

Appendix A To SCO's Memorandum In Opposition To IBM's Motion For Summary Judgment
On Its Claim For Declaratory Judgment Of Non-Infringement

<p>Ex. 169 ¶ 11; Ex. 214 (Ex. 3).)</p>	<p>IBM's cited sources do not support the assertion that any other "common UNIX standards" contain such material.</p>
<p>63. In addition to participating in the LSB project, Caldera, Inc. and/or Santa Cruz also participated in the following community projects directed at creating uniform standards for Linux:</p> <ul style="list-style-type: none"> (a) the Linux Professional Institute, an independent organization dedicated to the establishment of professional certification standards for Linux professionals (Ex. 107 at 13); (b) the Linux Internationalization Group (a voluntary Linux community working group, which Caldera helped to found, dedicated to addressing interoperability internationalization and localization of Linux applications in the international context) (Ex. 111 at 10, 14); (c) the IA64 Linux Project, an Intel-sponsored initiative to port the Linux kernel to the Intel Itanium processor (d.); and (d) the Open Source Development Lab (the goal of which was to "foster and support the development of additional open-source and Linux enhancements") (Id.). (Ex. 221 ¶ 54). 	<p>Disputed/Unsupported</p> <p>SCO disputes IBM's implication that the actions of Caldera, Inc. or Caldera Systems prior to May 2001 are attributable to SCO, or that Caldera, Inc. or Caldera Systems had the power to grant or release rights in the infringed SVr4 material.</p> <p>The actions of Caldera, Inc. and Caldera Systems prior to May 2001 are not attributable to SCO and could not grant IBM any rights to use the infringed SVr4 material, because neither Caldera, Inc. nor Caldera Systems owned copyrights in any UNIX material. (See Disputed Facts # 4, 22.).</p> <p>This fact is disputed as to Santa Cruz because none of IBM's sources support IBM's assertions to the extent they attribute actions to Santa Cruz, nor do they give a specific time frame for the asserted actions. And, in IBM Fact # 41, it states that "Santa Cruz is not a UNIX Company," which would also create disputes with this fact.</p>
<p>64. In August 1997, a group of developers in the Intel-compatible UNIX market met at Santa Cruz's headquarters to form a group called "86Open". The stated goal of 86Open was to create a common programming and binary interface for all variants of</p>	<p>Undisputed</p>

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	<p>UNIX-on-Intel operating systems. (Ex. 452; Ex. 207 ¶ 17; Ex. 184 ¶ 3.)</p>	
<p>65. Disputed</p> <p>SCO disputes that the ELF material in Linux was taken from the TIS Specification.</p> <p style="text-align: center;">REDACTED</p>	<p>By this date, Linux had implemented the TIS Committee ELF format as its programming and binary interface. (Ex. 184 ¶ 4.)</p>	
<p>66. Disputed/Unsupported</p> <p>SCO disputes IBM's implication that the actions of "86Open" or any individuals participating in "86Open" are attributable to any corporate entities, including SCO. IBM's own sources show that the actions of any individuals participating in the "86Open" group were not intended to represent or bind the employers of such individuals, including Santa Cruz, who held UNIX copyrights at that time. IBM Ex. 453 at 3 ("It cannot be emphasized enough that 86open is comprised of individuals, not organizations...nobody in this group speaks on behalf of their parent organization...").</p> <p>IBM's cited sources do not support the assertion that the "86Open" group ever reached any agreement regarding ownership of intellectual property rights, ever created any standard document, or was anything more than a "loose and informal group." See IBM Ex. 453 at 1.</p>	<p>Leading members of 86Open included the Caldera CEO at that time, Bryan Sparks, and Santa Cruz employee Dion Johnson. Nearly half (13 out of 30) of 86Open's full membership consisted of Caldera and Santa Cruz employees, including Michael Davidson (Santa Cruz) and Ron Record (Santa Cruz). (Ex. 453.)</p>	
<p>67. Disputed/Unsupported</p> <p>SCO disputes IBM's assertion that Linux was using "the TIS Committee ELF format." The format then used by Linux was derived from AT&T/SV14 material, not the TIS Specification. See Disputed Fact # 65.</p> <p>IBM's cited sources do not support IBM's assertion that Linus Torvalds proposed the mentioned format or that this format "would replace the TIS Committee ELF format."</p>	<p>As part of the initial 86Open standardization effort, Linus Torvalds proposed creating a new binary format ("Spec 150") that would replace the TIS Committee ELF format that was then implemented in Linux. (Ex. 454; Ex. 207 ¶ 19.)</p>	
<p>68. Disputed/Unsupported</p>	<p>However, Santa Cruz opposed Torvalds' new Spec</p>	

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<p>150 format, and instead proposed that the 86Open members retain the ELF format as the Linux standard because there REDACTED (Ex. 455 at SCO1820604.)</p>	<p>SCO disputes IBM's assertion that any actions taken as a part of "86Open" are attributable to Santa Cruz or SCO. <u>See</u> Disputed Fact # 66.</p>
<p>69. Santa Cruz's proposal was made possible by a utility it had created, called lxr_{un}, which permitted Linux ELF binaries to run on UNIX systems - thereby dispensing with the need for a common programming and binary interface between UNIX and Linux. (Ex. 215 ¶ 112; Ex. 454.)</p>	<p>Disputed/Unsupported/Incomplete SCO disputes IBM's assertion that any actions taken as a part of "86Open" are attributable to Santa Cruz or SCO. <u>See</u> Disputed Fact # 66. It is undisputed that Santa Cruz created a program called lxr_{un} that helped UNIX users run binaries formatted for use on Linux on their UNIX platforms; REDACTED</p>
<p>70. Santa Cruz's creation of lxr_{un} and its advocacy for the ELF implementation resulted in its adoption as the 86Open binary standard and as the de facto standard for Linux. (Ex. 184 ¶ 5; Ex. 454.)</p>	<p>Disputed/Unsupported/Incomplete SCO disputes that Santa Cruz engaged in any "advocacy" in relation to 86Open. <u>See</u> Disputed Fact # 66. Also, SCO disputes IBM's assertion that any actions taken as a part of "86Open" are attributable to Santa Cruz or SCO. <u>See</u> Disputed Fact # 66. IBM does not specify to what the term "the ELF implementation" refers. ELF was incorporated into Linux long before any "86Open" activities and not as a result of any 86Open activities. <u>See</u> Disputed Fact # 65. IBM Ex. 184, (Declaration of Ulrich Drepper) ¶ 5: The cited source does not support any supposed "advocacy" by Santa Cruz. IBM Ex. 454, Webpage - "The 86open Project (final update July 25, 1999)": The cited source does not support any supposed "advocacy" by Santa Cruz. The cited source does not support the assertion that "86Open" ever adopted a standard. Rather, the cited source states that the participants working with various operating systems independently decided what binary format to use.</p>
<p>71. The ELF implementation includes all of the ELF</p>	<p>Disputed/Incomplete</p>

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	<p>Material (Items 272-78). Lxrun uses and requires knowledge of much of the Linux Code, in that it includes all of the Linux kernel ELF Material described in Item 272. (Ex. 214 ¶ 52.)</p>	<p>SCO disputes IBM's statement that lxrun "includes all of the Linux kernel ELF Material described in Item 272.</p> <p style="text-align: center;">REDACTED</p> <p>IBM does not specify what the term "The ELF implementation" signifies. Accordingly, SCO cannot comment on the truthfulness of IBM's assertion.</p>
72.	<p>In 1998, in an effort to streamline its Linux business, Caldera, Inc. split and placed its assets relating to its business of developing and marketing Linux software into Caldera Systems, a newly formed corporation. (Ex. 221 ¶ 55; Ex. 107 at 31-32.)</p>	<p>Undisputed/Unsupported</p> <p>Undisputed, but SCO disputes IBM's implication that the actions of Caldera, Inc. or Caldera Systems prior to May 2001 are attributable to SCO, or that Caldera, Inc. or Caldera Systems had the power to grant or release rights in the infringed SVr4 material.</p> <p>The actions of Caldera, Inc. and Caldera Systems prior to May 2001 are not attributable to SCO and could not grant IBM any rights to use the infringed SVr4 material, because neither Caldera, Inc. nor Caldera Systems owned copyrights in any UNIX material. (See Disputed Facts # 4, 22.)</p>
73.	<p>Unlike Caldera, Inc., which maintained both a Linux business and a business line that was not engaged in developing and marketing Linux software, Caldera Systems was dedicated solely to the development and marketing of Linux-based business solutions. (Ex. 221 ¶ 56; Ex. 107 at 31-32.)</p>	<p>Undisputed</p> <p>Undisputed, but SCO disputes IBM's implication that the actions of Caldera, Inc. or Caldera Systems prior to May 2001 are attributable to SCO, or that Caldera, Inc. or Caldera Systems had the power to grant or release rights in the infringed SVr4 material.</p> <p>The actions of Caldera, Inc. and Caldera Systems prior to May 2001 are not attributable to SCO and could not grant IBM any rights to use the infringed SVr4 material, because neither Caldera, Inc. nor Caldera Systems owned copyrights in any UNIX material. (See Disputed Facts # 4, 22.)</p>
74.	<p>Caldera Systems continued to upgrade its Linux products, for which it received numerous awards</p>	<p>Undisputed/Unsupported</p>

