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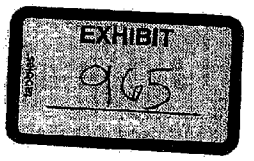
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

THE SCO GROUP, INC., Plaintiff/Counterclaim-Defendant, -against- INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant/Counterclaim-Plaintiff.	Civil No. 2:03CV-0294 DAK Honorable Dale A. Kimball Magistrate Judge Brooke C. Wells



DECLARATION OF STEVEN M. SABBATH

I, Steven M. Sabbath, declare as follows:

1. I joined The Santa Cruz Operation, Inc. as Vice President, Legal Affairs, in 1991. The Santa Cruz Operation, Inc. changed its name to Tarantella, Inc. in connection with the sale of its Server Software and Professional Services Divisions to Caldera International, Inc., which is now known as The SCO Group, Inc. ("Plaintiff"), on May 7, 2001. I refer to Tarantella, Inc. as "Santa Cruz" at times on or prior to May 7, 2001 and as "Tarantella" at times after May 7, 2001. I served as Senior Vice President of Law and Corporate Affairs & Secretary of Tarantella until November 2003.

2. This declaration is submitted in connection with the lawsuit entitled The SCO Group, Inc. v. International Business Machines Corporation, Civil Action No. 2:03CV-0294 DAK (D. Utah 2003). Except as stated otherwise, this declaration is based upon personal knowledge.

3. In Section I of this declaration, I describe my roles and responsibilities regarding UNIX operating systems. In Section II, I describe the December 1995 acquisition by Santa Cruz of certain UNIX assets from Novell, Inc. ("Novell") and Novell's continuing rights following the acquisition. In Section III, I describe my understanding of an amendment, which modified certain UNIX license agreements, entered into by Santa Cruz, Novell and International Business Machines Corporation ("IBM") in 1996. In Section IV, I describe certain provisions of an amendment, also entered into in 1996, to the asset purchase agreement between Santa Cruz and Novell relating to the December 1995 acquisition. Finally, in Section V, I describe a joint development agreement and a related confidentiality agreement entered

into by Santa Cruz and IBM in 1998, and the effect of an attempt by Santa Cruz to assign the joint development agreement to Plaintiff in 2001.

I. Roles and Responsibilities Regarding UNIX

4. I joined Santa Cruz as Vice President, Legal Affairs, in 1991. Between 1993 and 1997, I served as Vice President, Law and Corporate Affairs, and Secretary. I was named Senior Vice President, Law and Corporate Affairs, and Secretary in January 1998. I remained with Santa Cruz following the sale of its Server Software and Professional Services Divisions to Plaintiff on May 7, 2001, at which time Santa Cruz was renamed Tarantella, Inc. I served as Senior Vice President of Law and Corporate Affairs & Secretary of Tarantella until November 2003. I was the principal in-house attorney with respect to the matters described in this declaration.

5. In the summer of 1995, I was involved in negotiating the purchase by Santa Cruz of certain UNIX assets from Novell. On September 19, 1995, Santa Cruz entered into an Asset Purchase Agreement with Novell (the "Asset Purchase Agreement"), a true and correct copy of which is attached hereto as Exhibit 1. In December 1995, Santa Cruz acquired certain UNIX related assets from Novell pursuant to the Asset Purchase Agreement, as amended by Amendment No. 1 thereto ("Amendment No. 1"), a true and correct copy of which is attached hereto as Exhibit 2. However, as is described in more detail below, Novell retained certain rights with respect to the UNIX System V licensing business following the transaction.

6. In 1996, I was involved in negotiating an amendment ("Amendment No. X"), a true and correct copy of which is attached hereto as Exhibit 3, to the following UNIX license agreements with IBM:

- 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
- Software Agreement Supplement 170, as amended by a letter agreement dated on or about January 25, 1989.

I refer to these agreements, as amended, and together with any other Supplements that pertain to prior versions or releases of UNIX System V Release 3.2 ("SVR3.2"), as the "Related Agreements."

