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August 27, 2003

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

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

Re: *SCO v. IBM*

Dear Brent:

We have reviewed Plaintiff's Responses to Defendant's First Set of Interrogatories and First Request for the Production of Documents. Defendant/counterclaim-plaintiff International Business Machines Corporation ("IBM") has serious concerns about most of plaintiff/counterclaim-defendant The SCO Group's ("SCO's") responses and objections to IBM's first set of interrogatories (the "Interrogatories") and many of SCO's responses and objections to IBM's first set of document requests (the "Requests").

As you know, I advised you several weeks ago of IBM's concerns and requested that the parties meet and confer to address those concerns. I have telephoned you a number of times since then in an effort to arrange a teleconference to discuss IBM's concerns, but I have been unable to reach you, and you have not responded to my messages. As a result, I write to express IBM's concerns and request that SCO address them promptly, as set out below.

I. General Objections

In our judgment, SCO's general objections to the Interrogatories and the Requests are largely meritless and should be clarified and/or withdrawn.

General Objection Nos. 1-5, 9-11. SCO's General Objection Nos. 1-5 and 9-11 are meritless. It does not appear, however, that SCO is withholding responsive, non-privileged documents from production on the basis of these objections. Please confirm that this is correct.

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General Objection No. 6. In its General Objection No. 6, SCO objects to the Interrogatories and the Requests "as overly broad and unduly burdensome to the extent that they fail to contain any time limitations . . ." and declines to produce documents relating to the period prior to January 1, 1985. There is no basis for SCO's refusal to produce responsive, non-privileged documents merely because they relate to the period prior to January 1, 1985. For example, a document evidencing the public disclosure of an alleged trade secret is relevant and should be produced irrespective of its date of creation. Please confirm that SCO will not withhold responsive, non-privileged documents on the basis of its General Objection No. 6.

General Objection No. 7. SCO objects to IBM's definition of the term "Disputed Material" on the grounds that "it is overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence". SCO states that it will produce responsive, non-privileged documents only insofar as they "relate to software product, know-how, concept, idea, methodology, standard, specification, programming technique, code, architecture or schematic" that are "the subject of those certain Software and Sublicensing Agreements that are Exhibits to the Amended Complaint". We do not believe that this objection is well taken. But in an effort to achieve a compromise, we are prepared provisionally to defer any dispute as to the definition of "Disputed Material", so long as SCO confirms that it does not assert any rights that are not "the subject of those certain Software and Sublicensing Agreements that are Exhibits to the Amended Complaint". Please advise.

General Objection No. 8. SCO objects to IBM's definition of the term "document", in part, on the grounds that "it renders many of the interrogatories and requests for production overly broad, unduly burdensome, outside the scope of the Federal Rules of Civil Procedure, and in some instances seeks information protected by the work product doctrine, the attorney-client privilege and other privileges in that it 'includes electronic mail, electronic correspondence, or electronic peer-to-peer messages ('e-mail') and any attachments and files created and maintained in electronic form in the normal course of business'". SCO's challenge to this definition is misplaced. There is no basis for SCO's refusal generally to produce electronic documents. Please withdraw this objection and confirm that SCO will undertake a reasonable search for responsive documents, including electronic documents.

General Objection No. 10. SCO "objects to the production of trade secrets or confidential or proprietary information unless and until a confidentiality order is entered to provide for the preservation of the confidentiality of the trade secrets and the confidential and proprietary information". As you know, IBM does not oppose the entry of a confidentiality agreement and a corresponding order. In fact, we drafted one for your review several weeks ago and are, as I understand it, waiting for your approval on a

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few outstanding points to submit a proposal to the magistrate judge for signature. There is no reason, however, that execution of a confidentiality agreement and entry of a corresponding order should delay the exchange of confidential information. The parties should be able to proceed with discovery on an attorneys-eyes-only basis, pending execution of a confidentiality agreement and entry of a protective order, as proposed in my letter to you dated August 8, 2003. When we last discussed the issue, you stated that SCO was not willing to do so. We believe this position is unduly delaying discovery and respectfully ask that your client reconsider.

II. Interrogatory Responses

In addition to its concerns about IBM's general objections, IBM is concerned about SCO's specific objections and responses to the Interrogatories.

First, SCO objects to a number of the Interrogatories on the grounds that "discovery has just begun and it has not yet received responsive discovery from IBM that would allow it to fully answer this question because part of this information is peculiarly within the knowledge of IBM". See Interrogatory Nos. 1-4, 6-9, 68, 70 and 71-72. This objection is meritless. SCO is not entitled to discovery from IBM before responding to the Interrogatories. Please confirm that SCO is not withholding responsive information based upon this objection.

