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*Attorneys for Defendant/Counterclaim-Plaintiff
International Business Machines Corporation*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

THE SCO GROUP, INC., a Delaware corporation,
Plaintiff/Counterclaim-Defendant,

-against-

INTERNATIONAL BUSINESS MACHINES
CORPORATION, a New York corporation,
Defendant/Counterclaim-Plaintiff.

Civil No. 2:03CV-0294 DAK

Honorable Dale A. Kimball

DECLARATION OF MICHAEL J. DEFAZIO

I, Michael J. DeFazio, declare as follows:

1. I was the head of the organization responsible for product management, marketing and licensing terms and conditions for the Unix System V operating system from 1984 until 1995, first with American Telephone and Telegraph Company ("AT&T"), then with Unix System Laboratories, Inc. ("USL") and finally with Novell, Inc. ("Novell"). After December 1995, when Novell sold certain of its Unix related assets to The Santa Cruz Operation, Inc. ("Santa Cruz"), now known as Tarantella, Inc., I continued to be involved in Novell's remaining Unix business primarily in an administrative and an advisory capacity.

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 and review of the documents referenced herein.

3. Section I of this declaration describes my roles and responsibilities with respect to the Unix System V operating system. Section II sets out my understanding of certain terms of the standard license agreements pursuant to which the Unix System V operating system was licensed by AT&T, USL and Novell. Section III sets out my understanding of the confidentiality provisions of the license agreements. Section IV sets out my understanding of certain exceptions to the confidentiality provisions. Section V sets out my understanding of Novell's continuing rights under the

Unix System V license agreements following the sale of certain Unix related assets to Santa Cruz in 1995. Section VI of this declaration sets out my understanding of certain amendments to the license agreements with International Business Machines Corporation ("IBM"). Section VII sets out my understanding of an amendment to the asset purchase agreement between Novell and Santa Cruz.

I. Roles and Responsibilities Regarding Unix

4. I began working for Bell Laboratories ("Bell Labs"), the research and development arm of AT&T, in 1967. From 1967 until 1976, I worked on software related managerial and technical staff assignments on military projects. From 1977 until 1984, I had managerial responsibilities for development of application software supporting telephone company operations.

5. In February 1984, I left Bell Labs and accepted a position with Western Electric, a wholly owned subsidiary of AT&T, where I was the head of the organization responsible for product management, marketing and licensing terms and conditions for the Unix System V operating system. Western Electric was later renamed "AT&T Technologies, Inc." I believe that AT&T Technologies, Inc. was eventually merged into AT&T. Among other things, my organization was responsible for the terms and conditions of Unix System V source code license agreements, which generally included a number of "standard" form agreements with each licensee. The standard software agreement granted the licensee the right to use and modify the source code for its own internal business purposes. In addition, many licensees were parties to sublicensing agreements, which granted the licensees the right to copy and furnish Unix System V software, and sublicensed products based on Unix System V, to customers in

object code format. A substitution agreement provided that the software agreement and, if applicable, the sublicensing agreement, replaced earlier agreements relating to Unix System V software.

6. I was ultimately responsible for the terms and conditions of the license agreements executed after I assumed product management responsibilities for the Unix System V operating system in 1984. These license agreements included the following agreements between IBM and AT&T Technologies, Inc.:

- the Software Agreement (Agreement Number SOFT-00015) dated February 1, 1985 (the "IBM Software Agreement");
- the Sublicensing Agreement (Agreement Number SUB-00015A) dated February 1, 1985 (the "IBM Sublicensing Agreement");
- the Substitution Agreement (Agreement Number XFER-00015B) dated February 1, 1985 (the "IBM Substitution Agreement"); and
- the letter agreement dated February 1, 1985 (the "IBM Side Letter").

True and correct copies of these agreements are attached hereto as Exhibits 1 through 4. These agreements are referred to herein as the "IBM Related Agreements."

7. I was also ultimately responsible for the terms and conditions of the following agreements between Sequent Computer Systems, Inc. ("Sequent") and AT&T Technologies, Inc. relating to Unix software:

- the Software Agreement (Agreement Number SOFT-000321) dated April 18, 1985 (the "Sequent Software Agreement");
- the Sublicensing Agreement (Agreement Number SUB-000321A) dated January 28, 1986 (the "Sequent Sublicensing Agreement"); and
- the Substitution Agreement (Agreement Number XFER-000321B) dated January 28, 1986 (the "Sequent Substitution Agreement").