7. In 1997 and 1998, I was involved in negotiating a Joint Development Agreement (the "JDA") and a Confidential Disclosure Agreement (the "CDA") with IBM relating to a project known as "Project Monterey," which involved the development of a UNIX operating system designed to operate on a new 64-bit Intel architecture referred to as "IA-64." True and correct copies of the JDA and the CDA are attached hereto as Exhibits 4 and 5, respectively.

8. In 2001, I was involved in the sale of Santa Cruz's Server Software and Professional Services Divisions to Plaintiff. As is described in more detail below, Santa Cruz attempted to assign the JDA to Plaintiff in connection with the sale on May 7, 2001. IBM was notified of this attempted assignment in a letter dated June 6, 2001, a true and correct copy of which is attached hereto as Exhibit 6 (the

"June 6, 2001 Letter"). However, the assignment was not effective because IBM did not consent to the assignment. In fact, IBM objected to the assignment and terminated the JDA, in accordance with its terms, in a letter dated June 19, 2001, a true and correct copy of which is attached hereto as Exhibit 7 (the "June 19, 2001 Letter").

II. Novell's Continuing Rights

9. In the summer of 1995, I was involved in negotiating the purchase by Santa Cruz of certain UNIX assets from Novell. Novell had two principal UNIX businesses. The first was the legacy business of licensing UNIX System V software to other UNIX system vendors, who may use, modify and distribute the software, in object code format, under the terms of license agreements. The second was the UnixWare business, which developed, manufactured and distributed to end users (either directly or through third parties), in object code format, products derived from UNIX System V under the brand name "UnixWare."

10. Initially, Santa Cruz was interested in purchasing both of these businesses. However, the royalty stream associated with the UNIX System V software licensing business led to a total valuation for both businesses that Santa Cruz could not afford. Therefore, Santa Cruz proposed that Novell retain the legacy UNIX System V licensing business and Santa Cruz purchase only the UnixWare business. Under this proposal, Santa Cruz would administer the collection of royalties under the UNIX System V license agreements and pass through these royalties to Novell for a fee. To that end, Section 4.16(a) of the Asset Purchase Agreement provides that Novell generally receives any royalties payable under the UNIX System V license agreements, including

the Related Agreements, and Novell pays Santa Cruz a 5% administrative fee for its services in collecting these royalties.

11. Under the Asset Purchase Agreement, Novell retained significant UNIX related assets following the sale. For example, Schedule 1.1(b) of the Asset Purchase Agreement provided that much of the UNIX System V intellectual property would not be transferred to Santa Cruz by listing the following items as "Excluded Assets":

> V. Intellectual Property:
>
> A. All copyrights and trademarks, except for the trademarks UNIX and UnixWare.
>
> B. All Patents.

12. In addition, Section 4.16(b) of the Asset Purchase Agreement included the following language providing that Novell would have the right, at its sole discretion, to amend, modify, supplement or waive any rights under, or assign any rights to, the UNIX System V license agreements, including the Related Agreements, in any manner or respect:

> [Santa Cruz] shall not, and shall not have the authority to, amend, modify or waive any right under or assign any SVRX License without the prior written consent of [Novell]. In addition, at [Novell's] sole discretion and direction, [Santa Cruz] shall amend, supplement, modify or waive any rights under, or shall assign any rights to, any SVRX License to the extent so directed in any manner or respect by [Novell]. In the event that [Santa Cruz] shall fail to take any such action concerning the SVRX Licenses as required herein, [Novell] shall be authorized, and hereby is granted, the rights to take any action on [Santa Cruz's] own behalf.

Since Novell would be retaining the right to receive the royalties under the UNIX System V licenses, it was agreed that Novell also would retain certain rights to control the contractual relationships with the licensees. One of the reasons for this was to ensure

that actions by Santa Cruz (or its successors) could not adversely affect Novell's ability to realize the economic benefits flowing from these license agreements.

13. Amendment No. 1, executed in connection with the closing of the transaction, made changes to many sections of the Asset Purchase Agreement and to the schedules attached to the Asset Purchase Agreement. Although Amendment No. 1 made several changes to Section 4.16, it did not impose any new limits on Novell's ability, at its sole discretion, to amend, modify, supplement or waive any rights under, or assign any rights to, the legacy UNIX System V license agreements in any manner or respect. Furthermore, I am not aware of any provision in the Asset Purchase Agreement, or any amendment thereto, that imposed on Novell any obligation to preserve the confidentiality of the UNIX System V source code for the benefit of Santa Cruz.