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	<p>and recognition, including Internetweek's Best of the Best, The Linux Show's Best Distribution of Millennium, Linux Journal's Product of the Year award at Comdex and Network Computing's Well-Connected Award for Best Network Operating System. (Ex. 221 ¶ 57; Ex. 110 at 40.)</p>	<p>SCO disputes IBM's implication that the actions of Caldera, Inc. or Caldera Systems prior to May 2001 are attributable to SCO, or that Caldera, Inc. or Caldera Systems had the power to grant or release rights in the infringed SVr4 material.</p> <p>The actions of Caldera, Inc. and Caldera Systems prior to May 2001 are not attributable to SCO and could not grant IBM any rights to use the infringed SVr4 material, because neither Caldera, Inc. nor Caldera Systems owned copyrights in any UNIX material. (<u>See</u> Disputed Facts # 4, 22.).</p> <p>IBM Ex. 221 (Love Decl.) ¶ 57: Neither IBM's declaration nor the cited sources indicate a time frame in which the asserted actions took place.</p> <p>IBM Ex. 110 (Undated Caldera Systems, Inc. Form 424B1) at 40: Does not support IBM's assertion.</p>
75.	<p>Caldera Systems not only continued to market its Linux products as suitable for business, but also represented them as a replacement for UnixWare and OpenServer. For instance, in 1998, Ransom Love, the President and CEO of Caldera Systems, stated: "Linux does a better job than SCO UNIX, has better scalability and will run most applications written for SCO UNIX without modification." (Ex. 221 ¶ 58; Ex. 456.)</p>	<p>Disputed</p> <p>SCO disputes IBM's assertion that Linux was appropriate for enterprise-scale business use in 1998. Linux was not appropriate for enterprise-level business use until after the Linux 2.2 version. Rockkind I at 25-35.</p>
76.	<p>Caldera Systems accurately described itself and its Linux products and services as follows:</p> <p>"Caldera Systems Inc. is a 'Linux for eBusiness' technology leader in developing and marketing successful Linux-based business solutions" (Ex. 457);</p> <p>"Caldera has chosen, integrated, and tested key open source and commercial software to create a</p>	<p>Undisputed/Unsupported</p> <p>Undisputed, but SCO disputes IBM's implication that the actions of Caldera, Inc. or Caldera Systems prior to May 2001 are attributable to SCO, or that Caldera, Inc. or Caldera Systems had the power to grant or release rights in the infringed SVr4 material.</p> <p>The actions of Caldera, Inc. and Caldera Systems prior to May 2001 are not attributable to SCO and could not grant IBM any rights to use the infringed SVr4 material, because neither Caldera, Inc. nor Caldera Systems owned copyrights in any UNIX material. (<u>See</u> Disputed Facts # 4, 22.).</p>

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<p>predictable business quality server that meets your needs now and [sic] years to come" (Ex. 458);</p>	<p>IBM Ex. 221 (Love Decl.) ¶ 81: The cited source shows that the quoted descriptions were made in 2001, <u>after</u> IBM had already begun its Linux activities. <u>See, e.g.</u>, Disputed Fact # 89.</p>
<p style="text-align: center;">REDACTED</p>	<p>Undisputed/Unsupported Undisputed, but SCO disputes IBM's implication that the actions of Caldera, Inc. or Caldera Systems prior to May 2001 are attributable to SCO, or that Caldera, Inc. or Caldera Systems had the power to grant or release rights in the infringed SVr4 material.</p>
<p>(Ex. 221 ¶ 81.) Caldera Systems also continued the work of Caldera, Inc. by driving Linux community projects directed at creating uniform standards for Linux, including the LSB, the Linux Professional Institute, the Linux Internationalization Group, the IA64 Linux Project and the Open Source Development Lab. (Ex. 221 ¶ 59; Ex. 449; Ex. 107 at 13; Ex. 111 at 10-11, 14.)</p>	<p>The actions of Caldera, Inc. and Caldera Systems prior to May 2001 are not attributable to SCO and could not grant IBM any rights to use the infringed SVr4 material, because</p>

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		<p>neither Caldera, Inc. nor Caldera Systems owned copyrights in any UNIX material. (See Disputed Facts # 4, 22.).</p> <p>IBM Ex. 221 (Love Decl.) ¶ 59; IBM Ex. 107 (Caldera Systems, Inc. 2000 form 10/K) at 13; IBM Ex. 111 (Caldera International, Inc. 2001 Form 10/K): The cited sources provide no time frame for the asserted facts.</p> <p>IBM Ex. 449 (Caldera Systems, Inc. "Linux Standards Base" White Paper): This article was published in November 1999, after IBM began its Linux activities. See Disputed Fact # 89.</p>
<p>78.</p>	<p>Caldera Systems consistently contributed to the Linux and Open Source community by, among other things:</p> <p>“provid[ing] engineering assistance and specifications for the IPX kernel development”;</p> <p>“help[ing] with the development of SPX in the kernel”;</p> <p>“contribut[ing] to the development of DOSEMU”;</p> <p>“participat[ing] in the development of WINE, supporting WABI”;</p> <p>being an “early sponsor and architect of the Redhat Package Manager (RPM)”;</p> <p>“help[ing] sponsor the development of WABI and extensions”;</p> <p>“contribut[ing] equipment and funding for the SMP project”;</p>	<p>Disputed/Unsupported</p> <p>SCO disputes IBM's implication that the actions of Caldera, Inc. or Caldera Systems prior to May 2001 are attributable to SCO, or that Caldera, Inc. or Caldera Systems had the power to grant or release rights in the infringed SVr4 material.</p> <p>The actions of Caldera, Inc. and Caldera Systems prior to May 2001 are not attributable to SCO and could not grant IBM any rights to use the infringed SVr4 material, because neither Caldera, Inc. nor Caldera Systems owned copyrights in any UNIX material. (See Disputed Facts # 4, 22.).</p> <p>SCO disputes IBM's assertion to the extent it implies that Caldera Systems had authority to license any of the infringed material under the GPL. None of the infringed SVr4 material was properly released under the GPL or was otherwise “open” or “open source,” which is a disputed legal conclusion unsupported by IBM's cited facts. See Disputed Fact # 4-8, 22.</p> <p>IBM has not shown how any of the mentioned actions are relevant to SCO's claims of infringement.</p> <p>IBM Ex. 221 (Love Decl.) ¶ 60: This source provides no time frame for IBM's assertion.</p> <p>IBM Ex. 461 (Caldera Systems, Inc.'s "Our Social Contract with the Open Source Community" White Paper):</p>

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	<p>being "an early contributor to the development of various kernel drivers, including Ethernet and Frame Relay";</p> <p>"help[ing] incorporate some NT drivers for the Xfree Organization";</p> <p>"help[ing] fund the development of the K Desktop Environment (KDE)";</p> <p>"help[ing] make patches to streams available to the Open Source community";</p> <p>"help[ing] fund the initial porting of Netscape for Linux and Fast-Track for Linux";</p> <p>"develop[ing], then open-sourced Novell's Netware Client for Linux";</p> <p>"fund[ing] work on NFS for Linux";</p> <p>"co-sponsor[ing] the initial porting of WordPerfect to Linux";</p> <p>"help[ing] finance the development of StarOffice with Star Division";</p> <p>"GPL[ing] COAS, the Caldera Open Administration System";</p> <p>being "among the very first Linux distributors to work with commercial developers, promoting the porting of many important software works to Linux";</p> <p>"GPL[ing] [its] Linux Wizard, Lizard"; and</p>	<p>Community" White Paper): This source was published in November 1999, after IBM began its Linux activities. See Disputed fact # 89.</p>
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	<p>"continu[ing] to provide manpower and funding to vendor-neutral initiatives such as Linux Standard Base and the Linux Professional Institute". (Ex. 461; Ex. 221 ¶ 60.)</p>	
79.	<p>Caldera Systems also expanded its Linux technical training, certification and support, and began partnering with more schools and training centers throughout the world to offer its courses. (Ex. 221 ¶ 61; Ex. 462.)</p>	<p>Undisputed/Unsupported/Incomplete</p> <p>SCO disputes IBM's implication that the actions of Caldera, Inc. or Caldera Systems prior to May 2001 are attributable to SCO, or that Caldera, Inc. or Caldera Systems had the power to grant or release rights in the infringed SVr4 material.</p> <p>The actions of Caldera, Inc. and Caldera Systems prior to May 2001 are not attributable to SCO and could not grant IBM any rights to use the infringed SVr4 material, because neither Caldera, Inc. nor Caldera Systems owned copyrights in any UNIX material. (See Disputed Facts # 4, 22.)</p> <p>IBM Ex. 221 (Love Decl.) ¶ 61: The cited source provides no time frame for IBM's assertions.</p> <p>IBM Ex. 462 (Caldera Launches OpenLearning): This source was published on July 31, 2000, <u>after</u> IBM began its Linux activities. See Disputed Fact # 89.</p>
80.	<p>Caldera Systems' educational programs were designed to help its customers develop, deploy and administer Linux systems. (Ex. 221 ¶ 62; Ex. 107 at 4.)</p>	<p>Undisputed/Incomplete</p> <p>Incomplete, but SCO disputes IBM's implication that the actions of Caldera, Inc. or Caldera Systems prior to May 2001 are attributable to SCO, or that Caldera, Inc. or Caldera Systems had the power to grant or release rights in the infringed SVr4 material.</p> <p>The actions of Caldera, Inc. and Caldera Systems prior to May 2001 are not attributable to SCO and could not grant IBM any rights to use the infringed SVr4 material, because neither Caldera, Inc. nor Caldera Systems owned copyrights in any UNIX material. (See Disputed Facts # 4, 22.)</p>