Second, SCO responds to virtually all of the Interrogatories by stating "[s]ubject to and without waiving these objections, pursuant to Fed.R.Civ.P. 33(d), SCO will make available . . . the responsive documents". See Interrogatory Nos. 1-8 and 10-11. Rule 33(d) does not permit SCO to avoid providing meaningful answers to Interrogatory Nos. 1-8 and 10-11 merely by promising to provide an unspecified collection of documents sometime in the future. IBM is entitled to complete, detailed narrative responses to the Interrogatories. Please confirm that SCO will promptly provide complete, detailed narrative responses to the Interrogatories.

Third, SCO purports to respond to four of the Interrogatories by providing cursory restatements of its general allegations. See Interrogatory Nos. 3(d), 4(c), 7(c) and 9(c). These responses fall far short of SCO's obligation to provide detailed, complete and meaningful responses to the Interrogatories. Please confirm that SCO will provide complete, detailed narrative responses to the Interrogatories.

Fourth, SCO objects to Interrogatory No. 10 on the grounds that it "is overly broad and unduly burdensome in that it seeks information outside the custody or control of plaintiff by asking information known by plaintiff's predecessors". This

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objection is baseless. Please confirm that SCO will respond completely to this interrogatory without withholding "information known by plaintiff's predecessors".

Fifth, SCO objects to Interrogatory No. 11 on that grounds that it "is overly broad and unduly burdensome and seeks irrelevant information by requesting all products ever marketed, sold or distributed by plaintiff's predecessors in interest, including but not limited to the terms on which each was marketed, sold or distributed". IBM is prepared to narrow this interrogatory to include information relating only to Unix or Linux and not to require the production of every invoice relating to those products. Please confirm that SCO will provide detailed, complete and meaningful responses to this interrogatory as revised.

III. Document Responses

Finally, IBM is concerned about a number of SCO's specific objections and responses to the Requests.

A. Request Nos. 1-2, 20-23, 25-26, 35-39, 41, 44-45, 48-52, 56-57, 62, 64, 67-73.

As we understand SCO's responses and objections to these requests, SCO will make the requested documents available for copying or inspection. Subject to review of SCO's production, we do not take issue with SCO's responses and objections to these requests, except insofar as SCO has declined promptly to produce responsive, non-responsive documents at a time when they are plainly ready for production.

B. Request Nos. 6, 8-15, 17-19, 27-33, 53-54, 60.

As we understand plaintiff's responses and objections to these requests, SCO will make non-privileged documents responsive to these requests available for copying or inspection based upon a narrowing of the term "Disputed Material". As stated above, we do not believe that SCO's objection to the term "Disputed Material" is well taken. In an effort to achieve a compromise, however, we are prepared provisionally to defer any dispute as to the definition of "Disputed Material", so long as SCO confirms that it does not assert any rights that are not "the subject of those certain Software and Sublicensing Agreements that are exhibits to the Amended Complaint". Please advise us whether this is correct.

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C. Request Nos. 4-5, 7, 16, 24, 34, 40, 42-43, 46-47, 55, 58-59, 61, 63, 65-66.

Finally, as stated below, IBM has a number of concerns regarding SCO's responses and objections to Request Nos. 4-5, 7, 16, 24, 40, 42-43, 46-47, 55, 58-59, 61, 63, 65-66. Please clarify and/or withdraw SCO's responses and/or objections as follows:

Request Nos. 4-5, 7, 24. SCO's objections to these requests are meritless. Here again, in an effort to achieve a compromise, we are prepared provisionally to defer any dispute as to the definition of "Disputed Material", so long as SCO confirms that it does not assert any rights that are not "the subject of those certain Software and Sublicensing Agreements that are exhibits to the Amended Complaint". Please advise us whether, in view of this modification, SCO will produce non-privileged documents responsive to these requests, without withholding documents from production on the grounds that the requests call for the production of many of the documents in SCO's possession or that the term "value" is vague or on any other grounds.

Request No. 16. We are prepared to limit this request to all documents concerning any lawsuit relating to Unix or Linux. At least as it is limited, SCO's objections to this request are meritless. Please confirm that SCO will produce non-privileged documents responsive to this request.

Request No. 34. SCO's objections to this request are meritless. Please confirm that SCO will produce non-privileged documents responsive to this request.