True and correct copies of these agreements are attached hereto as Exhibits 5 through 7. These agreements are referred to herein as the "Sequent Related Agreements." I have been advised that Sequent has been acquired by, and merged into, IBM.

8. In 1989, AT&T reorganized the organizations responsible for Unix, and associated system software products and services, into a separate business unit called Unix Software Operation. In 1989, USL was incorporated as a separate subsidiary of AT&T and in April 1991 rights to Unix operating systems and related products, technology and intellectual property were transferred to it. Also in 1991, AT&T sold approximately 20% of the equity interests in USL to a number of participants in the open computer systems industry, including Novell. I was named Executive Vice President, Unix System V Software, of USL. In that capacity, I had overall business planning, product management and development oversight responsibility for Unix System V, including the terms and conditions of source code license agreements such as the IBM Related Agreements and the Sequent Related Agreements.

9. In 1992, Roel Pieper, Chief Executive Officer of USL, initiated strategic planning to examine possible corporate merger transactions. With the concurrence of Robert Kavner, a Senior Vice President of AT&T and a member of USL's board of directors, and Ray Noorda, Chief Executive Officer of Novell until 1994, USL entered into discussions regarding a possible merger with Novell. I was a member of the team that negotiated the transaction. In June 1993, Novell acquired USL by merger. In January 1994, I became Executive Vice President, Unix Systems Group, of Novell.

10. In the summer of 1995, Bob Frankenberg, Chief Executive Officer of Novell from 1994 until he resigned in 1996, and I met with Doug Michels, Executive

Vice President of Santa Cruz, and discussed the possibility of a sale of Novell's Unix businesses to Santa Cruz. Together with Ed Chatlos, Senior Director for Business Development and Mergers and Acquisitions for Novell, I was responsible for negotiating this sale on behalf of Novell. I participated in a meeting with Santa Cruz executives Doug Michels and Alok Mohan, Chief Executive Officer of Santa Cruz, as well as Dan Case, a representative of Santa Cruz's investment bank, and other representatives of Santa Cruz. At this meeting, we presented to Santa Cruz the high-level terms of our initial proposal for the sale of certain Unix assets. Negotiating this transaction was Mr. Chatlos's full-time responsibility during this period. As the senior executive most knowledgeable regarding Unix, I spent a significant amount of time negotiating this transaction as well. Other individuals within Novell were brought in to represent their functional areas as needed in the course of the negotiations. On September 19, 1995, Novell entered into an Asset Purchase Agreement with Santa Cruz (the "Asset Purchase Agreement"), a true and correct copy of which is attached hereto as Exhibit 8. In December 1995, Novell sold certain Unix related assets to Santa Cruz pursuant to the Asset Purchase Agreement. As is described in more detail below, Novell retained significant substantive rights with respect to the Unix System V source code licensing business, including those under the IBM Related Agreements and the Sequent Related Agreements.

11. After the sale to Santa Cruz, I remained with Novell where my work focused on its broader networking strategy. I continued to be involved in Novell's remaining Unix business primarily in an administrative and an advisory capacity, including overseeing some administrative items required for Novell to fulfill its

responsibilities relating to the sale. In that capacity, I was involved in certain amendments to the IBM Related Agreements and the Asset Purchase Agreement in 1996. I left Novell in 1997.

12. I have extensive firsthand knowledge and experience regarding the Unix System V license agreements described in this declaration, the Asset Purchase Agreement and the related amendments. During the period from 1984 through 1995, I was the business person who was ultimately responsible for the terms and conditions of the licensing of the Unix System V operating system. With the assistance of legal counsel, I was responsible for establishing the terms of the standard license agreements pursuant to which AT&T, USL and Novell licensed the Unix System V operating system source code to hundreds and perhaps thousands of licensees.

13. As a result, I believe I know what the parties to these agreements understood them to mean and intended them to accomplish. That is, of course, particularly true with respect to the understanding and intent of AT&T, USL and Novell.