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		<p>IBM Ex. 221 (Love Decl.) ¶ 62; IBM Ex. 107 (Caldera Systems, Inc. 2000 10/K) at 4: IBM's cited sources provide no time frame for IBM's assertion.</p>
<p>81.</p>	<p>Caldera System was at the forefront of Linux development and promotion. But for its efforts, Linux would not have progressed as rapidly as it did to become an enterprise-ready operating system. (Ex. 221 ¶ 63.)</p>	<p>Disputed/Unsupported/Incomplete</p> <p>SCO disputes IBM's implication that the actions of Caldera, Inc. or Caldera Systems prior to May 2001 are attributable to SCO, or that Caldera, Inc. or Caldera Systems had the power to grant or release rights in the infringed SVr4 material.</p> <p>The actions of Caldera, Inc. and Caldera Systems prior to May 2001 are not attributable to SCO and could not grant IBM any rights to use the infringed SVr4 material, because neither Caldera, Inc. nor Caldera Systems owned copyrights in any UNIX material. (See Disputed Facts # 4, 22.)</p> <p style="text-align: center;">REDACTED</p>
<p>82.</p>	<p>Caldera received numerous awards and significant recognition for its work in promoting Linux. During 1999 and 2000 alone, Caldera received the following awards and recognition: <u>CNET</u> Editor's Choice Award (October 2000); <u>Network World</u> Blue Ribbon Award (September</p>	<p>IBM Ex. 221 (Love Decl.) ¶ 63: The cited source provides no timeframe for IBM's assertion.</p> <p>Undisputed</p> <p>Undisputed, but SCO disputes IBM's implication that the actions of Caldera, Inc. or Caldera Systems prior to May 2001 are attributable to SCO, or that Caldera, Inc. or Caldera Systems had the power to grant or release rights in the infringed SVr4 material.</p> <p>The actions of Caldera, Inc. and Caldera Systems prior to May 2001 are not attributable to SCO and could not grant IBM any rights to use the infringed SVr4 material, because</p>

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<p>2000);</p> <p><u>Linux Magazine's</u> Emperor Award (May 2000); PC ONLINE Testieger's (April 2000);</p> <p>Listing in <u>Upside Magazine's</u> Millennium 2000 eBusiness 150 (March 2000);</p> <p>Andover.net Dave Central's Best of Linux winner (February 2000); <u>Linux Magazine's</u> Cool Product Award (February 2000);</p> <p><u>PC Direct</u> (Ziff-Davis) Best Buy 2000 award (January 2000);</p> <p><u>Interntweek's</u> Best of the Best award for best software for 1999 (December 1999);</p> <p><u>The Linux Show's</u> Best Distribution of Millennium (December 1999);</p> <p><u>Linux Journal's</u> Product of the Year award at Comdex (November 1999);</p> <p>Listing in <u>PC Magazine's</u> Top 100 Technology Companies That Are Changing the World (October 1999);</p> <p><u>Linuxworld</u> Editor's Choice Award: Best Client and Distribution (August 1999);</p> <p>Highest Rated Linux Distribution by <u>VarBusiness</u> in 2000 Annual Report Card;</p> <p><u>Network Computing's</u> Well-Connected Award for Best Networked Operating System (May</p>	<p>neither Caldera, Inc. nor Caldera Systems owned copyrights in any UNIX material. (See Disputed Facts # 4, 22.).</p> <p>All specific cited dates show that the cited awards, except for the Network Computing award, were issued after IBM began its Linux activities. See Disputed Fact # 89.</p> <p>IBM Ex. 221 (Love Decl.) ¶ 63: The cited source does not specify which "Caldera" entity received the cited awards.</p> <p>IBM Ex. 107 (Caldera Systems, Inc. 2000 10/K) at 11: The cited source shows that Caldera Systems, Inc. received the cited awards.</p>
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	<p>1999); and <u>MicroPC's</u> Product of the Year Award (1999). (Ex. 221 ¶ 64; Ex. 107 at 11.)</p>	
83.	<p>Substantially all of Caldera Systems' revenue was derived from sales of Linux products and services. (Ex. 221 ¶ 65; Ex. 106 at 16.)</p>	<p>Disputed/Unsupported SCO disputes IBM's implication that the actions of Caldera, Inc. or Caldera Systems prior to May 2001 are attributable to SCO, or that Caldera, Inc. or Caldera Systems had the power to grant or release rights in the infringed SVr4 material. The actions of Caldera, Inc. and Caldera Systems prior to May 2001 are not attributable to SCO and could not grant IBM any rights to use the infringed SVr4 material, because neither Caldera, Inc. nor Caldera Systems owned copyrights in any UNIX material. (See Disputed Facts # 4, 22.) SCO disputes IBM's assertion to the extent it could be read as referring to Caldera International. After acquiring Santa Cruz and the associated UNIX rights, substantially all of Caldera International's revenue was derived from UNIX products and services. (IBM Ex. 106 (Caldera International 2002 10-K) at 16; See <i>also</i> Disputed Facts # 126-27.) IBM Ex. 221 (Love Decl.) ¶ 65: The cited source does not give a time frame for IBM's assertion.</p>
84.	<p>The success of Linux, and its structural and functional similarity to UNIX operating systems, led some at Santa Cruz to question whether Linux included code improperly copied from UNIX System V. (See Ex. 221 ¶ 82.)</p>	<p>Undisputed/Unsupported IBM's assertion that "[t]he success of Linux, and its structural and functional similarity to UNIX" led Santa Cruz to investigate the possibility of copyright infringement is pure conjecture. The cited source does not indicate <i>why</i> Santa Cruz investigated the content of Linux.</p>
85.	<p>Santa Cruz commissioned a study by Bob Swartz in 1999 to compare certain UNIX and Linux code. The Swartz study concluded that "there can be no</p>	<p>Disputed/Unsupported/Incomplete SCO disputes IBM's fact to the extent it implies that Santa Cruz knew that Linux</p>

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	<p>doubt that parts of the Linux distribution were derived from UNIX" (Ex. 399; Ex. 463), including some of the Linux Code (Items 209-10, 221-23, 231) (Ex. 463).</p>	<p>contained the infringed UNIX material at issue in this case in 1999</p> <p>The Swartz investigation was limited to literal code, did not address whether any code in Linux was proper or improperly contributed, and was not delivered to Santa Cruz until October 1999, after IBM began its Linux activities and before the release of Linux 2.4 or 2.6. See IBM Ex. 463; Disputed Fact # 41, 89.</p> <p>Indeed, IBM's own cited sources indicate that Santa Cruz did not believe the Swartz study showed the presence of infringing material in Linux. See IBM Exs. 399, 463; Disputed Fact # 41.</p>
<p>86.</p>	<p>Although SCO now claims "this memo shows that there are problems with Linux", following the study's conclusion in 1999, Santa Cruz did not take any legal action against Linux or Linux users. (Ex. 463 at SCO1777093.)</p>	<p>Undisputed</p> <p>Undisputed, but SCO does not dispute that Santa Cruz did not bring suit based on Linux. However, SCO disputes IBM's implication that the presence of UNIX material in Linux was not an issue of concern to Santa Cruz.</p> <p style="text-align: center;">REDACTED</p> <p>SCO disputes IBM's implication that SCO's decision to bring suit regarding Linux 2.4 and 2.6 was based on the same information available to Santa Cruz in the Swartz memo. The Swartz investigation was limited to literal code, did not address whether any code in Linux was proper or improperly contributed, and was not delivered to Santa Cruz until October 1999, after IBM began its Linux activities and before the release of Linux 2.4 or 2.6. See Disputed Fact # 85.</p> <p>Furthermore, the complex and changing nature of both Linux and IBM's Linux-related activities more than justify any delay on behalf of Santa Cruz, Caldera International, or SCO in bringing suit. See <i>A.C. Aukerman Co. v. R.L. Chaides Construction Co.</i>, 960 F.2d 1020 (Fed. Cir. 1992); <i>Boothroyd Dewhurst, Inc. v. Poli</i>, 783 F. Supp. 670, 680-81 (D. Mass. 1991); <i>Lotus Development Corp. v. Paperback Software Int'l</i>, 740 F. Supp. 37, 82-83 (D. Mass. 1990).</p>