Request Nos. 40, 42. SCO's objections to these requests are not well taken. IBM does not seek the production of documents entitled to the protections of the attorney-client privilege or work-product immunity. We understand that SCO will log such documents as required by the Federal Rules of Civil Procedure. These requests plainly call for discoverable documents. Please confirm that SCO will produce non-privileged documents responsive to these requests.

Request No. 43. In response to this request, SCO states that "[o]ther than the documents responsive to Requests 27, 28 and 31, this request seeks information that is protected from disclosure based on the attorney-client privilege and work product immunity". Please confirm that SCO will not withhold responsive, non-privileged documents.

Request Nos. 46-47. We are prepared to narrow these requests to relate only to UNIX or Linux. At least as they are limited, SCO's objections to these requests are meritless. IBM does not, by these requests, seek the production of documents entitled

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to the protections of the attorney-client privilege or work-product immunity; we understand that SCO will log such documents as required by the Federal Rules of Civil Procedure. Please confirm that SCO will produce non-privileged documents responsive to this request.

Request No. 55. Unless we misunderstand SCO's objections to this request, they are not well taken. Please advise us why you believe the request is overly broad and vague, specifying the types of documents that you believe should not be produced. Otherwise, please withdraw your objections to this request and produce non-privileged, responsive documents.

Request Nos. 58-59. We do not believe that SCO may properly refuse to produce documents pursuant to these requests, based upon our understanding of SCO's litigation against Microsoft. However, we are prepared to reconsider the requests after review of the discovery requests and responses served by the parties to the litigation (*i.e.*, SCO and Microsoft) and the alleged order of destruction. Please provide us with copies of these materials.

Request No. 61. Contrary to SCO's objections, this request is neither overly broad nor unduly burdensome. We do not seek the production of code that is not in SCO's possession, custody or control. And we do not believe that SCO may refuse to produce code merely because it may be publicly available. Please confirm that SCO will produce code, including Linux code, responsive to this request.

Request No. 63. We are prepared to narrow this request to relate only to UNIX or Linux. At least as it is limited, SCO's objections to the request are meritless: it is neither overbroad nor unduly burdensome, and it does not seek documents that are irrelevant to the case.

Request Nos. 65-66. SCO responds to these requests by reference to its response to Interrogatory No. 11. SCO's response to Interrogatory No. 11 is, however, not responsive to Request Nos. 65-66. They seek documents sufficient to show "persons" and "dates", whereas Interrogatory No. 11 seeks the identification of "products". SCO's objections to Interrogatory No. 11 are misplaced for the reasons stated above. And SCO's response to Interrogatory No. 11 says nothing about the production of documents sufficient to identify "persons" or "dates". Please confirm that SCO will produce non-privileged documents responsive to these requests.

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IV. Timing

As stated above, the execution of a confidentiality agreement and the entry of a corresponding protective order should not be delaying discovery. The parties have essentially agreed upon the terms of a proposed, stipulated protective order and should be able to proceed upon the agreement of counsel. Please let me know by the end of the day tomorrow whether SCO is agreeable to entry of the revised, proposed order circulated by IBM last week. We intend to submit a proposed protective order to the Court on Friday, August 29, 2003, and would prefer to be able to submit a proposed order upon which the parties are in full agreement.

For the reasons stated above, we believe that SCO has failed properly to respond to IBM's interrogatories. Detailed, complete and meaningful answers to the Interrogatories were due more than three weeks ago and should be provided immediately. Similarly, SCO has refused to produce non-privileged documents that are plainly discoverable. SCO's objections should be clarified and/or withdrawn as requested above. There is no reason that the parties should not be exchanging responsive documents as soon as they are collected, reviewed, processed and ready for production.

Please advise me by the end of the day on Friday, August 29, 2003, whether SCO will provide detailed, complete and meaningful answers to the Interrogatories no later than Friday, September 5, 2003. Please also advise me by the end of the day on Friday, August 29, 2003, whether SCO will produce non-privileged, responsive documents as soon as they are collected, reviewed, processed and ready for production. If we have not been served with detailed, complete and meaningful answers to the Interrogatories, or if SCO has not stated that it will produce non-privileged documents responsive to the Requests and actually begun to produce any non-privileged documents that are collected, reviewed, processed and ready for production by the end of the day on Friday, September 5, then we will be required to move to compel and to seek costs as a sanction.

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Please let me know whether I can be of any assistance to you in amending SCO's responses and objections to the Interrogatories and the Requests. I look forward to hearing from you.

Very truly yours,



Todd Shaughnessy

cc: David R. Marriott, Esq.
Mark J. Heise, Esq.