14. I have been advised that: (1) Plaintiff purports to have terminated IBM's rights under the Related Agreements; (2) Novell sent a letter to Plaintiff dated June 9, 2003, a copy of which is attached hereto as Exhibit 8, stating that Plaintiff had no right to terminate IBM's license rights and directing Plaintiff to waive any purported right Plaintiff may claim to terminate the Related Agreements or to revoke any rights thereunder; (3) Plaintiff failed to comply with this direction; (4) Novell sent a letter to Plaintiff and to IBM dated June 12, 2003, a copy of which is attached hereto as Exhibit 9, waiving on behalf of Plaintiff any purported right Plaintiff claimed to terminate the Related Agreements or to revoke any rights thereunder; and (5) Novell sent a letter to Plaintiff dated October 7, 2003, a copy of which is attached hereto as Exhibit 10, directing Plaintiff to waive any purported right Plaintiff may claim to require IBM to treat code developed by IBM, or licensed by IBM from a third party, which IBM incorporated

in AIX but which itself does not contain proprietary UNIX code supplied by AT&T under the license agreements between AT&T and IBM, itself as subject to the confidentiality or use restrictions of the agreements between AT&T and IBM, as amended. I do not know and I do not believe that anything would refresh my recollection as to whether Novell's actions are consistent with the language of Section 4.16(b) of the Asset Purchase Agreement.

III. IBM's Irrevocable, Fully Paid-Up and Perpetual Rights

15. On April 26, 1996, Novell, acting on its own behalf and on the behalf of Santa Cruz, and IBM entered into an amendment to the Related Agreements (the "April 1996 Amendment"), a true and correct copy of which is attached hereto as Exhibit 11. Among other things, the April 1996 Amendment (1) provided that "IBM will have the irrevocable, fully paid-up, perpetual right to exercise all of its rights under the Related Agreements," (2) relaxed the confidentiality restrictions in the Related Agreements and (3) permitted IBM to redistribute UNIX System V source code to customers and contractors for limited purposes.

16. Santa Cruz objected to the April 1996 Amendment. In an effort to resolve our concerns, I had a number of discussions with representatives of Novell, including Lawrence A. Bouffard, Christopher Hogan and A. Allison Lisbonne, Esq. (now known as A. Allison Amadia). I discussed the April 1996 Amendment with Alok Mohan, the Chief Executive Officer of Santa Cruz.

17. On or about May 21, 1996, Mr. Bouffard of Novell sent to William Sandve, Jr. of IBM a letter (the "May 21 Letter"), a copy of which is attached hereto as Exhibit 12, attaching revisions to the April 1996 Amendment proposed by Santa Cruz.

We had requested changes to Paragraph 1 of the April 1996 Amendment, but I do not recall requesting any changes to the "irrevocable, fully paid-up, perpetual" language in that paragraph. We proposed, among other things, to impose right-to-use fees on IBM contractors and customers who were provided licensed source code. We also sought to prohibit IBM employees who may have retained intangible information in the form of ideas, concepts, know-how or techniques after having access to licensed source code from making any attempt to preserve such information by reducing it to writing or otherwise memorializing it.

18. Novell generally negotiated separately with IBM and with Santa Cruz in an effort to resolve our concerns. These negotiations culminated in the execution of Amendment No. X (which replaced the April 1996 Amendment) by Novell, Santa Cruz and IBM in October 1996. As reflected in Amendment No. X, IBM was unwilling to agree to our proposal to impose fees on IBM contractors and customers who are provided licensed source code. However, IBM was willing to limit its right to provide contractors and customers with copies of licensed source code to a specified number of copies. Ultimately it was agreed that the number of copies would be limited to 50 copies at any one point in time. IBM also agreed to record-keeping, audit and other similar provisions related to the 50-copy limitation.