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<p>87. Instead, Santa Cruz continued to pursue the development of Linux-related products and services. For example, Santa Cruz:</p> <ul style="list-style-type: none"> Announced to its OEMs and partners that it was developing a Linux distribution for servers; Took people who were experienced in writing UNIX code and put them to work writing code for Linux; Continued to make contributions to various open source projects, including to the GNU C compiler collection and other open source components found in Linux; Offered a free Open Source Software Supplement CD that included many Open Source technologies and a comprehensive set of Linux and Open Source-related professional services for use in its UNIX products, including the KDE desktop, Apache and Squid web/proxy servers, GNU development tools, Perl and Python, cdrecord, and Samba. <p>(Ex. 463; Ex. 331 at 86:16-20; Ex. 464; Ex. 465; Ex. 227.)</p>	<p>Disputed/Unsupported</p> <p>SCO disputes the assertion that Santa Cruz undertook and Linux-related activities "instead" of pursuing claims based on the inclusion of UNIX material in Linux. REDACTED</p> <p>None of IBM's sources support the assertion that Santa Cruz pursued development of Linux-related products "instead" of investigating/asserting its claims that Linux contained infringing material.</p> <p>Furthermore, SCO disputes IBM's implication that any of the mentioned Santa Cruz activities are relevant to this litigation. None of Santa Cruz's cited actions related to the Linux 2.4 and 2.6 versions at issue in this case. <u>See</u> Disputed Fact # 41. Furthermore, Santa Cruz did not contribute any of the infringed UNIX material to Linux. (<u>See</u> Disputed Facts # 4-5.).</p> <p>IBM Ex. 227, McCrabb declaration: The cited source does not support the assertion that Santa Cruz engaged in the asserted actions at any time before the "Spring of 2000," after IBM began its Linux activities. <u>See</u> Disputed Fact # 89.</p> <p>IBM Ex. 331, Michael Davidson Deposition at 86: The cited source does not support the assertion that Santa Cruz contributed any material, infringing or otherwise, to Linux or that any such contributions by Santa Cruz employees were somehow attributable to Santa Cruz. The cited source provides no time frame for IBM's assertions.</p> <p>IBM Ex. 463 (: Does not support IBM's assertions. REDACTED</p> <p>IBM Ex. 464, webpage, Linux PR: SCO Invests in LinuxMall.com (October 14, 1999): The cited source does not support the assertion that any of the alleged actions occurred prior to October 14, 1999, after IBM began its Linux activities. <u>See</u> Disputed Fact # 89.</p> <p>IBM Ex. 465, SCO webpage, Caldera Skunkware, Open Source Software:</p>
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		<p>The cited source does not support IBM's assertion regarding any actions of Santa Cruz. The cited source does not support the assertion that any of the asserted actions were taken prior to June 1, 2001, after IBM began its Linux activities. See Disputed Fact # 89.</p> <p>SCO disputes that Santa Cruz pursued the Linux-related products and services by providing open source software for use in its UNIX products.</p>
88.	<p>Meanwhile, Caldera Systems continued forging strategic alliances with other companies, including IBM, that it sought to involve in Linux, such as by promoting Linux and furthering its Linux business. (Ex. 221 ¶ 66.)</p>	<p>Undisputed</p> <p>SCO disputes IBM's implication that the actions of Caldera, Inc. or Caldera Systems prior to May 2001 are attributable to SCO, or that Caldera, Inc. or Caldera Systems had the power to grant or release rights in the infringed SVr4 material.</p> <p>The actions of Caldera, Inc. and Caldera Systems prior to May 2001 are not attributable to SCO and could not grant IBM any rights to use the infringed SVr4 material, because neither Caldera, Inc. nor Caldera Systems owned copyrights in any UNIX material. (See Disputed Facts # 4, 22.)</p> <p>IBM's cited source does not support its assertion regarding "other companies."</p>
89.	<p>Caldera Systems approached IBM about entering into a business relationship relating to Linux. In July 1999, the companies entered into a "Strategic Business Agreement" relating to Linux. (Ex. 221 ¶¶ 66-67; Ex. 466 at 1710023483-87.)</p>	<p>Undisputed</p> <p>Undisputed, but SCO disputes IBM's implication that the actions of Caldera, Inc. or Caldera Systems prior to May 2001 are attributable to SCO, or that Caldera, Inc. or Caldera Systems had the power to grant or release rights in the infringed SVr4 material.</p> <p>The actions of Caldera, Inc. and Caldera Systems prior to May 2001 are not attributable to SCO and could not grant IBM any rights to use the infringed SVr4 material, because neither Caldera, Inc. nor Caldera Systems owned copyrights in any UNIX material. (See Disputed Facts # 4, 22.)</p> <p>SCO disputes IBM's assertion to the extent it implies that IBM and Caldera Systems reached an agreement regarding any Linux version other than Caldera OpenLinux. The</p> <p style="text-align: center;">REDACTED</p>

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<p>90.</p>	<p>By that time, Linux already was appropriate for business use because of its comprehensive Internet functionality, flexibility and customizability, high scalability, stability, interoperability with multiple systems and networks, multiappliance capability, including Internet access devices, low acquisition and maintenance costs and compliance with technical and communications standards. (Ex. 221 ¶ 66; Ex. 445 at 5-6.)</p>	<p>Disputed SCO disputes that Linux was appropriate for enterprise-level commercial use by the middle of 1999. REDACTED Ex. 287 at 25-35.</p>
<p>91.</p>	<p>The Linux products that Caldera provided to IBM to ship were based on the Linux kernel and included Linux Code. (Ex. 467.)</p>	<p>Disputed/Unsupported SCO disputes IBM's implication that the actions of Caldera, Inc. or Caldera Systems had prior to May 2001 are attributable to SCO, or that Caldera, Inc. or Caldera Systems had the power to grant or release rights in the infringed SVr4 material. The actions of Caldera, Inc. and Caldera Systems prior to May 2001 are not attributable to SCO and could not grant IBM any rights to use the infringed SVr4 material, because neither Caldera, Inc. nor Caldera Systems owned copyrights in any UNIX material. (See Disputed Facts # 4, 22.). SCO also disputes IBM's assertion to the extent it implies that all of the infringing Linux material, or all of the "Linux Code," was contained in the products distributed by Caldera International or SCO to IBM. REDACTED</p>
<p>92.</p>	<p>As part of their Strategic Business Agreement, Caldera granted IBM a license to use the material in Caldera Systems' Linux products, including the Linux Code. (Ex. 221 ¶ 68; Ex. 466 at 1710023483, 1710023486-87; Ex. 467 at 1710023509, 1710023515.)</p>	<p>Disputed/Unsupported/Incomplete SCO disputes IBM's assertion that any Caldera entity granted a license to use any infringing Linux material. No Caldera entity ever granted IBM a license to use the infringing Linux material in Linux, for several reasons. First, neither Caldera, Inc. nor Caldera Systems owned any copyrights in any UNIX material. (See Disputed Facts # 4, 22.).</p>

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		<p style="text-align: center;">REDACTED</p> <p>Accordingly it is disputed that IBM obtained a license under the SBA. Third, neither the SBA nor the SOW cover use of any material outside an OpenLinux for eDesktop or eServer product. (See IBM Exs. 466-467; Disputed Fact # 89.)</p>
93	<p>Specifically, Caldera granted IBM</p> <p style="text-align: center;">REDACTED</p> <p>(Ex. 466 at 1710023486-87; Ex. 467 at 17100233509.)</p>	<p>Disputed/Unsupported/Incomplete</p> <p style="text-align: center;">REDACTED</p>
94.	<p>IBM's license applied, and was intended to apply, to future versions of Caldera's Linux products, including what would eventually be released as SCO Linux 4.0. (Ex. 221 ¶ 71; Ex. 466; Ex. 467.) SCO Linux 4.0 was licensed to IBM under the Strategic Business Agreement. (Ex. 221 ¶ 71; Ex. 466; Ex. 467.) The contract was intended to grant IBM a license that would protect it against a claim of infringement relating to the material in Caldera's Linux products. (Ex. 221 ¶ 74; Ex. 466; Ex. 467.)</p>	<p>Disputed/Unsupported</p> <p>SCO disputes IBM's assertion that any Caldera entity granted a license to use any infringing Linux material. No Caldera entity ever granted IBM a license to use the infringing Linux material in Linux. See Disputed Fact # 92. The license could not have, and was not intended to, apply to any UNIX material. See Ex. 269 ¶ 9; Disputed Fact # 4.</p>

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<p>95.</p>	<p>Furthermore, in the Strategic Business Agreement, Caldera expressly warranted to IBM that IBM would be protected against claims of infringement relating to the material in Caldera's Linux products, and promised that it would hold harmless and indemnify IBM from third party intellectual property rights claims. (Ex. 221 ¶¶ 75-76; Ex. 466 at 1710023486.)</p>	<p>Disputed/Unsupported</p> <p>SCO disputes IBM's assertion that any Caldera entity granted a license to use any infringing Linux material. No Caldera entity ever granted IBM a license to use the infringing material in Linux. See Disputed Fact # 92.</p>
<p>96.</p>	<p>Following the execution of the Strategic Business Agreement, and based in part on the conduct of Caldera, Inc., Santa Cruz and Caldera Systems, and their promotion of and representations about the Linux operating system, IBM made the decision to expand its support of and "embrace" Linux in December 1999. (Ex. 194 ¶ 5; See Ex. 3 ¶ 89; Ex. 586 ¶¶ 4-7.)</p>	<p>Disputed/Unsupported</p> <p>First SCO disputes that IBM decided to "embrace" Linux, or made any Linux-related decision, in December of 1999. Linux began its Linux activities at least as early as July of 1999. See Disputed Fact # 89.</p> <p>Second, SCO disputes that IBM relied on, or reasonably could have relied on, any conduct of Caldera, Inc. or Caldera Systems prior to May 2001. Neither Caldera, Inc. nor Caldera Systems owned UNIX copyrights prior to May 2001. (See Disputed Facts # 4, 22.)</p> <p style="text-align: center;">REDACTED</p> <p>Third, SCO disputes IBM's assertion that it relied on actions by Santa Cruz in undertaking its Linux activities, because IBM knew that Santa Cruz was concerned about the presence of UNIX material in Linux and the potential of Linux to take market share in the high-end market space.</p> <p style="text-align: center;">REDACTED</p> <p>Furthermore, IBM has not submitted any sources, in fact # 96 or otherwise, showing actions undertaken by Santa Cruz prior to IBM's July 1999 decision to begin its Linux</p>

