COVER SHE FOR CIVIL FILING A ONS - Page 1

Party Identification (Attach additional sheets as necessary)

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ATTY FOR DEFENDANT/RESPONDENT
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TOTAL CLAIM FOR DAMAGES
$ _____

JURY DEMAND
☐ Yes ☐ No

SCHEDULE FEES: §78-7-35. CHECK ANY THAT APPLY.

(See Case Types for filing Fees for Complaints other then Claim for Damages.)

— COMPLAINT FOR DAMAGES —

$45 ☐ Civil, Interpleader or Small Claims: $2000 or less
$70 ☐ Small Claims: $2001-$5000
$90 ☐ Civil or Interpleader: $2001 - $9999
$140 ☑ Civil or Interpleader: $10,000 and over
$140 ☐ Civil Unspecified

---------- MISCELLANEOUS ----------

$75 ☑ Jury Demand
$2 ☐ Vital Statistics §26-2-25

Effective: 05/05/02

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Attorneys for Plaintiff Caldera Systems, Inc. d/b/a The SCO Group

IN THE THIRD JUDICIAL DISTRICT OF SALT LAKE COUNTY

STATE OF UTAH

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CALDERA SYSTEMS, INC., a Delaware corporation d/b/a THE SCO GROUP, Plaintiff, vs. INTERNATIONAL BUSINESS MACHINES CORPORATION, a Delaware corporation, Defendant.	**COMPLAINT** (Jury Trial Demanded) Case No. 030905199 Judge Lewis

Plaintiff, Caldera Systems, Inc., a Delaware corporation doing business as The SCO Group ("SCO"), complains of Defendant International Business Machines Corporation ("IBM") and alleges as follows:

Nature of This Action

1. UNIX is a computer operating system program and related software originally developed by AT&T Bell Laboratories ("AT&T"). SCO/UNIX is a modification of UNIX and related software developed by SCO and its predecessors. UNIX and SCO/UNIX are widely used in the corporate, or "enterprise," computing environment.

2. As a result of its acquisition of the rights to UNIX from AT&T and its own development of UNIX and SCO/UNIX, SCO is the present owner of both UNIX and SCO/UNIX software. UNIX and SCO/UNIX are valuable software programs and SCO and its predecessors have invested hundreds of millions of dollars in their development and enhancement. SCO (which, as used herein, includes its predecessor) has licensed UNIX and SCO/UNIX both to software vendors such as IBM and computer end-users such as McDonald's. The UNIX and SCO/UNIX licenses granted to software vendors and end-users are limited licenses, which impose restrictions and obligations on the licensees designed to protect the economic value of UNIX and SCO/UNIX.

3. UNIX and SCO/UNIX compete with other proprietary programs and with "open source" software, which is software dedicated to the public. There are advantages of proprietary programs to end-users (including their proprietary functions in which their developers have invested large amounts of time and money). There are also advantages to open source programs to end-users (including that they do not have to pay for the program itself) and to software vendors (whom market the additional products and services that end-users who

use open source programs ordinarily require). This case is not about the debate about the relative merits of proprietary versus open source software. Nor is this case about IBM's right to develop and promote open source software if it decides to do so in furtherance of its independent business objectives, so long as it does so without SCO's proprietary information. This case is, and is only, about the right of SCO not to have its proprietary software misappropriated and misused in violation of its written agreements and well-settled law.

4. As set forth in more detail below, IBM has breached its own obligations to SCO, induced and encouraged others to breach their obligations to SCO, interfered with SCO's business, and engaged in unfair competition with SCO, including by

   a) misusing and misappropriating SCO's proprietary software;

   b) inducing, encouraging, and enabling others to misuse and misappropriate SCO's proprietary software; and

   c) incorporating (and inducing, encouraging, and enabling others to incorporate) SCO's proprietary software into open source software offerings.

Parties, Jurisdiction and Venue

5. Plaintiff SCO is a Delaware corporation with its principal place of business in Utah County, State of Utah.

6. Defendant IBM is a Delaware corporation with its principal place of business in the State of New York.

7. This Court has general jurisdiction of this action pursuant to *Utah Code Ann.* §78-3-4(1).

8. Venue is properly situated in the Third Judicial District pursuant to *Utah Code Ann.* §78-13-5-7 in that plaintiff's action arose in the State of Utah and IBM maintains an office or place of business in Salt Lake County.