II. Basic Grant of Rights to Unix System V Licensees

14. During the period from 1984 to 1995, AT&T, USL and Novell licensed Unix System V source code to hundreds and perhaps thousands of licensees. The code was licensed pursuant to software agreements. The standard software agreement granted the licensee the right to use and modify the source code for its own internal business purposes.

15. In addition, many of these licensees were parties to sublicensing agreements. The standard sublicensing agreement granted the licensee the right to copy

and furnish Unix System V software, and sublicensed products based on Unix System V, to customers in object code format.

16. Section 2.01 of the standard software agreement granted to the licensee the right to use software products, such as Unix System V. In early versions of the standard software agreement, including the IBM Software Agreement, Section 2.01 also included the following language regarding modifications and derivative works:

Such right to use includes the right to modify such SOFTWARE PRODUCT and to prepare derivative works based on such SOFTWARE PRODUCT, provided the resulting materials are treated hereunder as part of the original SOFTWARE PRODUCT.

A modification or a derivative work would constitute "resulting materials" to be treated as part of the original Unix System V software product only so long as it contained any protected Unix System V source code provided by AT&T, USL or Novell. Source code developed by or for a licensee, even if it were included in such a modification or a derivative work, would not by itself constitute "resulting materials". The purpose of treating portions of Unix System V source code included in modifications and derivative works as part of the original software product was to ensure that the Unix System V source code provided by AT&T, USL or Novell and contained in the licensee's derivative works would continue to be protected as if it were standalone Unix System V source code.

17. The agreements did not (and do not) give AT&T, USL, Novell or any of their successors or assigns the right to assert ownership or control over modifications and derivative works prepared by its licensees, except to the extent of the original Unix System V source code included in such modifications and derivative works. AT&T, USL and Novell never intended to assert ownership or control over modifications

and derivative works prepared by its licensees, except to the extent of the original Unix System V source code included in such modifications and derivative works. I do not believe that our licensees would have been willing to enter into the software agreement if they understood Section 2.01 to grant AT&T, USL, Novell or their successors or assigns the right to own or control source code developed by or for the licensee. Modifications and derivative works contained Unix System V source code and code developed by or provided to the licensee. The Unix System V source code contained in a modification or derivative work continued to be owned by AT&T, USL, Novell or their successors, while the code developed by or provided to the licensee remained the property of the licensee or provider to the licensee.

18. In fact, some licensees sought to clarify that, under the agreements, the licensee, not AT&T, USL, Novell or their successors or assigns, would own and control modifications and contributions to derivative works prepared by or for the licensee. When asked, we provided the requested clarification because that is what we understood the language in the standard software agreement to mean in any event. For example, Paragraph A.2 of the IBM Side Letter clarified the standard provisions as follows:

Regarding Section 2.01, we agree that modifications and derivative works prepared by or for [IBM] are owned by [IBM]. However, ownership of any portion or portions of SOFTWARE PRODUCTS included in any such modification or derivative work remains with [AT&T].

I understood and understand this language to mean that IBM, not AT&T, would have the right to control modifications and contributions to derivative works prepared by or for IBM. Like all licensees under the agreements, IBM fully owns any modifications of and contributions to derivative works based on Unix System V prepared by or for IBM, and

can freely use, copy, distribute or disclose such modifications and contributions to derivative works, provided that IBM does not copy, distribute or disclose any portions of the original System V source code (except as permitted by the IBM Related Agreements). Clarifications of the kind reflected in Paragraph A.2 of the IBM Side Letter did not represent a substantive change to the standard software agreement since AT&T, USL and Novell did not intend to assert ownership or control over modifications and derivative works prepared by licensees, except to the extent of the original Unix System V source code included in such modifications and derivative works.

