVC user documentation and a custom README file that contains basic instructions on how to start and navigate the server, CMVC, the necessary IDs and passwords, and a script to instruct SCO how to determine the changes made by each person who contributed code to AIX, as recorded by CMVC. A copy of the README file is attached to this Declaration as Exhibit A. A copy of the script is attached to this Declaration as Exhibit B.

II. Production of Dynix Code and Documents from RCS

20. Revision Control System ("RCS") is the source code revision system that was used by Sequent's and IBM's Dynix development organization. It also serves as a shared electronic repository for programmer's notes, design documents, and white papers. The source code revision information in RCS dates back to 1988. Other than the Dynix source code stored in RCS, IBM has searched for, but has not been able to locate, revision control information for Dynix prior to 1988. RCS does not contain any source code or other information for the AIX operating system.

21. IBM has produced one hundred percent (100%) of the source code in RCS that is part of or related to Dynix (including the base operating system and layered products, development tools, and test programs). IBM also extracted, and produced to SCO, one hundred percent (100%) of the Dynix-related design documents, white papers, and programmer's notes that were stored in RCS.

22. The RCS server at IBM that contains source code and information related to Dynix also contains source code and material that is neither part of, nor related to, Dynix. IBM has not produced source code or material in RCS for components that are unrelated to Dynix or its code, internal design, or methods. IBM excluded components containing design, manufacturing, and test information specific to IBM or Sequent hardware products, such as hardware system designs, hardware test exercisers and other hardware test programs, and hardware manufacturing-related components. IBM also excluded firmware source code (machine-level code, distinct from the operating system, that is embedded into a computer hardware device or placed on a computer system to function at a level below the computer's operating system), and other software programs that are distinct from the operating system, such as middleware (software that provides support functions for software applications, such as

application-to-application exchange of data, data storage management, and other services) and applications.

23. Extracting the source code that is part of or related to the Dynix operating system required identification of the source code files that are not part of or related to the Dynix operating system. A thorough review of the contents of the RCS system was undertaken by IBM to determine which files are part of or related to the Dynix operating system.

24. Copies of both the source text file and the comma v file for each of the Dynix-related code files were extracted from RCS. Comma v files are the files maintained by RCS that provide the file development history since 1988 (or the inception of the file) for the particular corresponding source code file in the Dynix operating system or related source code. The copies were prepared in tape archive ("tar") format, and then compressed using a zip program to allow them to fit on the CDs. The total amount of this Dynix source code produced from RCS represents more than 17 GB of uncompressed data.

25. For each source code file produced to SCO, IBM reviewed the copyright notices in the code to identify potentially confidential third party material. IBM located a copy of the relevant confidentiality terms and notified the third party prior to production, when required.

III. Production of AIX Design Documents, Programmer's Notes, White Papers and Code Outside CMVC

26. IBM also searched for design documents, programmer's notes, white papers and AIX source code that are not stored in the CMVC database and has completed its production of these documents. Certain AIX development teams keep a large portion of their work files and documents, other than what is required to be stored in CMVC, in shared electronic repositories. To collect a large volume of AIX design documents, programmer's notes, whitepapers, and code, and to avoid redundancy, IBM collected potentially responsive documents from shared electronic repositories at a department, team, and project level. These documents were reviewed for

responsiveness, third-party confidential information, and attorney-client privileged communications, and responsive, non-privileged documents have been produced to SCO.

27. IBM also located, from shared electronic repositories and from some data tapes, some source code for the AIX operating system. Although it is likely that this code is duplicative of the AIX source code already produced to SCO on the CMVC server as discussed in Paragraphs 7-19, IBM was unable to confirm that the code is duplicative, and therefore has produced this AIX source code to SCO, on CDs.

28. As I have noted above, IBM does not maintain revision control information for AIX source code pre-dating 1991. To the extent that any code for the AIX operating system (that did not duplicate the code already being produced in CMVC) was found during the search described in Paragraphs 26-27 above, it was produced. Paragraphs 29-31 below describe additional search efforts IBM undertook to locate pre-1991 versions of AIX code. No versions of AIX pre-dating 1991 were found.

29. In the 1980s and early 1990s, IBM prepared vital records backups of AIX source code and transferred them to a remote storage location. At some point in the 1990s, the AIX vital records tapes were transferred to Austin, Texas. In late 2000, the tapes were determined to be obsolete, and were not retained.

30. The AIX development organization contacted other IBM employees who were known or believed to have been involved with the development or product release of AIX versions prior to 1991. In addition, IBM managers and attorneys asked current members of the AIX development organization whether they were aware of the location of pre-1991 releases of AIX source code. No one asked was aware of any remaining copies of pre-1991 AIX source code.