9. This Court has *in personam* jurisdiction over IBM pursuant to *Utah Code Ann.* §78-27-24 on the bases that IBM (a) is transacting business within this State, (b) is contracting to provide goods and services within this State and (c) is causing tortious injury and breach of contract within this State.

Background Facts

The UNIX Operating System

10. UNIX is a computer software operating system. Operating systems serve as the link between computer hardware and the various software programs ("applications") that run on the computer. Operating systems allow multiple software programs to run at the same time and generally function as a "traffic control" system for the different software programs that run on a computer.

11. By way of example, in the personal computing market, Microsoft Windows is the best-known operating system. The Windows operating system was designed to operate on computer processors ("chips") built by Intel. Thus, Windows serves as the link between Intel-based processors and the various software applications that run on personal computers.

12. In the business computing environment for larger corporations (often called the "enterprise" environment), UNIX is widely used.

13. The UNIX operating system was built by AT&T Bell Laboratories. Initially, UNIX was used to power AT&T's telecommunications business.

14. After successful in-house use of the UNIX software, AT&T began to license UNIX as a commercial product for use in enterprise applications by other large companies.

15. Over the years, AT&T Technologies Inc., a wholly owned subsidiary of AT&T, and its related companies licensed UNIX for wide-spread enterprise use. IBM, Hewlett-Packard, Inc. ("HP"), Sun Microsystems, Inc. ("Sun") and Silicon Graphics, Inc. ("SGI") became some of the principal United States-based UNIX licensees.

16. IBM, HP, Sun, SGI and the other major UNIX vendors each modified UNIX to operate on their own processors. Thus, HP-UNIX, for example, started identically to SGI-UNIX, excepting only that HP-UNIX was designed to interface with, and operate on, a different processor chip set than SGI-UNIX. Over time, each of the major vendors has included its own "value added" layer to help distinguish its marketplace offerings. These various versions of UNIX are sometimes referred to as UNIX "flavors."

17. All commercial UNIX "flavors" in use today are based on the UNIX System V Technology ("System V Technology").

18. SCO is the present owner of all software code and licensing rights to System V Technology.

19. IBM has branded its version or "flavor" of the UNIX software as "AIX." All references hereinafter to AIX are so defined. AIX is a modification of AT&T/SCO's licensed UNIX that is designed to run on IBM's processor chip set, currently called the "Power PC" processor.

20. There are multiple variants of processor chip sets in the industry. Most chip sets will not operate with the processor chip sets designed for other UNIX vendors. Thus, while the Intel chip set is commonly known to consumers because of Intel's aggressive advertising

campaign, it is by no means the only chip set used in the industry. Further, processor chip sets manufactured by Intel are not inter-operable with the IBM Power PC processor chip set or other chip sets, such as Sun Microsystem's "SPARC."

21. In the computing industry, the term "desktop computers" is sometimes used to refer to the less powerful computers used by individuals and some businesses and the term "workstation" is sometimes used to refer to the more powerful computers used primarily by enterprises.

22. The personal computing market for relatively low-priced desktop computers came to be dominated by the Windows operating system software operating on Intel-based processor chip sets. Thus, the acronym "Wintel" became known in the industry as the combination of Windows and Intel for relatively low-priced desktop computers for the personal computing market.

23. The enterprise computing market for high-performance (and higher priced) workstation computers came to be dominated by UNIX and the primary UNIX vendors identified above, each operating on a different processor chip set, and each using UNIX pursuant to licenses from AT&T/SCO. Except for SCO, none of the primary UNIX vendors ever developed a UNIX "flavor" to operate on an Intel-based processor chip set. This is because the earlier Intel processors were considered to have inadequate processing power for use in the more demanding enterprise market applications.

SCO's Creation of a Market for Intel – The Genesis of SCO OpenServer

24. As computers grew in popularity to perform business functions, the processing power of Intel-based processor chips also began to increase dramatically. Consistent with Intel

founder Gordon Moore's famous prediction, computer chips remained inexpensive while exponentially increasing in power and performance.

25. Seeing this emerging trend, it became evident to SCO that Intel chips would gradually gain widespread acceptance for use in the enterprise marketplace.

26. Therefore, while other major UNIX vendors modified UNIX for their own respective non-Intel computing platforms, SCO developed and licensed SCO/UNIX for Intel-based processors for enterprise use.