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		<p>activities on which IBM could have relied. (See Disputed Facts # 40-41, 54, 59-60, 63, 66, 69-71, 85-87, 103.)</p> <p>IBM Ex. 3 (SCO's Second Amended Complaint) ¶ 89; IBM Ex. 194 (May 2004 Declaration of Daniel Frye) ¶ 5:</p> <p>The cited sources do not support the assertion that IBM decided to engage in its Linux activities based on any activities by any Caldera entity, Santa Cruz, or SCO.</p> <p>IBM Ex. 586, Sept 2006 Declaration of Daniel Frye:</p> <p>The vague assertions in the cited source (1) indicate that IBM relied on third-party actions as much on any actions of SCO, and (2) do not support the assertion that IBM relied on the actions of any Caldera entity or Santa Cruz.</p> <p>Because SCO <i>did not exist</i>, much less engage in any Linux-related actions—when IBM actually began its Linux activities, or when IBM claims to have “embraced” Linux—SCO disputes that IBM decided to “embrace” Linux based on any actions of SCO. (See Disputed Facts # 89; Ex. 250.)</p>
<p>97. In its marketing materials and SEC filings, SCO and its predecessors repeatedly urged IBM and others to use and rely on Linux. (Ex. 106 at 3-5; Ex. 111 at 4-11; Ex. 114 at 1, 4-6; Ex. 115 at 1, 4-6; Ex. 221 ¶¶ 115-16; Ex. 340 at 57:12-25; 58:1-8; 88:2-24.) The role of SCO and its predecessors in improving Linux and shaping the Linux marketplace, especially through SCO's work with the LSB and UnitedLinux, LLC (See ¶¶ 111-20 below), influenced IBM's decision to invest in Linux. In making its decision to embrace Linux, IBM relied, at a minimum, on the fact that SCO had never identified a single line of infringing code in Linux. But for SCO's silence and inaction, IBM would not have made Linux an important part of its business so quickly. (Ex. 586 ¶¶ 4-7; Ex. 167 ¶¶ 3-5.)</p>	<p>Disputed/Unsupported</p> <p>First, SCO disputes that that SCO, Caldera International, or Santa Cruz “urged” anyone to use or rely on Linux in SEC filings. Neither SCO, Caldera International, nor Santa Cruz “urged” any use or reliance on Linux in its SEC filings. See IBM Exs. 106, 111, 114. None of IBM's cited sources indicate that SCO, Caldera International, or Santa Cruz urged any use of or reliance on Linux before IBM began its Linux activities. See Disputed Fact # 89, 96.</p> <p>Second, SCO disputes that IBM relied on any actions of SCO, which did not exist until after IBM began its Linux activities. See SCO Timeline Ex. 250; Disputed Fact # 89.</p> <p>Third, SCO disputes that IBM relied on any UnitedLinux-related actions. UnitedLinux LLC did not exist until after IBM began its Linux activities. (See Disputed Facts # 89, 111.)</p> <p>Fourth, SCO disputes IBM's implication that the actions of Caldera, Inc. or Caldera</p>	

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	<p>Systems prior to May 2001 are attributable to SCO, or that Caldera, Inc. or Caldera Systems had the power to grant or release rights in the infringed SVr4 material.</p> <p>The actions of Caldera, Inc. and Caldera Systems prior to May 2001 are not attributable to SCO and could not grant IBM any rights to use the infringed SVr4 material, because neither Caldera, Inc. nor Caldera Systems owned copyrights in any UNIX material. (See Disputed Facts # 4, 22.)</p> <p>Any reliance by IBM on Caldera, Inc., Caldera Systems, or other non-copyright holders is unreasonable. See Disputed Fact # 96.</p> <p>IBM Ex. 221 (Love Declaration) ¶¶ 115-16: The cited source does not support the assertion that SCO or any possible predecessor urged IBM or others to use or rely on Linux in SEC filings. The cited source does not support the assertion that "Caldera" urged IBM or others to rely on Linux at any point when "Caldera" owned copyrights to SVr4 material.</p> <p>IBM Ex. 340 REDACTED</p> <p>The cited source does not support the assertion that SCO or any conceivable predecessor urged IBM or others to rely on Linux in SEC filings.</p> <p style="text-align: center;">REDACTED</p> <p>IBM Ex. 586 (Frye Declaration) ¶¶ 4-7: The cited source does not support IBM's assertions, conflicts with other facts, and/or is disputed by SCO. See Disputed Fact # 96.</p>
	<p>Disputed/Unsupported</p> <p>SCO disputes that IBM put a "greater emphasis" on Linux-related activities than other activities, or that IBM put a "greater emphasis" on Linux-related activities than it would have in some other factual scenario to the extent IBM suggests that it undertook its Linux activities in reliance on the actions of Santa Cruz, Caldera, or SCO. (See Disputed Facts 96-97.)</p>
98.	<p>IBM placed greater emphasis on the importance of Linux to its business and made a significant contribution to the development of Linux, requiring a significant expenditure of time and money at the expense of other opportunities. For example, IBM developed many Linux-related products: mainframes and servers that run Linux; memory</p>

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	<p>solutions for Linux environments; a broad range of software offerings; services that include deployment of Linux based e-business environments, migration of database applications and data to Linux systems, support for Linux-based cluster computing, server consolidation and a 24-hour technical engineering support line. (Ex. 586 ¶¶ 4-7; Ex. 194 ¶ 7; See Ex. 4 ¶ 44.)</p>	
99.	<p>Moreover, IBM has made significant and valuable contributions to the Linux kernel and the Linux environment. (Ex. 208 ¶¶ 69-75.) SCO has admitted that it included over 783,000 lines of IBM code in SCO Linux 4.0 (<i>id.</i> ¶ 66 (<i>citing</i> Ex. 45)), demonstrating that IBM contributed a significant amount of source code to Linux (not at issue here) that was useful enough that SCO included it in its own product. (Ex. 208 ¶ 68.)</p>	<p>Disputed</p> <p>SCO disputes IBM's assertion to the extent it implies that SCO contributed material to the Linux program it received from UnitedLinux LLC before distributing the program as part of the SCO Linux 4.0 package. SCO received UnitedLinux 1.0 from SuSE engineers and redistributed the program verbatim as part of its SCO Linux 4.0 package. SCO's own additions to the SCO Linux 4.0 package were embodied in separate media. See Ex. 233 ¶¶ 19-22.</p> <p>Regardless, IBM's assertion is immaterial to whether IBM's Linux-related activities infringe SCO's copyrights, and is addressed in SCO's response to IBM's 8th counter claim.</p>
100.	<p>SCO intended that its Linux activities be acted on, and SCO acted such that IBM had a right to believe they were so intended. (Ex. 221 ¶¶ 25-27, 115-16.)</p>	<p>Disputed/Unsupported</p> <p>SCO disputes IBM's assertion to the extent it implies that SCO intended to convince IBM or any other third-party that SCO did not object to the use of UNIX material in Linux, that Linux did or does not infringe SCO's UNIX copyrights, or that UNIX material could be used in Linux without a license from SCO. (See Disputed Facts # 4-5.)</p> <p>Furthermore, SCO disputes that IBM could reasonably, or had no right to, believe that its Linux activities did not infringe copyrights in UNIX. (See Disputed Fact # 96-97.)</p>
101.	<p>Not knowing that SCO would change its position and declare war on Linux after years of promoting it, IBM (and others) built a part of its business around the operating system. (Ex. 586 ¶¶ 4-7.)</p>	<p>Undisputed/Unsupported</p> <p>SCO disputes that it has changed its position regarding use of UNIX material in Linux. SCO never took the position that it would contribute UNIX material to Linux, or allow</p>

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		<p>the use of UNIX material in Linux, and has not "declare[d] war on Linux." (<u>See</u> Disputed Facts 4-5.)</p> <p>SCO disputes IBM's assertion to the extent it implies that IBM did rely, or reasonably could have relied, on the actions of Caldera Systems, Caldera, Inc., Santa Cruz, Caldera International, or SCO in undertaking its Linux activities. IBM did not, and could not reasonably have relied, on any actions of Caldera Systems, Caldera, Inc., Santa Cruz, Caldera International, or SCO in undertaking its Linux activities. <u>See</u> Disputed Fact # 96-8.</p> <p>Furthermore, IBM has not supported its assertion.</p> <p>Mr. Frye, founder and head of the Linux Technology Center, states in his declaration that, "IBM decided to invest in Linux due, at least in part, to the existence and activity of SCO and other commercial Linux distributors." IBM Ex. 586 ¶ 6. IBM then argues, based in part on this statement in Mr. Frye's declaration, that IBM believed SCO had waived its intellectual property rights with respect to Linux. IBM Mem. at 84.</p> <p>IBM's assertion of reliance is substantially undercut by Mr. Frye's deposition testimony.</p> <p style="text-align: center;">REDACTED</p> <p>IBM Ex. 586 (2006 Frye Decl.) ¶¶ 4-7: The cited source supports that IBM engaged in Linux activities, but no other aspect of IBM's assertion.</p>
102.	IBM has conducted its Linux activities in the good faith belief-supported by years of reinforcement - that they were permissible. Allowing SCO to reverse course now would result in severe damage to IBM and others. (<u>See</u> Ex. 586 ¶¶ 2-7.)	<p>Disputed/Unsupported</p> <p>SCO disputes IBM's assertion to the extent it implies that IBM did rely, or reasonably could have relied, on the actions of Caldera Systems, Caldera, Inc., Santa Cruz, Caldera International, or SCO in undertaking its Linux activities. IBM did not, and could not reasonably have relied, on any actions of Caldera Systems, Caldera, Inc., Santa Cruz, Caldera International, or SCO in undertaking its Linux activities. (<u>See</u> Disputed Fact # 96-97).</p>