31. Source code archives retained by the IBM group responsible for filing IBM copyright registrations and maintaining some of the IBM copyright records were transferred to IBM's Austin site in 2000. IBM searched those archives; all of the source code in the archives are duplicative of AIX versions and changes already produced on the CMVC server as discussed in Paragraphs 7-19.

IV. Production of Dynix Design Documents, Programmer's Notes, White Papers and Code Outside RCS

32. RCS is the shared electronic repository that was used by Dynix developers to store design documents, programmer's notes, and white papers. As discussed above, IBM collected responsive code and documents from RCS. In addition, IBM searched for and retrieved potentially responsive materials from archived Sequent records. These documents were reviewed for responsiveness, third-party confidential information, and attorney-client privileged communications, and all responsive, non-privileged documents have been produced to SCO.

33. As noted above, IBM searched for, but was unable to locate, revision control information for Dynix prior to 1988. IBM did locate some pre-1988 copies of archived Dynix source code files (without revision control information), which were produced to SCO on CDs.

V. Contributors to AIX and Dynix

34. As IBM previously noted in response to SCO's Interrogatory 5, the list of 7,200 individuals who have or have had access to AIX or Dynix source code are the people who work or worked on developing AIX and Dynix. Not all of these individuals, however, have made contributions or changes to AIX or Dynix source code; for example, a development supervisor may have access to CMVC or RCS, but may have never personally made any changes to the code. In response to the Court's order that IBM provide information as to which persons made contributions or changes to AIX or Dynix source code, IBM has identified the names, user IDs,

and contact information (to the extent IBM has such information in its records) for all of the individuals recorded by CMVC and RCS as having created or made changes to AIX or Dynix or related source code files, and has produced all such information to SCO.

35. The total number of individuals who are recorded by CMVC or RCS as having made contributions or changes to AIX or Dynix or related source code files is 2,704. This number, while less than the 3,000 individuals contemplated by the Order, includes all individuals who are recorded by CMVC and RCS as having made contributions and changes to AIX or Dynix.

36. The list of AIX contributors contains 2,234 names. These names were obtained by using CMVC tools to determine which CMVC users have ever created or modified AIX or related source code since CMVC versioning was initiated in 1991. This list includes all of the persons who are recorded by CMVC as having made changes to AIX source code. The list was examined manually to merge the data for users who had multiple IDs or name changes.

37. IBM has also produced to SCO the user IDs for all of the individuals who made changes or contributions to Dynix, as recorded by RCS. The list contains 470 user IDs and identifies the number of files created or modified by each user ID. IBM reconstructed and reviewed archived Sequent records and questioned former Dynix developers, and has provided to SCO all of the corresponding employee names and contact information that were obtained.

38. The CMVC and RCS revision control data produced by IBM include complete information (to the extent such information is recorded by CMVC or RCS) as to which individuals made which specific contributions or changes to AIX or Dynix source code, as well as when each such change was made.

39. For AIX, the contributions and changes made by each person can be determined by running a simple script, a copy of which was produced to SCO along with the CMVC system

on March 18, 2005. A copy of the script is also attached to this Declaration as Exhibit B. Using the script, SCO can type in any individual user ID, and the script will produce as its output a detailed list of all of the contributions and changes made by that user.

40. For Dynix, information about each change made to each file in the Dynix source code, including the date and time the change was checked-in to the RCS system, who checked-in the change, the number of lines of code added and deleted from the previous revision of the file, and a log message entered by the person who checked-in the change can be ascertained using standard RCS tools, such as the "rlog" command. For example, to determine the change history of the base_callback.c,v file in the 4.6.1 version of the Dynix base operating system, SCO can type "rlog base_callback.c,v", which results in the following output:

```
$ rlog base_callback.c,v

RCS file:       base_callback.c,v;   Working file:    base_callback.c
head:           1.4
branch:
locks:          ; strict
access list:
symbolic names:  v4_6_1p: 1.4.3;  v4_6_1: 1.4;  v4_6_0p: 1.4.2;  v4_6_0: 1.4;
comment leader:  " * "
total revisions: 6;    selected revisions: 6
description:
base_callback.c
----------------------------
revision 1.4
date: 97/09/29 18:20:23;  author: mjs;  state: Exp;  lines added/del: 7/9
branches:  1.4.2;  1.4.3;
Made appropriate use of SYMUSED lint directive in this file.
PR #230499 / SCN rtol031.
----------------------------
revision 1.3
date: 95/11/03 03:08:44;  author: mjs;  state: Exp;  lines added/del: 5/2
lint fix.
----------------------------
revision 1.2
date: 95/11/03 02:01:20;  author: mjs;  state: Exp;  lines added/del: 20/2
Added lint ref for base_callback.
----------------------------
revision 1.1
date: 95/11/02 20:14:52;  author: mcneil;  state: Exp;
Initial revision
----------------------------
revision 1.4.3.1
date: 20/1./3. 6.:0.:6.;  author: hbeare;  state: Exp;  lines added/del: 6/2
Branch for v4_6_1p
----------------------------
revision 1.4.2.1
date: 20/0./9. 5.:8.:1.;  author: breazile;  state: Exp;  lines added/del: 6/2
Branch for v4_6_0p
============================================================================
```