19. Eventually, we revised the standard software agreement to clarify this point. For example, Section 2.01 of a software agreement between AT&T Information Systems Inc. and Santa Cruz entered into in May 1987, a true and correct copy of which is attached hereto as Exhibit 9, included the following language:

Such right to use includes the right to modify such SOFTWARE PRODUCT and to prepare derivative works based on such SOFTWARE PRODUCT, provided that any such modification or derivative work *that contains any part of a SOFTWARE PRODUCT subject to this Agreement* is treated hereunder the same as such SOFTWARE PRODUCT. *AT&T-IS claims no ownership interest in any portion of such a modification or derivative work that is not part of a SOFTWARE PRODUCT.* (emphasis added)

20. Regardless of whether we entered into a side letter to clarify the treatment of modifications and derivative works or altered the language of Section 2.01 of the standard software agreement, AT&T's, USL's and Novell's intent was always the same--we never intended to assert ownership or control over any portion of a modification or any contribution to a derivative work that was not part of Unix System V. The licensee was free to use, copy, distribute or disclose such modifications and contributions to derivative works, provided that it did not copy, distribute or disclose any

portions of the original Unix System V source code (except as permitted by the license agreements).

21. A number of our customers developed technology for their own sublicensed products that AT&T, USL or Novell wished to integrate into Unix System V. We entered into cooperative development agreements with a number of these customers because we did not have any rights to modifications or contributions to derivative works, or standalone products, prepared by or for our customers in the absence of such agreements. In fact, under the license agreements, we did not even have copies of the modifications and derivative works developed by our licensees in either source or object code form. The cooperative development agreements generally provided AT&T, USL or Novell with the right to use, and to sublicense and distribute, selected technology developed by our customers. However, our customers generally retained all rights of ownership of their technology. Such cooperation agreements were entered into with Microsoft Corporation, Santa Cruz, Sun Microsystems, Inc. and many others.

22. Although IBM and Sequent were and/or are prohibited from disclosing Unix System V source code (except as permitted by the IBM Related Agreements or the Sequent Related Agreements), IBM and Sequent were and/or are free to use, copy, distribute, or disclose modifications of and contributions to derivative works based on Unix System V, provided that they do not copy, distribute or disclose any portions of the original Unix System V source code (except as permitted by the IBM Related Agreements or the Sequent Related Agreements). Therefore, IBM and Sequent are and/or were free, at least under the AT&T software and related agreements, to open source all of AIX and Dynix/PTX other than those portions of the original Unix

System V source code included therein (except as permitted by the IBM Related Agreements or the Sequent Related Agreements).

III. Confidentiality Restrictions in the License Agreements

23. The standard software agreement that was used for Unix System V during my tenure at AT&T, USL and Novell imposed certain confidentiality restrictions on the licensee. Even though we may have entered into side letters or other agreements with a number of the licensees that, among other things, clarified or amended the confidentiality restrictions in the standard software agreement, as a practical matter, essentially the same confidentiality restrictions applied to all licensees.

24. Section 7.06(a) of the standard software agreement included the following language prohibiting the licensee from disclosing the Unix System V source code obtained from AT&T:

LICENSEE agrees that it shall hold all parts of the SOFTWARE PRODUCTS subject to this Agreement in confidence for AT&T. LICENSEE further agrees that it shall not make any disclosure of any or all of such SOFTWARE PRODUCTS (including methods or concepts utilized therein) to anyone, except to employees of LICENSEE to whom such disclosure is necessary to the use for which rights are granted hereunder.

This prohibition was (and is) subject to a number of important exceptions, including that a licensee's obligations under this section do not apply if "a SOFTWARE PRODUCT subject to this Agreement at any time becomes available without restriction to the general public by acts not attributable to LICENSEE or its employees," as is discussed in Section IV below.

25. The purpose of this provision was to require licensees to keep confidential those parts of the licensed software that AT&T, USL and Novell wished to keep confidential, namely source code. We recognized that there were limits on the

extent to which we would be able to require confidentiality, since the source code was to be broadly distributed and it would become increasingly known to the public. But it was AT&T's, USL's and Novell's goal to protect the confidentiality of portions of the code for as long as possible.

26. Some licensees sought to clarify or modify the confidentiality restrictions of Section 7.06(a). For example, Paragraph A.9 of the IBM Side Letter clarified the confidentiality provision of the IBM Software Agreement in a number of important respects. First, Paragraph A.9 of the Side Letter deleted the phrase "all parts of" from the first sentence. The purpose of this deletion was to clarify that IBM would not be held in breach of the confidentiality provision for immaterial disclosures of source code. I viewed this language as a clarification, not a substantive change, since I did not believe that a licensee would be held in breach of the standard software agreement for immaterial disclosures. Even a licensee like Sequent, which did not have a side letter like IBM, would not, under the terms of its agreements with AT&T, be held in breach for disclosing parts of the source code that were not material.