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		<p>SCO also disputes that IBM's current Linux activities are undertaken in "good faith." IBM has continued its Linux-related activities long after receiving unambiguous notice that such activities infringe SCO's copyrights. (See Ex. 257). Such action is not undertaken in "the good faith belief supported by years of reinforcement that [such actions are] permissible." (See <i>also</i> Disputed Facts # 96-97.).</p> <p>IBM's cited source does not support its assertion or the assertion that IBM undertook any sort of investigation or inquiry into whether its Linux activities infringed any third-party copyrights. The cited source does not support IBM's assertion regarding any supposed "severe damage."</p>
103.	<p>On the strength of its Linux business, Caldera Systems went public on March 21, 2000. (Ex. 110 at 26.) Santa Cruz supported the move in January 2000 by collaborating with Sun Microsystems, Inc., Novell and several other groups on a \$30 million investment in Caldera Systems. (Ex. 221 ¶ 79; Ex. 469.)</p>	<p style="text-align: center;">REDACTED</p> <p>Undisputed/Unsupported</p> <p>IBM's assertion is unsupported to the extent it implies any grant of rights to UNIX material between Santa Cruz and Caldera Systems.</p>
104.	<p>On May 7, 2001, using most of the proceeds from its initial public offering, Caldera Systems undertook to expand and enhance its Linux business by acquiring the Server Software and Professional Services divisions of Santa Cruz, including its UNIX assets. Caldera Systems completed the transaction through a newly formed subsidiary, known as Caldera International, Inc. ("Caldera International"), which then functioned as the operating company of Caldera Systems.</p>	<p>Undisputed</p>

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<p>105.</p>	<p>(Ex. 221 ¶ 80; Ex. 106 at 16.) One of the primary purposes of the acquisition was to acquire a distribution channel for SCO's Linux products. As Caldera announced at Linux World in August 2000: Business customers tell us that they'd be more aggressive in the adoption of Linux if they could purchase and obtain support through the same distribution channel that they use for everything else. The SCO acquisition gives us more than 15,000 knowledgeable, trained resellers, ISVs and support staff worldwide. This infrastructure would have taken us millions of dollars and years to develop. (Ex. 470 at 12-13.)</p>	<p>Disputed/Unsupported SCO disputes that the Caldera Systems/Caldera International/Santa Cruz merger/acquisition was undertaken to acquire distribution "for SCO's Linux products." SCO did not exist at the time Santa Cruz was acquired by/merged into Caldera International, so acquiring a distribution channel for SCO's Linux products could not have been a "primary purpose" for the acquisition. (See Ex. 250.). Furthermore, Santa Cruz had never distributed a Linux product. (Ex. 233 ¶ 4). SCO disputes that the primary value of the Santa Cruz acquisition was distribution channels for Linux products, as opposed to the UNIX assets themselves. IBM's own sources show that 95% of Caldera International, Inc.'s revenue came from UNIX, not Linux, products after the Santa Cruz acquisition. (See Disputed Fact # 83.).</p>
<p>106.</p>	<p>(Ex. 221 ¶ 92.) Caldera International purchased the UNIX assets of Santa Cruz with an eye toward open-sourcing its UNIX technology to improve Linux. (Ex. 221 ¶ 85; Ex. 471.) Caldera CEO Ransom Love stated that Santa Cruz's UNIX assets were rapidly losing their value, that the market was moving toward Linux, and that "UNIX on Intel is dead, except as a value add to Linux". (Ex. 221 ¶ 85; Ex. 472 at 2.)</p>	<p>Disputed SCO disputes IBM's assertion that Caldera International or SCO did anything more than consider the idea of licensing UNIX material under an "open source" license. Neither Caldera International nor SCO ever did or intended to "open source" any UNIX material. (See Disputed Facts # 4-5). IBM's cited sources do not support the assertion that Caldera International or SCO ever did "open source" any UNIX material.</p>
<p>107.</p>	<p>Caldera International continued to distribute Santa Cruz's UnixWare and OpenServer products following the acquisition in 2001, but it positioned its Linux products ahead of its UNIX products. (Ex. 221 ¶ 91; Ex. 340 at 31:20-25, 33:12-25, 34:1-12; 55:4-15; Ex. 472.) For example, Caldera encouraged ISVs and OEMs, such as Oracle, to focus on the certification and</p>	<p>Disputed/Unsupported SCO disputes that Caldera International or SCO positioned Linux products or services ahead of UNIX products or services. REDACTED Caldera International received 95% of its revenues from UNIX products and services, as opposed to Linux products and services. (See Disputed Fact # 83.).</p>

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<p>support of its Linux products, to the detriment of its UNIX products. (Ex. 221 ¶ 91; Ex. 340 at 57:12-25, 58:1-25, 59:1-5; Ex. 472; Ex. 473.)</p>	<p>Disputed/Unsupported</p> <p>SCO disputes the assertion that Caldera International or SCO knew of infringing UNIX material in Linux prior to late 2002. SCO did not look into the presence of UNIX material in Linux until late 2002, at the earliest. (Ex. 6 ¶ 13; Ex. 9 ¶ 3.)</p> <p>SCO disputes IBM's assertion that Caldera International or SCO "did not care whether UNIX source code had been included in Linux improperly." (See Ex. 269 ¶ 11-12.)</p> <p>SCO disputes IBM's assertion to the extent it implies that the actions of Caldera, Inc. or Caldera Systems prior to May 2001 are attributable to SCO, or that Caldera, Inc. or Caldera Systems had the power to grant or release rights in the infringed SVr4 material.</p> <p>The actions of Caldera, Inc. and Caldera Systems prior to May 2001 are not attributable to SCO and could not grant IBM any rights to use the infringed SVr4 material, because neither Caldera, Inc. nor Caldera Systems owned copyrights in any UNIX material. (See Disputed Facts # 4, 22.)</p> <p>SCO disputes IBM's assertion to the extent it implies that Santa Cruz, Caldera International, or SCO chose to undertake Linux activities "instead" of pursuing its UNIX products and services or UNIX intellectual property rights. Neither Santa Cruz, Caldera International, nor SCO ever did or intended to waive intellectual property rights in UNIX as a result of any Linux-related activities. (See Disputed Facts # 4-5.) Caldera International derived 95% of its revenues from its UNIX products and services. (See Disputed Fact # 83.)</p>
<p>108. Caldera Systems knew that some at Santa Cruz had had concerns that UNIX source code had been included in Linux improperly. (Ex. 221 ¶ 82.) But Caldera did not care whether UNIX source code had been included in Linux improperly and did not publicly disclose any potential problem with Linux. (Id. ¶ 83.) Instead, Caldera chose further to stake its future on Linux. (Id. ¶ 115.)</p>	<p>Disputed/Unsupported</p> <p>SCO disputes IBM's implication that the actions of Caldera, Inc. or Caldera Systems prior to May 2001 are attributable to SCO, or that Caldera, Inc. or Caldera Systems had the power to grant or release rights in the infringed SVr4 material.</p>
<p>109. Caldera recognized that pursuing litigation against Linux would be bad for business and made the decision not to attack the operating system that it had promoted for nearly a decade. (Ex. 221 ¶ 84.) At no point did Caldera publicly disclose that there might be any problem with Linux. (Id. ¶ 83.)</p>	<p>Disputed/Unsupported</p> <p>SCO disputes IBM's implication that the actions of Caldera, Inc. or Caldera Systems prior to May 2001 are attributable to SCO, or that Caldera, Inc. or Caldera Systems had the power to grant or release rights in the infringed SVr4 material.</p>

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		<p>The actions of Caldera, Inc. and Caldera Systems prior to May 2001 are not attributable to SCO and could not grant IBM any rights to use the infringed SVr4 material, because neither Caldera, Inc. nor Caldera Systems owned copyrights in any UNIX material. (See Disputed Facts # 4, 22.).</p> <p>SCO disputes that Caldera International or SCO decided not to pursue litigation based on Linux activities. Neither Caldera International nor SCO made any decisions regarding legal action based on Linux activities until late 2002 or early 2003 at the earliest. (See Ex. 165 ¶ 3; Ex. 9 ¶ 3.).</p> <p>SCO disputes IBM's assertion to the extent that it implies that either Caldera International or SCO did not disclose problems with Linux at a time that such entities knew of such problems. Neither Caldera International nor SCO investigated potential infringement of UNIX copyrights by Linux material until late 2002 or early 2003 at the earliest, and discussed such problems with IBM at that time. (See Ex. 165 ¶ 3-6; Ex. 9 ¶ 3-5.). IBM itself acknowledges that SCO has made public statements regarding the infringement problems posed by Linux. (See Disputed Fact # 131.).</p>
<p>110. Like Caldera Systems before the acquisition, Caldera International: Expended development funds to promote Linux products (Ex. 106 at 4); Represented Linux as a product that could be used to power the Internet and software needs of businesses, academics and technical institutions around the world (<i>Id.</i> at 3); Represented the benefits of Linux specifically to include comprehensive Internet functionality,</p>	<p>Disputed</p> <p>SCO disputes IBM's assertion to the extent it implies that Caldera International or SCO encouraged or authorized the reproduction, distribution, or preparation of derivative works based on UNIX material by parties other than Caldera International, SCO, or their licensees. (See Disputed Facts # 4-5.).</p> <p>SCO also disputes any implication that IBM undertook its Linux activities in reliance on the cited actions. IBM began its Linux activities long before Caldera International existed. (See Disputed Fact # 89, 104.).</p>	<p style="text-align: center;">REDACTED</p>