19. Amendment No. X, like the April 1996 Amendment, provides that "IBM will have the irrevocable, fully paid-up, perpetual right to exercise all of its rights under the Related Agreements . . . ." I do not know and I do not believe that anything would refresh my recollection as to what was intended by this language, which was negotiated between IBM and Novell in connection with the April 1996 Amendment. We

were more concerned with limiting IBM's right to provide contractors and customers with copies of licensed source code than we were with preserving the termination rights in the Related Agreements.

20. Amendment No. X, like the April 1996 Amendment, permits IBM employees to actually refer to the licensed source code while they are working on other projects. As a result of Amendment No. X, IBM employees could refer to the licensed documents and materials, including source code, while they were developing or providing products or services. Therefore, after the execution of Amendment No. X, IBM was subject to diminished confidentiality restrictions.

IV. Amendment No. 2 to the Asset Purchase Agreement

21. On the same day that we executed Amendment No. X, Santa Cruz and Novell entered into Amendment No. 2 to the Asset Purchase Agreement, a true and correct copy of which is attached hereto as Exhibit 13. As discussed above, Santa Cruz had objected to the April 1996 Amendment effecting a royalty buy-out transaction with IBM, leading to the negotiation of Amendment No. X. Santa Cruz wished, among other things, to establish a process for managing future royalty buy-outs.

22. Section B of Amendment No. 2 sets forth the agreed process for managing "any potential transaction which concerns a buy-out of any such licensee's royalty obligations . . . ." Since a royalty "buy-out" had already been effected with IBM pursuant to Amendment No. X, the process set forth in Amendment No. 2 would not apply to any subsequent potential transaction with IBM.

23. Furthermore, since the process set out in Amendment No. 2 applies only in the context of a royalty buy-out, Novell has the right, at its sole discretion, to

direct Plaintiff to amend, modify, supplement or waive any rights under, or assign any rights to, any "SVRX Licenses," as defined in the amended Asset Purchase Agreement, without complying with the process set out in Amendment No. 2 (and, if Plaintiff fails to do so, to take such action on Plaintiff's behalf), so long as such amendment, modification, supplement or waiver does not effect a buy-out of a licensee's royalty obligations. (If the process set out in Amendment No. 2 were applicable, Paragraph B.5 would be applicable, which states that Amendment No. 2 "does not give Novell the right to increase any SVRX licensee's rights to SVRX source code, nor does it give Novell the right to grant new SVRX source code licenses." Paragraph B.5 also provides that "Novell may not prevent [Santa Cruz] from exercising its rights with respect to SVRX source code in accordance with the [Asset Purchase Agreement].") I understand that AT&T Technologies, Inc. entered into SVRX Licenses with Sequent Computer Systems, Inc. ("Sequent"), and that Sequent was later merged into IBM. I do not claim to understand the implications of the transaction between IBM and Sequent. However, assuming the Sequent SVRX Licenses remain in effect, with IBM as a party by virtue of the merger, Novell has the right, at its sole discretion, to direct Plaintiff to amend, modify, supplement or waive any rights under, or assign any rights to, the Sequent SVRX Licenses (and, if Plaintiff fails to do so, to take such action on Plaintiff's behalf) without complying with the process set out in Amendment No. 2, so long as such amendment, modification, supplement or waiver does not effect a buy-out of the royalty obligations under the Sequent SVRX Licenses. (If the process set out in Amendment No. 2 were applicable, Paragraph B.5 would apply, as described above.)

24. Amendment No. 2 also revised Schedule 1.1(b) of the Asset Purchase Agreement. Schedule 1.1(b) of the Asset Purchase Agreement, as originally executed on September 19, 1995, provided that certain UNIX System V intellectual property would not be transferred to Santa Cruz by listing the following items as "Excluded Assets":

V. Intellectual Property:

A. All copyrights and trademarks, except for the trademarks UNIX and UnixWare.

B. All Patents.

Amendment No. 1, executed on December 6, 1995 in connection with the closing of the transaction, made changes to Schedule 1.1(b) but did not change the above provision excluding certain intellectual property from the transferred assets. In negotiating Amendment No. X and Amendment No. 2, I negotiated with Novell to amend Section V, Subsection A, of Schedule 1.1(b). Amendment No. 2 revised this section to read as follows:

> All copyrights and trademarks, except for the copyrights and trademarks owned by Novell as of the date of this 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.