27. SCO's early engineers faced difficult design challenges in modifying UNIX for effective use on an Intel processing platform. The principal design constraint centered around the limited processing power the Intel chip possessed in the early 1980's. The Intel chip (designed as it was for personal computers) was not nearly as powerful as the enterprise chips used by IBM, Sun, SGI and others in their respective UNIX offerings.

28. Based on the early design constraint of Intel's limited processing power, SCO found an appropriate enterprise market niche for the early versions of SCO UNIX—single-purpose applications such as point-of-sale control, inventory control and transactions processing, with the highest possible reliability. Intel processors were fully capable of performing these relatively simple, repetitive tasks, and could do so at a lower cost and as reliably as the more powerful enterprise processing platforms sold by the other UNIX vendors, such as Sun and IBM.

29. One example of a customer well-suited to the earlier version of SCO UNIX software is McDonald's Corp. McDonald's has thousands of stores worldwide and needs all stores to operate on an integrated computing platform for ease of use, immediate access to information and uniformity. However, the actual computing requirements for each

individual McDonald's location are functionally simple—sales need to be tracked and recorded, and inventory functions need to be linked to sales. SCO's UNIX reliably fulfills McDonald's computing requirements at reduced cost.

30. SCO's business model provides enterprise customers the reliability, extensibility (ease of adding or changing functionality), scalability (ease of adding processors or servers to increase processing power) and security of UNIX—but on inexpensive Intel processor chips. This combination allowed customers to perform an extremely high number of transactions and, at the same time, gather and present the information from those transactions in an economical and useful way for enterprise decision makers.

31. The simplicity and power of this "UNIX on Intel" business model helped SCO grow rapidly. SCO gained other large enterprise customers such as CitiGroup, K-Mart, Cendant, Target Stores, Texas Instruments, BMW, Walgreens, Merck, Sherwin Williams, Radio Shack, Auto Zone, British Petroleum, Papa John's Pizza, Costco and many others.

32. As Intel's prominence grew in the enterprise computing market, SCO's early version of UNIX also grew into the operating system of choice for enterprise customers who wanted an Intel-based computing solution for a high volume of repetitive, simple computing transactions.

33. SCO's software offering based on its early development of UNIX for high volume, repetitive computing transactions is known in the market as "SCO OpenServer."

34. SCO OpenServer is based on the original UNIX Software Code developed by AT&T, but was modified by SCO for the functionality described above. Thus, while performing single-function applications, SCO OpenServer did so, and continues to do so, with the 99.999% reliability of UNIX.

35. Over 4,000 separate applications have been written by developers around the world specifically for SCO OpenServer. Most of these applications are vertical applications for targeted functions, such as point-of-sale control for specific industries, inventory control for specific industries, and funds transfer for the financial industry. Collectively, these various applications (software programs) are referred hereinafter as the "SCO OpenServer Applications."

The SCO OpenServer Libraries

36. In creating the thousands of SCO OpenServer Applications, each designed for a specialized function in a vertical industry, software developers wrote software code specifically for the SCO OpenServer shared libraries (hereinafter the "SCO OpenServer Shared Libraries").

37. A "shared library" is a common set of computer code inside an operating system that performs a routine function for all the applications (software programs) designed to run on that particular operating system. Thus, Microsoft Windows has its own set of shared libraries. SCO OpenServer (UNIX designed for Intel chips) has its set of own shared libraries. Sun Solaris (UNIX designed for SPARC chips) has its own set of shared libraries.

38. The shared libraries of all operating systems are designed with "hooks." These "hooks" are computer code that trigger the operation of certain routine functions. A software developer can shorten the development effort for any new software program and create a more efficient code base by writing programs that access the various "hooks" of the operating system, and thereby use a shared set of code built into the operating system to perform the repetitive, common functions that are involved in every program.

39. Every one of the specialized applications (software programs) designed by various third-party software developers for use on the SCO OpenServer operating system was written to access the various "hooks" built into SCO OpenServer; and therefore designed to access the SCO OpenServer Shared Libraries.

40. The SCO OpenServer Shared Libraries are the proprietary and confidential property of SCO. SCO OpenServer has been licensed to numerous customers subject to restrictions on use that prohibit unauthorized use of any of its software code, including without limitation, the SCO OpenServer Shared Libraries.