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	<p>flexibility, customizability and stability, interoperability with multiple systems and networks, low acquisition and maintenance costs, and compliance with technical and communication standards (<u>Id.</u>); and</p> <p>Provided a full range of pre- and post-sales technical support for SCO Linux (<u>Id.</u> at 6). (Ex. 221 ¶ 93.)</p>	
111.	<p>Rather than pursue litigation related to Linux, in May 2002 Caldera International joined with other Linux vendors, Conectiva, Inc., SuSE Linux AG and Turbolinux, to form a Joint Development Limited Liability Company called UnitedLinux, LLC ("UnitedLinux"). (Ex. 221¶ 94; Ex. 106 at 4; Ex. 348; Ex. 474.)</p>	<p>Disputed/Unsupported</p> <p>SCO disputes IBM's assertion to the extent it implies that Caldera International or SCO chose to undertake Linux activities "instead" of pursuing its UNIX products and services or UNIX intellectual property rights. Neither Caldera International nor SCO ever did or intended to waive intellectual property rights in UNIX as a result of any Linux-related activities. (See Disputed Facts # 4-5.) Caldera International derived 95% of its revenues from its UNIX products and services. (See Disputed Fact # 83.) Furthermore, neither Caldera International nor SCO investigated the infringement of UNIX material in Linux until late 2002 or early 2003. (See Disputed Fact # 109.)</p> <p>IBM's cited documents do not support its assertion that UnitedLinux activities were an alternative to litigation or other pursuit of UNIX intellectual property rights.</p>
112.	<p>UnitedLinux was formed to streamline Linux development and certification around a global, uniform distribution of Linux for business. By developing a single Linux distribution, Caldera International and the other members of UnitedLinux endeavored to give businesses a reliable, tested, and supportable version of Linux. (Ex. 221 ¶¶ 96-97; Ex. 106 at 4.)</p>	<p>Undisputed</p>
113.	<p>Caldera International's CEO, Ransom Love, was a driving force behind UnitedLinux and was the signatory for Caldera to the Joint Development</p>	<p>Undisputed</p>

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<p>114. Contract ("JDC") and Master Transaction Agreement ("MTA") that created UnitedLinux. (Ex. 221 ¶ 95; Ex. 474; See Ex. 176 ¶ 18.)</p>	<p>Disputed/Unsupported</p> <p>SCO disputes IBM's legal conclusion that UnitedLinux members assigned all intellectual property rights in any UnitedLinux product except for "Pre-Existing Technology and Enhancements." Caldera International did not assign any rights in pre-existing UNIX material. Rather, members only assign rights in material "developed pursuant to the UnitedLinux effort.</p> <p>In his sworn declaration, Andy Nagle, Product Manager of The SCO Group, Inc., states that:</p> <p style="padding-left: 40px;">Based on my interactions with member representatives, all the Members understood that Caldera did not agree to, did not intend to, and in fact did not contribute any rights to its UNIX technology to the UnitedLinux project. In my experience, the Members understood that the UL agreements reflected Caldera's decision not to contribute its UNIX technology. In the time that I was involved with UnitedLinux, no one communicated or manifested to me a different view. For example, neither the Board of Managers nor the development engineers incorporated into the project any Caldera pre-existing technology other than the items specifically listed in Exhibit C. Indeed, despite Mr. Rex's appeals for the UNIX technology, SUSE did not receive any UNIX technology from Caldera.</p> <p>Ex. 233 ¶ 14.</p> <p>The United Linux Agreement states that intellectual property in the Software developed pursuant to the JDC "shall be assigned" to the LLC. However, to the extent, if any, that the joint development effort gave rise to any assignable intellectual property, no member, including Caldera, ever executed any documents assigning such rights, and no such assignments were ever requested:</p>
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<p>Other than specified Pre-Existing Technology, which was listed in Exhibit C of the JDC, and the Jointly Developed Technology, which was developed pursuant to the UnitedLinux project, the intellectual property that each Member separately owned was not intended to be assigned, and was not assigned, to the LLC or any of its Members. That is, each Member fully retained its intellectual property rights in all its pre-existing technology (such as Caldera's UNIX technology) not listed in Exhibit C of the JDC. In fact, neither SCO nor any other Member ever executed any type of assignment to the LLC. Nor did any other Member ever even request any assignment from another Member.</p> <p>Ex. 233 ¶ 15.</p> <p>This conclusion is confirmed by Ralph Yarro, who states in his declaration that, "After Caldera International acquired the UNIX divisions in 2001 until Mr. Love left, the company did not act to waive or otherwise relinquish any rights or protections to the core UNIX intellectual property it acquired from Santa Cruz. No authority or approval was granted by the Board of Directors to do so at any time." Ex. 269 ¶ 18.</p> <p>The term "Software" has a specific meaning under the JDC. "i</p> <p style="text-align: center;">REDACTED</p> <p>." (IBM</p>	<p>Ex. 474 at SCO1170521-22.).</p> <p>The purpose of the JDC was to transfer intellectual property only in material developed under the JDC. The linux kernel that SUSE used as the kernel for UnitedLinux was not developed under the JDC; rather, it already existed at the time the parties entered into the JDC. This is confirmed by the Love Declaration, which states that, "To achieve the above purpose of UnitedLinux, each member assigned to UnitedLinux ownership of the intellectual property rights in the Software that was developed by UnitedLinux. In addition, Pre-Existing Technology was licensed to UnitedLinux. Any enhancements that were made to their Pre-Existing Technology (the 'Enhancements') remained the property</p>
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		<p>of the contributing company.” (IBM Ex. 221 ¶ 98.)</p> <p>It was never the intent of SCO to contribute any System V code into UnitedLinux, and in fact, SCO never contributed any System V code to the UnitedLinux project. IBM's assertion is a legal conclusion unsupported by sufficient factual basis. The cited source only supports the assertion in relation rights in the “Software,” which is a defined term referring to material created by UnitedLinux LLC.</p>
115.	<p>Caldera intended to assign and did assign ownership of the intellectual property rights in all UnitedLinux products (other than Caldera's Pre-Existing Technology and Enhancements) to UnitedLinux. (Ex. 221 ¶ 100.)</p>	<p>Disputed/Unsupported</p> <p>SCO disputes IBM's legal conclusion that Caldera International assigned all intellectual property rights in all UnitedLinux products other than “Pre-Existing Technology and Enhancements” or that Caldera intended to do so. The infringed UNIX material was developed before the creation of UnitedLinux LLC, was not developed by UnitedLinux, and was not assigned to UnitedLinux. (See Disputed Fact # 114.)</p> <p>IBM's cited source only supports the assertion in relation rights in the “Software,” which is a defined term referring to material created by UnitedLinux LLC. (See Disputed Fact # 114.)</p> <p>None of the disputed code was “developed pursuant to” the JDC. All of the disputed code was pre-existing at the time the JDC was signed in 2002. Under the JDC, no pre-existing code was to be contributed to the venture, except as specifically set forth in JDC Exhibit C.</p>
116.	<p>This assignment of ownership included all of the allegedly infringing Linux kernel files (Items 183-85, 209-10, 212, 214, 224, 225, 228, 231, 272). (Ex. 215 (Ex. H); Ex. 474.)</p>	<p>Disputed/Unsupported</p> <p>SCO disputes the assertion that IBM assigned any rights in pre-existing UNIX material, including any allegedly infringing Linux material. The infringed UNIX material was developed before the creation of UnitedLinux LLC, was not developed by UnitedLinux, and was not assigned to UnitedLinux. (See Disputed Facts # 114-15.)</p>
117.	<p>UnitedLinux released its first Linux distribution, UnitedLinux Version 1.0, in November 2002. (Ex. 349.) UnitedLinux Version 1.0 was marketed</p>	<p>Undisputed/Unsupported</p> <p>IBM's cited source does not support any assertion regarding UnitedLinux members other</p>