25. The language in Amendment No. 2 created an exception to the pre-existing arrangement, pursuant to which Novell had retained its UNIX copyrights and trademarks. Pursuant to Amendment No. 2, copyrights and trademarks would be transferred to the extent "required for [Santa Cruz] to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies."

26. As discussed above, the fundamental business deal reflected in the Asset Purchase Agreement was that Santa Cruz would acquire Novell's UnixWare business and Novell would effectively retain the legacy UNIX System V licensing business. My understanding was that the language in Amendment No. 2 quoted above was intended to implement this business deal with respect to copyrights and trademarks. So far as I know, neither Santa Cruz nor Novell ever identified the specific copyrights or trademarks for which a transfer of ownership was "required" for Santa Cruz to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies. I do not know whether Novell ever executed an instrument of assignment to transfer ownership of specific copyrights or trademarks to Santa Cruz, nor do I know whether such an instrument was required in order to effect the transfer.

27. Furthermore, I do not know what copyrights, if any, Novell owned with respect to UNIX source code or object code. I do not have any specific recollection of performing due diligence to determine what source code or object code copyrights Novell owned, or whether Novell had acquired copyrights with respect to the source code or object code in connection with its acquisition of UNIX System Laboratories, Inc. ("USL") in 1993. Although we managed certain UNIX related trademarks following the acquisition, so far as I know Santa Cruz never registered any copyrights with respect to UNIX System V source code or object code following the acquisition.

28. As is discussed on page 12 of Santa Cruz's Form 10-K for the fiscal year ended September 30, 1996 (the fiscal year in which Santa Cruz acquired certain UNIX assets from Novell), a true and correct copy of which is attached hereto as Exhibit 14, although Santa Cruz generally took steps to protect its intellectual property,

we "believe[d] that trademark and copyright protections [were] less significant to [Santa Cruz's] success than other factors, such as the knowledge, ability, and experience of [Santa Cruz's] personnel, name recognition, and ongoing product development and support." I believe that Santa Cruz assigned little, if any, of the value of the acquisition to any copyrights that it might have acquired from Novell.

29. It is my understanding, based upon my review of Plaintiff's amended complaint, that Plaintiff claims to have acquired all right, title and interest in and to UNIX System V operating system source code, software and sublicensing agreements, together with copyrights, additional licensing rights in and to UNIX System V, and claims against all parties breaching such agreements. I understand that Plaintiff also claims to control the right of all UNIX vendors to use and distribute UNIX System V. I believe that these claims are incorrect. As described above in relation to the Related Agreements and Amendment No. 2, Novell retained certain rights under the UNIX System V licensing agreements, as well as certain UNIX System V intellectual property as described above.

V. Project Monterey and the Purported Assignment to Plaintiff

30. Santa Cruz and IBM entered into the JDA with respect to Project Monterey on October 23, 1998. Section 17.0 of the JDA provided that the parties generally did not have an obligation of confidentiality under the JDA. If the parties desired to exchange confidential information, it was to be handled under "the Agreement for the Exchange of Confidential Information ('AECI') #4997AU6595." Although the actual title of the CDA is "Confidential Disclosure Agreement," and it was originally

numbered AUS970557, it is in fact the agreement referred to in Paragraph 17.0 of the JDA. Santa Cruz and IBM did exchange confidential information under the CDA.

31. For example, pursuant to Supplement No. 4998PKM02 dated November 13, 1998, as amended by a letter agreement dated December 18, 1998, true and correct copies of which are attached hereto as Exhibits 15 and 16, Santa Cruz disclosed to IBM, among other things, its "Gemini 64 and Unixware 7 in source code and object code form, and associated documentation regarding the architecture and design of [Santa Cruz's] port of Unixware 7 to Intel's IA64 Merced processor." Pursuant to these same supplements, IBM disclosed to Santa Cruz, among other things, its "AIX 4.3.2 Base Operating System and Monterey IA64 in source code and object code form, associated documentation and technical documentation." I understand that Plaintiff alleges that IBM breached its obligations under the CDA, but I have no knowledge of any such breach by IBM.