27. Second, Paragraph A.9 of the IBM Side Letter deleted the parenthetical "(including methods or concepts utilized therein)" from the second sentence. This change acknowledged the reality that Unix System V methods and concepts were increasingly becoming well known in the industry. In fact, it was part of AT&T's strategy at the time to distribute the source code widely, and under terms favorable to AT&T's customers, in order to promote Unix as a standard operating system.

28. Finally, Paragraph A.9 of the IBM Side Letter included a provision expressly stating that:

Nothing in this agreement shall prevent LICENSEE from developing or marketing products or services employing ideas, concepts, know-how or techniques relating to data processing embodied in SOFTWARE PRODUCTS subject to this Agreement, provided that LICENSEE shall not copy any code from such SOFTWARE PRODUCTS into any such product or in connection with any such service and employees of LICENSEE shall not refer to the physical documents and materials comprising SOFTWARE PRODUCTS subject to this Agreement when they are developing any such product or service or providing any such service.

This language made very explicit that IBM was provided specific relief from confidentiality obligations with respect to Unix System V trade secrets, including ideas, concepts, know-how, methods and techniques, and also acknowledged the reality that Unix System V ideas, concepts, know-how, methods and techniques were increasingly becoming widely known in the industry.

29. As clarified by its side letter, IBM had no obligation to keep confidential any trade secrets or other information embodied in any of the software products provided to IBM, provided that IBM did not copy the actual source code or refer to the physical documents and materials comprising the software products while developing or providing products or services. IBM was (and is) free to use and disclose any of the ideas, concepts, know-how, methods or techniques embodied in the software products. Indeed, as is discussed in more detail below, even the restriction on referring to the physical documents and materials comprising the software products was eliminated by amendments executed in 1996. After the execution of those amendments, IBM's only confidentiality obligation under its agreements with AT&T was not to disclose source code copied directly from Unix System V (unless that code had become available without restriction to the general public).

30. As discussed above, we never sought, by way of the confidentiality provisions in the software agreements, to assert ownership or control over any portion of a modification or any contribution to a derivative work that was not part of Unix System V. Such modifications and contributions to derivative works are not subject to the confidentiality restrictions of Section 7.06(a) (except for any protected Unix System V source code actually included therein) because they are owned by the licensees. The licensees are free to use, copy, distribute or disclose such modifications and contributions to derivative works, provided that they do not copy, distribute or disclose any portions of the original Unix System V source code (except as permitted by the license agreements).

31. I understand that plaintiff claims that IBM and/or Sequent have breached the IBM Related Agreements and the Sequent Related Agreements by using/disclosing Unix methods, derivative works and modifications in violation of the confidentiality and other restrictions contained in those agreements, irrespective of whether IBM and/or Sequent have disclosed any specific protected source code copied from Unix System V. Such claims are, in my view, inconsistent with the provisions of the license agreements generally and the IBM Related Agreements and the Sequent Related Agreements in particular. I do not believe that anyone at AT&T, USL or Novell intended these agreements to be construed in this way. In all cases, modifications and licensees' contributions to derivative works are not subject to the confidentiality and other restrictions contained in the license agreements (except for any protected Unix System V source code actually included therein) because they are owned by the licensees.

IV. Relief from Confidentiality Restrictions

32. Because AT&T, USL and Novell intended to widely distribute the Unix System V source code and related information, we understood, as stated above, that it would become--indeed it was becoming--increasingly difficult to require that the code and related information be kept confidential. Since we believed that our licensees held the same view, the standard software agreements provided that a licensee would not be required to keep a software product confidential if it became available without restriction to the general public.

33. The exception is set forth in Section 7.06(a) of the standard software agreement:

If information relating to a SOFTWARE PRODUCT subject to this Agreement at any time becomes available without restriction to the general public by acts not attributable to LICENSEE or its employees, LICENSEE'S obligations under this section shall not apply to such information after such time.