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<p>and sold by each of the partners in UnitedLinux, including Caldera International, under its own brand name. (Id.)</p>	<p>than Caldera International.</p>
<p>118. SCO's release of UnitedLinux 1.0 was called "SCO Linux 4.0". SCO Linux 4.0 was based on the Linux 2.4 kernel and was distributed under the GPL. (Ex. 349; Ex. 106 at 5; Ex. 475; Ex. 226 ¶ 10; See Ex. 278 ¶ 6.)</p> <p>Every line of the Linux Code is included in SCO Linux 4.0, powered by UnitedLinux. (Ex. 215 (Ex. H); Ex. 226 ¶ 10; Ex. 208 ¶ 65; See Ex. 166 ¶ 32; Ex. 278 ¶ 20.)</p> <p>Furthermore, SCO Linux 4.0 included all but one line of the SUS Material (Items 183-84, 205-31), all of the memory allocation code (Item 185), all of the ELF material from elf.h (Item 272), and much of the Streams Material (Items 150, 152-55, 157-59, 160-64). (Ex. 226 ¶ 10; Ex. 215 (Ex. H).)</p>	<p>Disputed/Unsupported</p> <p>First, SCO disputes IBM's assertion that Caldera International, SCO, or any other entity licensed UnitedLinux 1.0, SCO Linux 4.0, the Linux 2.4 kernel, or any other infringing Linux material under the GPL. Neither SCO, Caldera International, nor any other entity properly licensed such material under the GPL. See Disputed Fact # 5.</p> <p>Rather, SuSE engineers created the UnitedLinux 1.0 program for UnitedLinux LLC. Caldera International received UnitedLinux 1.0 on a gold master CD from UnitedLinux LLC. Caldera International distributed the UnitedLinux 1.0 program <u>verbatim, without modifying or placing a GPL license notice on the program</u>, as part of its SCO Linux 4.0 product. Caldera International's contributions to the SCO Linux 4.0 product were embodied on media that was separate from the UnitedLinux 1.0 program. See Ex. 233 ¶¶ 19-22; Disputed Fact # 5.</p> <p>Second, SCO disputes IBM's assertion to the extent it states that all of the "Linux Code" and all of the elf.h material was contained in UnitedLinux 1.0/SCO Linux 4.0.</p> <p style="text-align: center;">REDACTED</p> <p>Third, SCO disputes IBM's assertion that UnitedLinux 1.0/SCO Linux 4.0 contained all but one line of the "SUS Material." UnitedLinux 1.0 did not contain some material from at least two files that constitute the "SUS Material." See <i>id.</i></p> <p>In general, much of the infringing Linux material, including Linux kernel material, was not included in UnitedLinux 1.0 (the basis for SCO Linux 4.0). See <i>id.</i></p> <p>Furthermore, none of IBM's expert reports address any of the non-literal aspects of the infringing Linux material, including whether such material was included in UnitedLinux 1.0. See Ex. 22 at 13:10-21, 14:7-13, 22:22-33:11, 34:10-22, 277:12-278:13, 279:9-15, 291:8-15.</p>

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	<p>IBM Ex. 166 (Beattie Declaration): The cited source provides no support for the assertion that the declarant has knowledge regarding UnitedLinux products or activities, was employed by Caldera International, or was at all involved in UnitedLinux activities. The cited source does not state what material was in SCO Linux 4.0, does not specify what material was in UnitedLinux 1.0, and does not deal with all the facts necessary to support IBM's assertion regarding its defined term "Linux Code."</p> <p>IBM Ex. 208 — REDACTED The cited source does not support IBM's assertions.</p> <p>REDACTED</p> <p>IBM Ex. 226 (Mazieres Declaration) ¶ 9-10: IBM Ex. 226 constitutes a new expert report, from an expert that SCO has not had the opportunity to depose, and cannot form the basis of summary judgment. SCO has not had sufficient opportunity to verify the truthfulness of the cited source.</p> <p>The cited source contradicts itself, by defining the term "Disputed Code" as "allegedly infringed lines of System V" and stating that SCO Linux Server 4.0 contains <i>all</i> the Disputed Code, yet also stating that it does <i>not</i> include some material from Items 183-84, 205-31 and strongly implying that it does <i>not</i> include much of the Streams material.</p> <p>IBM Ex. 278 (Whiteley Declaration) ¶ 20: The cited source does not provide the necessary detail to support IBM's factual assertions regarding its defined terms, or the necessary factual assertions to support IBM's legal conclusions.</p>
119.	<p>Caldera International marketed and sold SCO Linux 4.0 to businesses around the world, representing among other things:</p> <p>"SCO Linux 4.0 is a high-quality Linux operating system designed for mission-critical business applications, with guaranteed stability,</p> <p style="text-align: right;">UNDISPUTED</p>

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	<p>security and worldwide support from SCO.” (Ex. 349.)</p> <p>“SCO Linux has it all...SCO is a perfect fit for most application server environments.” (Ex. 475.)</p> <p>“Talk to us, and we will help you configure a solution including SCO Linux to meet your every requirement.” (<u>Id.</u>)</p> <p>“SCO Linux 4.0, powered by UnitedLinux provides customers with the base UnitedLinux operating system as well as the additional software, support and services from SCO that customers need to successfully run Linux in business environments.” (Ex. 349.)</p> <p>“SCO is uniquely qualified to make the UnitedLinux platform viable for business because of its proven track record in successfully building, deploying and supporting stable operating platforms for more than 23 years.” (<u>Id.</u>)</p> <p>“SCO Linux 4.0 is built upon SCO's traditional combination of top OS platform technology, and support and service features that customers can rely on to support critical business environments.” (<u>Id.</u>)</p> <p>“With SCO's recent introduction of a Retail Hardened Linux for Point of Sale (POS), SCO is providing retail companies opportunities to reap the benefits of the power of Linux while being able to rejuvenate their legacy POS</p>	
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	<p>investments.” (Ex. 476.)</p> <p>“SCO’s business class Linux product is powered by UnitedLinux, the culmination of the might and expertise of 4 leading Linux vendors, SCO, SuSE, Turbolinux and Connectiva.” (<i>Id.</i>)</p> <p>“As a result customers can now choose SCO Linux, confident they have access to the widest array of certified applications and hardware backed up by SCO’s world renowned expert services.” (<i>Id.</i>)</p>	
120.	<p>To coincide with this release of UnitedLinux and SCO Linux 4.0, SCO enlisted strategic partners in November 2002, such as Hewlett-Packard, IBM, Computer Associates, Oracle, BEA, BakBone, Fujitsu, Fujitsu Siemens, NEC, Toshiba, Progress and AMD to help promote UnitedLinux. (Ex. 106 at 6) SCO also allied with numerous solution providers who wrote and developed custom applications to run on SCO’s Linux operating system. (<i>Id.</i> at 6-7.)</p>	<p>Disputed</p> <p>SCO disputes that Caldera International “enlisted” the named partners for cooperation relating to SCO Linux 4.0. SCO did not “enlist” these third-parties for use with SCO Linux 4.0; they were already partners in SCO’s UNIX operations. See IBM Ex. 106 at 5-7.</p>
121.	<p>Caldera International also continued to distribute earlier versions of its Linux products, including “OpenLinux Server 3.1.1” and “OpenLinux Workstation 3.1.1” products, which were released in January 2002. Both included the Linux 2.4 kernel. (Ex. 350; Ex. 351.)</p>	<p>Undisputed/Unsupported</p> <p>SCO disputes that IBM’s cited sources support the assertion that Caldera International or SCO distributed the OpenLinux Server 3.1.1 or OpenLinux Workstation 3.1.1 at any time after <u>January of 2002.</u></p>
122.	<p>SCO’s Linux products collectively included code from every allegedly infringing Linux kernel file. (Ex. 215 ¶¶ 109-13; Ex. 215 (Ex. H); Ex. 226 ¶ 12.)</p>	<p>Disputed/Unsupported</p> <p>SCO disputes IBM’s assertion to the extent it implies that all of the infringing Linux material was contained in products distributed by SCO.</p> <p style="text-align: center;">REDACTED</p>

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		<p>Furthermore, neither Caldera International, SCO, nor Santa Cruz intended to or did contribute any of the infringed UNIX material into Linux products. (See Disputed Facts # 4-5.)</p> <p>IBM Ex. 226 (Mazieres Declaration): The cited source is internally contradictory and improper. See Disputed Fact # 118.</p>
123.	<p>SCO knew that the Linux Code was in Linux. (Ex. 193 ¶¶ 11-13; Ex. 176 ¶ 20; Ex. 166 ¶ 33; Ex. 232 ¶ 5; Ex. 278 ¶ 14.) The Linux Code has been in Linux since before SCO commenced this lawsuit, with some included as far back as 1991, and much included for over a decade. (Ex. 166 ¶ 18; Ex. 278 ¶ 12.)</p>	<p>Disputed/Unsupported/Incomplete</p> <p>SCO disputes IBM's assertion to the extent it implies that SCO or Caldera International knew the "Linux Code" or any other infringed UNIX material was in Linux prior to, at the earliest, late 2002 or early 2003. SCO did not investigate the presence of UNIX material in Linux until, at the earliest, late 2002 or 2003, and informed IBM of its concerns at that time. See Disputed Fact # 108.</p> <p>SCO disputes IBM's assertion to the extent it implies that Santa Cruz knew of the presence of the infringed UNIX material in Linux prior to, at the earliest, October 1999.</p> <p style="text-align: center;">REDACTED</p> <p style="text-align: center;">86; _____ Disputed Facts # 41, 84-</p> <p>Furthermore, none of IBM's cited sources support any assertion as to what specific entity had any purported knowledge, when that particular entity obtained such purported knowledge, or how/when/why any individual's knowledge can be attributed to any particular entity.</p>
124.	<p>Despite its success in promoting Linux and its Linux products, SCO was unable to run a profitable business. (Ex. 106 at 10.)</p>	<p>Undisputed/Unsupported</p> <p>IBM's cited source does not support IBM's assertions regarding whether SCO was "able" to earn a profit.</p>
125.	<p>At no point prior to its acquisition of UNIX assets from Santa Cruz did SCO (Caldera International or Caldera, Inc.) have a profitable year. (Ex. 106 at</p>	<p>Undisputed/Unsupported</p> <p>IBM's cited source does not support IBM's assertion.</p>