41. I declare under penalty of perjury that the foregoing is true and correct.

Executed: May 3, 2005

Salt Lake City, Utah

Todd M. Shaughnessy

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of May, 2005, a true and correct copy of the foregoing was sent by U.S. Mail, postage prepaid, to the following:

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

Stephen N. Zack
Mark J. Heise
BOIES, SCHILLER & FLEXNER LLP
100 Southeast Second Street, Suite 2800
Miami, Florida 33131

Robert Silver
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, New York 10504

Todd M. Shaughnessy

EXHIBIT B

Snell & Wilmer
L.L.P.
LAW OFFICES

15 West South Temple
Suite 1200
Gateway Tower West
Salt Lake City, UT 84101
801.257.1900 P
801.257.1800 F
swlaw.com

Todd M. Shaughnessy
801-257-1937
tshaughnessy@swlaw.com

DENVER
IRVINE
LAS VEGAS
PHOENIX
SALT LAKE CITY
TUCSON

December 5, 2005

VIA FACSIMILE AND U.S. MAIL

Edward Normand
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504

Re: SCO v. IBM; IBM v. SCO

Dear Ted:

We have completed a preliminary analysis of SCO's interim disclosures and supplemental interrogatory responses pursuant to the Court's order of July 1, 2005. As stated in IBM's memorandum in opposition to SCO's objection to Magistrate Judge Wells' order dated October 12, 2005, SCO's disclosures and interrogatory responses fall far short of SCO's obligations. We ask that SCO remedy these shortcomings no later than December 22, 2005, when it submits its final disclosures and updates its interrogatory responses.

As you know, IBM's discovery requests, and the Court's orders called for SCO to disclose the allegedly misused material with specificity. For example, SCO was required to identify the allegedly misused material by version, file and line of code. In addition, to the extent SCO contends IBM has infringed its copyrights, SCO was required to identify and match up the allegedly infringing and allegedly infringed material by version, file and line of code. To the extent SCO contends that IBM has breached its contractual obligations by contributing code to Linux, SCO was required to identify the material alleged to have been contributed improperly by version, file and line of code, and to the extent the allegedly contributed material is not Unix System V code, but is in any sense alleged to have been based on or resulted from Unix System V code, the version, file and line of Unix System V code from which the allegedly contributed material is alleged to derive or result.

Despite IBM's requests and the Court's orders, SCO's interim disclosures and interrogatory responses fail to specifically disclose all of the allegedly misused material as required. For most of the allegedly misused material, SCO still fails to

disclose (1) files and lines of code in Linux; (2) files and lines of code in AIX or Dynix; and (3) files and lines of code in UNIX System V. Furthermore, in the few instances where SCO does identify specific lines of Linux, AIX, or Dynix code as allegedly contributed material, SCO generally fails adequately to provide any identification of the lines of Unix System V code from which the allegedly contributed material is alleged to derive or result. Any such linkage to Unix System V code should be done in an unambiguous manner—for example, through tables listing and matching up file names and line numbers between the allegedly misused non-Unix System V code, and Unix System V code.

Moreover, SCO's interim disclosures and supplemental interrogatory responses are unclear as to how they relate to SCO's prior interrogatory responses. It is not clear, for example, whether SCO's latest disclosures are cumulative or merely supplement its prior disclosures, especially since there are inconsistencies among SCO's various responses. SCO's interim disclosures are likewise unclear as to how the allegedly misused material relates to SCO's different causes of action for example, it is unclear whether certain of the allegedly misused material relates to SCO's contract claims, SCO's copyright claims, IBM's claim seeking a declaration of noninfringement, or a combination of these claims.

To avoid confusion, comply with the Court's orders and avoid unnecessary motion practice, SCO should (1) provide the requisite specificity in its final disclosures; (2) make its final disclosures and updated interrogatory responses cumulative; and (3) make clear to which of the claims the allegedly misused material relates. As IBM understands the Court's orders, SCO may not challenge any allegedly misused material not properly disclosed in SCO's final disclosures. IBM intends to ask the Court to preclude SCO from pursuing any claims regarding allegedly misused material not properly disclosed on or before December 22, 2005.

Finally, we reiterate our previous request that SCO provide its disclosures in a usable electronic format, just as it did with its privilege log. We do not believe there is any reason it cannot do so and would prefer not to have to raise this issue with the Court at the December 13 hearing.

Snell & Wilmer
LLP

Sincerely,

Todd M. Shaughnessy

TMS:dw
cc: Brent Hatch
David Marriott
Peter Ligh
Amy Sorenson