I understood this provision to mean that the licensee was free to disclose, without any restriction whatsoever, any information that became available without restriction to the general public by acts not attributable to that particular licensee or its employees.

34. If part or all of a software product is "available without restriction to the general public" within the meaning of the agreements, and no longer protected by any confidentiality restriction, then it is not entitled to be protected as a trade secret. The purpose of the confidentiality provisions of the software and related agreements was to ensure that AT&T, USL and Novell retained the right to protect source code as a trade secret. The purpose of this requirement was not to impose upon licensees a confidentiality obligation beyond what AT&T, USL and Novell could enforce under trade secret law.

35. Neither at the time we entered into the IBM Related Agreements and the Sequent Related Agreements, nor subsequently, had we cataloged all the ways in which a software product could become available without restriction to the general public. Nor, to my knowledge, had we ever developed a listing or index of the methods and concepts of Unix System V that we considered to be trade secrets. However, I believe that a software product (or any part thereof) would be "available without restriction to the general public", within the meaning of the software and related agreements, if, for example, it were (1) published by no fault of the licensee; (2) accessible by the general public without meaningful restriction, such as for download from the internet without enforceable confidentiality restrictions; (3) available broadly in the marketplace because the owner of the software (whether AT&T, USL, Novell or their successors) failed, even if by inadvertence or simple negligence, to take steps necessary to ensure the confidentiality of the software; or (4) distributed so widely that no confidentiality provision could adequately preserve the confidentiality of the software.

36. While I was responsible for the distribution of Unix System V code, my major concern about Unix source code possibly becoming unprotectable as a trade secret (or otherwise) was based upon the breadth of its distribution. Although we sought to protect the confidentiality of the source code by distributing it only under legally binding license agreements that included confidentiality provisions, the Unix System V source code was distributed to hundreds and perhaps thousands of such licensees, and was made available by those licensees to tens of thousands of individuals, including professional software developers, university faculty members and students.

37. One purpose of distributing the source code so widely was to promote the widespread adoption of Unix operating systems by ensuring that Unix System V ideas, concepts, know-how, methods and techniques would be widely known and understood by future programmers. AT&T viewed a growing population of Unix-knowledgeable programmers to be a key asset in achieving its goal of making Unix System V pervasive within the information technology marketplace. Furthermore, AT&T intended Unix to be an "open" operating system, meaning that customers would not be locked in with a particular hardware vendor or a particular operating system vendor. To that end, AT&T published a System V Interface Definition ("SVID"), which provided a complete interface specification that could even be used by AT&T's competitors to develop independently their own Unix-like operating systems. AT&T also created a System V Verification Suite ("SVVS"), which was made available to test the compliance of both sublicensed products based on Unix System V and other Unix-like operating systems with SVID. We also permitted the publication of a book entitled *The Design of the Unix Operating System*, by Maurice J. Bach, which describes the internal algorithms and structures that form the basis of the operating system and their relationship to the programmer interface. We published SVID and SVVS, and permitted the publication of *The Design of the Unix Operating System*, because we were more concerned with promoting the Unix operating system as a de facto industry standard "open" operating system than we were with protecting Unix trade secrets. Although I am no longer responsible for the distribution of Unix source code, it is my understanding that it has been distributed since my departure from Novell. Based solely on the breadth of its

distribution, I doubt there are many, if any, parts of the Unix System V Release 4.x and earlier source code that could be said still to be confidential.

38. It is my understanding that hundreds, and perhaps thousands, of books, articles, internet web-sites and other publications have been published regarding Unix, many of which provide detailed information regarding the design and implementation of the Unix operating system. For example, I have been informed that *Lions' Commentary on Unix 6th Edition with Source Code*, by John Lions, includes a complete source code listing of AT&T's Unix Operating System Source Code Level 6 and states that it was published with the permission of SCO Inc. I have also been informed that *Unix Internals, A Practical Approach*, published in 1996 by Steve Pate, then a Senior Kernel Engineer at Santa Cruz, describes in detail the internals of SCO OpenServer Release 5, a Unix operating system that is a sublicensed product based on Unix System V Release 3.2 ("SVR3.2"). The information contained in books, articles, internet web-sites and other publications of this kind is "available without restriction to the general public" within the meaning of the software and related agreements and is therefore not subject to their confidentiality restrictions.