41. Shared libraries are by their nature unique creations based on various decisions to write code in certain ways, which are in great part random decisions of the software developers who create the shared library code base. There is no established way to create a specific shared library and the random choices in the location and access calls for "hooks" that are part of the creation of any shared library. Therefore, the mathematical probability of a customer being able to recreate the SCO OpenServer Shared Libraries without unauthorized access to or use of the source code of the SCO OpenServer Shared Libraries is nil.

SCO's Development of UnixWare on Intel

42. While the original SCO OpenServer operating system performs with all the reliability and dependability of other UNIX systems, it was originally designed for the initially low processing power of Intel chips. Therefore, SCO OpenServer does not contain, or require, the same level of scalability and extensibility that other versions of UNIX offer.

43. During or about 1992, SCO's predecessor in interest, Novell, Inc. ("Novell"), acquired all right, title and interest in and to the UNIX Software Code from AT&T for $750 million in Novell stock. For branding purposes, Novell renamed UNIX as "UnixWare."

44. Upon SCO's acquisition of the UNIX assets from Novell, SCO owned the rights to all UNIX software designed for Intel processors. SCO retained its original UNIX product, SCO OpenServer, which remained dedicated to the relatively low-power computing tasks identified above. SCO also had acquired UnixWare from Novell, which was designed for high-power computing tasks, and competed directly against the related UNIX products of Sun, IBM, SGI and others.

45. Existing UnixWare customers include large companies, such as NASDAQ, Lucent Technologies, Daimler Chrysler, K-Mart, Goodyear, Comverse, and numerous others. These customers all have highly sophisticated computing needs that now can be performed on an Intel processor chip set.

46. From and after September 1995, SCO dedicated significant amounts of funding and a large number of UNIX software engineers, many of whom were original AT&T UNIX software engineers, to upgrading UnixWare for high-performance computing on Intel processors.

47. By approximately 1998, SCO had completed the majority of this task. That is to say, UnixWare had largely been modified, tested and "enterprise hardened" to use Intel-based processors in direct competition against IBM and Power PC chips, the Sun SPARC chip and all other high-performance computing UNIX platforms for all complex computing demands. The term "enterprise hardened" means to assure that a software product is fully capable of performing under the rigorous demands of enterprise use.

48. SCO was ready to offer large enterprise customers a high-end UNIX computing platform based on inexpensive Intel processors. Given the rapid growth of Intel's performance capabilities and Intel's popularity in the marketplace, SCO found itself in a highly desirable market position. In addition, SCO still has its SCO OpenServer business for retail and inventory-targeted functions, with its 4,000 applications in support.

49. Prior to the events complained of in this action, SCO was the undisputed global leader in the design and distribution of UNIX-based operating systems on Intel-based processing platforms.

Project Monterey

50. As SCO was poised and ready to expand its market and market share for UnixWare targeted to high-performance enterprise customers, IBM approached SCO to jointly develop a new 64-bit UNIX-based operating system for Intel-based processing platforms. This joint development effort was widely known as Project Monterey.

51. Prior to this time, IBM had not developed any expertise to run UNIX on an Intel chip and instead was confined to its Power PC chip.

52. In furtherance of Project Monterey, SCO expended substantial amounts of money and dedicated a significant portion of SCO's development team to completion of the project.

53. Specifically, plaintiff and plaintiff's predecessor provided IBM engineers with valuable information and trade secrets with respect to architecture, schematics, and design of UnixWare and the UNIX Software Code for Intel-based processors.

54. By about May 2001, all technical aspects of Project Monterey had been substantially completed. The only remaining tasks of Project Monterey involved marketing and branding tasks to be performed substantially by IBM.

55. On or about May 2001, IBM notified plaintiff that it refused to proceed with Project Monterey, and that IBM considered Project Monterey to be "dead." In fact, in violation of its obligations to SCO, IBM chose to use and appropriate for its own business the proprietary information obtained from SCO.

AT&T UNIX Agreements

56. AT&T Technologies originally licensed the UNIX operating system software code to approximately 30,000 software licensees, including defendant IBM, for the UNIX operating system software source code, object code and related schematics, documentation and derivative works (collectively, the "UNIX Software Code"). To protect the confidential and proprietary source code information, these license agreements, as detailed below, contained strict limitations on use and dissemination of UNIX Software Code.