32. Santa Cruz and IBM worked together on Project Monterey until we sold our Server Software and Professional Services Divisions to Plaintiff in May 2001. I was personally involved in the sale of Santa Cruz's Server Software and Professional Services Divisions to Plaintiff. We wanted to assign the JDA to Plaintiff, and Plaintiff wanted to acquire our rights under the JDA, in connection with the sale.

33. Santa Cruz and Plaintiff both knew that the JDA could not be assigned to Plaintiff without IBM's consent. This is because Section 22.12 of the JDA provides that "[n]either party may assign, or otherwise transfer, its rights or delegate any of its duties or obligations under [the JDA] without the prior written consent of the other party." This restriction is subject to certain exceptions, but none of the exceptions were

applicable in the case of the sale by Santa Cruz to Plaintiff. Santa Cruz disclosed to IBM that it was considering a possible transaction with Plaintiff. Although I had no reason to believe that IBM would withhold its consent, Santa Cruz did not obtain IBM's prior written consent to the assignment of the JDA to Plaintiff.

34. The sale to Plaintiff was consummated on May 7, 2001. After the purported assignment, Tarantella (formerly known as Santa Cruz) sent the June 6, 2001 Letter to IBM, asserting that Plaintiff had accepted assignment of the JDA. However, IBM did not acquiesce in the assignment. Instead, IBM objected to the assignment and properly terminated the JDA in the June 19, 2001 Letter.

35. Under Section 15.2 of the JDA, IBM had the right to terminate the JDA "immediately upon the occurrence of a Change of Control of [Santa Cruz] which IBM in its sole discretion determines will substantially and adversely impact the overall purpose of the cooperation set forth by [the JDA] and applicable Project Supplements or will create a significant risk or material and adverse exposure of IBM's confidential and/or technical proprietary information (which is subject to, and to the extent of, confidentiality restrictions) . . . ."

36. A "Change of Control" under Section 15.2 of the JDA included a transfer of "more than half the equity, capital or business assets" of Santa Cruz. As discussed above, Santa Cruz sold its Server Software and Professional Services Divisions to Plaintiff on May 7, 2001. Financial information regarding these divisions was included in financial statements filed with the Securities and Exchange Commission as part of Tarantella's Form 10-K for the fiscal year ended September 30, 2001, a true and correct copy of which is attached hereto as Exhibit 17. I participated in the preparation of

the Form 10-K and I signed it as Senior Vice President of Law and Corporate Affairs & Secretary of Tarantella. Based on Note 16 of the financial statements included in the Form 10-K, the Server Software and Professional Services Divisions accounted for approximately 95% of Santa Cruz's total revenues in fiscal 1999 and 92% in fiscal 2000, the two full fiscal years preceding the sale. Furthermore, the Server Software division was the only division of Santa Cruz that generated operating income in either of the two full fiscal years preceding the sale. Since the sale to Plaintiff clearly involved more than half of Santa Cruz's business assets, the transaction constituted a Change of Control and IBM had the right to terminate the JDA.

37. So far as I know Santa Cruz delivered to Plaintiff all physical materials relating to Project Monterey, including the source code, object code and related materials for the Santa Cruz Gemini 64 and UnixWare 7 operating systems and the IBM AIX 4.3.2 Base Operating System and Monterey IA64. I do not know whether Plaintiff used any of the confidential information provided to Santa Cruz by IBM, such as the IBM AIX 4.3.2 Base Operating System and Monterey IA64, but so far as I know Plaintiff did not have any right under the JDA to do so.

38. Paragraph 5 of the CDA provides that neither party may assign or otherwise transfer its rights under the CDA without the prior written consent of the other party, and that any attempt to do so is void. So far as I know, Santa Cruz never obtained IBM's written consent to transfer its rights under the CDA to Plaintiff. I do not know whether IBM has any confidentiality obligation with respect to confidential information provided to IBM by Santa Cruz under the CDA.

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

Executed: December 22, 2003.

Boulder Creek, California

Steven M. Sabbath