39. I have been advised that plaintiff has made Unix source code available for download free of charge to anyone with an internet connection, without ensuring that the people who download the source code would be legally obligated to protect its confidentiality and could reasonably be expected to do so. Based on my understanding of the intent of the confidentiality provisions in the software and related agreements, any such source code is "available without restriction to the general public" and therefore not subject to any confidentiality restrictions whatsoever, even if plaintiff

purported to place limited restrictions on use of the downloaded source code (such as that it not be used for commercial purposes).

40. I understand that plaintiff has alleged that IBM and Sequent have breached the confidentiality and other restrictions in the IBM Related Agreements and the Sequent Related Agreements. Even in 1985, as discussed above, we were concerned that the Unix System V source code and related information had been so widely distributed that it was becoming increasingly difficult to enforce the confidentiality restrictions in our license agreements. In light of the enormous amounts of additional information that has become available to the general public since then regarding the design and implementation of the Unix operating system, in some cases including complete source code listings, I believe that little, if any, Unix System V Release 4.x and earlier source code, all of which is over ten years old, remains subject to confidentiality restrictions.

V. **Novell's Continuing Rights**

41. In 1995, Novell sold certain Unix system related assets to Santa Cruz. Novell also retained significant Unix assets, including important intellectual property and significant substantive rights under the Unix System V source code license agreements, such as the IBM Related Agreements and the Sequent Related Agreements.

42. Ed Chatlos and I were responsible for negotiating the sale of Novell's Unix businesses to Santa Cruz. Novell had two principal Unix businesses. The first was the USL legacy business of licensing Unix System V source code to other Unix system vendors, who may use, modify and distribute the software under the terms of the license agreements. The second was the Unix Ware 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."

43. Initially, Santa Cruz expressed an interest in purchasing both of these businesses. However, the royalty stream associated with the Unix System V source code licensing business led to a total valuation for both businesses that Santa Cruz stated it could not afford. Therefore, Santa Cruz proposed that Novell retain the legacy Unix System V source code 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 source code license agreements and pass through these royalties to Novell for a fee.

44. Novell accepted the proposal, and the Asset Purchase Agreement was drafted to reflect the parties' understanding. 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 source code license agreements, including the IBM Related Agreements and the Sequent Related Agreements, and Novell pays Santa Cruz a 5% administrative fee for its services in collecting such royalties.

45. Novell retained significant Unix related assets following the sale. For example, Schedule 1.1(b) provides that 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.

I believed the intent of the retention of the Unix System V intellectual property, including all copyrights and patents, by Novell was to protect Novell's future monetary benefits from the Unix System V source code licensing business. Novell did not have any obligation under the Asset Purchase Agreement to preserve the confidentiality of the Unix System V source code for the benefit of Santa Cruz.

46. 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 source code license agreements, including the IBM Related Agreements and the Sequent 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 the right to control the then-existing source code contractual relationships with the licensees. The purpose of Section 4.16(b) was to ensure that Novell would have the right to control these contractual relationships in its sole discretion, so 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.

47. Amendment No. 1, dated December 6, 1995, to the Asset Purchase Agreement, a true and correct copy of which is attached hereto as Exhibit 10, made minor changes to Section 4.16 but, in my judgment, did not alter the fundamental business deal--that Novell would retain significant substantive rights under Unix System V source code license agreements, including the right to receive the royalties and, at its sole discretion, to amend, modify, supplement or waive any rights under, or assign any rights to, these agreements in any manner or respect.

48. I have been advised that (1) plaintiff purports to have terminated IBM's rights under the IBM Related Agreements; (2) Novell sent a letter to plaintiff dated June 9, 2003, a true and correct copy of which is attached hereto as Exhibit 11, 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 IBM Related Agreements or to revoke any rights thereunder; (3) plaintiff failed to comply with this direction; and (4) Novell sent a letter to plaintiff and to IBM dated June 12, 2003, a true and correct copy of which is attached hereto as Exhibit 12, waiving on behalf of plaintiff any purported right plaintiff claimed to terminate the IBM Related Agreements or to revoke any rights thereunder. This is the kind of situation contemplated by Section 4.16(b) of the Asset Purchase Agreement. Novell's actions are entirely consistent with my understanding of its retained rights under Section 4.16(b) of the Asset Purchase Agreement.

VI. April 1996 Amendment and Amendment No. X

49. I am familiar with an amendment to the IBM Related Agreements dated April 26, 1996 between Novell, acting on its own behalf and on the behalf of Santa

Cruz, and IBM (the "April 1996 Amendment"), and an amendment dated October 17, 1996, among Novell, Santa Cruz and IBM ("Amendment No. X"), which replaced the April 1996 Amendment, true and correct copies of which are attached hereto as Exhibits 13 and 14. Although I was not directly involved in negotiating the April 1996 Amendment or Amendment No. X, I was involved with those negotiations in an advisory capacity. I have read the Amadia Declaration dated June 9, 2003, and it is consistent with my understanding of the events, and the purpose and intent of the parties, relating to the April 1996 Amendment and Amendment No. X.

50. The last sentence of Paragraph 6 of Amendment No. X (like the corresponding provision in the April 1996 Amendment) permits IBM employees to actually refer to the licensed source code, documents and materials while they are working on other projects. After the execution of Amendment No. X, the only conduct that Novell or Santa Cruz could seek to enjoin under the confidentiality provisions of the IBM Related Agreements would be disclosing source code copied directly from SVR3.2 in violation of Novell's or Santa Cruz's rights, provided that Novell or Santa Cruz could satisfy the standards for obtaining such relief. As a result of Amendment No. X, IBM was (and is) not only free to use and disclose any of the ideas, concepts, know-how, methods or techniques embodied in SVR3.2, but was (and is) also permitted to actually refer to the physical documents and materials comprising SVR3.2 while developing or providing products or services.

51. The understanding of the irrevocability provisions of the April 1996 Amendment and Amendment No. X described in the Amadia declaration is consistent with my understanding. I understood that, following the execution of the April

1996 Amendment and Amendment No. X, Novell and Santa Cruz no longer had any right to terminate IBM's rights under the IBM Related Agreements under any circumstances, though they retained the right to seek to enjoin or otherwise prohibit conduct that breached the provisions of the IBM Related Agreements, provided that they could satisfy the standards for obtaining such relief. So, for example, Novell and Santa Cruz contracted away the right, based upon an alleged breach of the IBM Related Agreements, to terminate IBM's rights to copy and furnish, including market, license and distribute, sublicensed products based on SVR3.2 and previous releases, including IBM's AIX operating system product, but retained the right to enjoin IBM, under certain circumstances, from publishing licensed source code.

52. I understand that plaintiff, which was not involved in negotiating the April 1996 Amendment or Amendment No. X, purports to have terminated IBM's rights under the IBM Related Agreements based on alleged breaches by IBM of the IBM Related Agreements. However, for the reasons discussed above, I do not believe that IBM's rights under the IBM Related Agreements can be terminated.

VII. Amendment No. 2 to the Asset Purchase Agreement

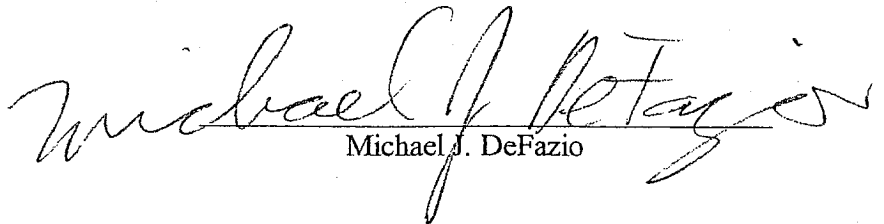
53. On the same day that they executed Amendment No. X, Novell and Santa Cruz executed Amendment No. 2 to the Asset Purchase Agreement ("Amendment No. 2"), a true and correct copy of which is attached hereto as Exhibit 15. I was not involved in negotiating Amendment No. 2, and I do not have personal knowledge as to what it was intended to accomplish and am unable to address what it means.

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

correct.

Executed: October 3, 2003.

Bedminster, New Jersey


Michael J. DeFazio