57. When SCO acquired the UNIX assets from Novell in 1995, it acquired rights in and to ***all*** (1) underlying, original UNIX software code developed by AT&T Bell Laboratories, including all claims against any parties relating to any right, property or asset used in the business of developing UNIX and UnixWare; (2) the sale of binary and source code licenses to various versions of UNIX and UnixWare; (3) the support of such products and (4) the sale of other products that are directly related to UNIX and UnixWare.

58. As a result of this acquisition, SCO became the authorized successor in interest to the original position of AT&T Technologies with respect to all licensed UNIX software products.

59. There are two primary types of software licensing agreements between AT&T Technologies and its various licensees:

a) The AT&T-related software agreements are collectively referred to hereinafter as the "AT&T UNIX Software Agreements."

b) The AT&T-related sublicensing agreements are collectively referred to hereinafter as the "AT&T UNIX Sublicensing Agreements."

The AT&T UNIX Software Agreements and the AT&T UNIX Sublicensing Agreements are sometimes collectively referred to hereinafter as the "AT&T UNIX Agreements."

60. Plaintiff is successor in interest to, and owner of, all contractual rights arising from the AT&T UNIX Agreements.

61. On February 1, 1985, AT&T and IBM entered into certain AT&T UNIX Agreements:

a) Software Agreement Number Soft-00015 ("AT&T / IBM Software Agreement" attached hereto and incorporated herein as Exhibit A);

b) Sublicensing Agreement Number Sub-00015A ("AT&T / IBM Sublicensing Agreement" attached hereto and incorporated herein as Exhibit B).

62. In addition, AT&T and IBM entered into a side letter on that date ("AT&T / IBM Side Letter" attached hereto and incorporated herein as Exhibit C).

63. Thereafter, Amendment X to Software Agreement SOFT-00015, as amended, was executed on or about October 16, 1996 by and among IBM, The Santa Cruz Operation, Inc. ("SCO") and Novell, Inc. ("IBM Amendment X" attached hereto and incorporated herein as Exhibit D).

64. Collectively these agreements, side letter and amendment are referred to hereinafter as the "AT&T / IBM UNIX Agreements."

65. Pursuant to the AT&T / IBM UNIX Agreements, the parties agreed, *inter alia*, to the following terms and conditions:

a) IBM recognizes the proprietary nature of the Software Products (defined to mean the UNIX Software Code) and the need to protect against its unrestricted disclosure (Side Letter, ¶9);

b) IBM may not transfer or dispose of the UNIX Software Code in whole or in part (AT&T / IBM Software Agreement §7.10);

c) IBM is required to hold all UNIX Software Code subject to the AT&T / IBM Agreements in confidence (Software Agreement §7.06(a) as amended by Side Letter ¶9); and

d) IBM may not use the UNIX Software Code directly for others or allow any use of the UNIX Software Code by others (Software Agreement §2.05).

66. The cumulative effect of these provisions requires IBM to protect the UNIX Software Code against *unrestricted disclosure*, *unauthorized transfer or disposition* and *unauthorized use* by others.

67. In addition, IBM's ability to sublicense UNIX Software Code for the use of others is restricted under §2.01 of the Sublicensing Agreement as follows:

> AT&T grants to LICENSEE personal, nontransferable and nonexclusive rights:
>
> a) To make copies of SUBLICENSED PRODUCTS and to furnish, either directly or through DISTRIBUTORS, such copies of SUBLICENSED PRODUCTS to customers anywhere in the world (subject to U.S. government export restrictions) for use on customer CPUs solely for each such customer's internal business purposes, provided that the entity (LICENSEE or a DISTRIBUTOR) furnishing the sublicensed products obtains agreement as specified in section 2.02 from such a customer, before or at the time of furnishing each copy of a SUBLICENSED PRODUCT, that:
>
> i) Only a personal, nontransferable and nonexclusive right to use such copy of the SUBLICENSED PRODUCTS on one CPU at a time is granted to such customer;

ii) No title to the intellectual property in the SUBLICENSED PRODUCT is transferred to such customer;

iii) Such customer will not copy the SUBLICENSED PRODUCT except as necessary to use such SUBLICENSED PRODUCT on such one CPU;

iv) Such customer will not transfer the SUBLICENSED PRODUCT to any other party except as authorized by the entity furnishing the SUBLICENSED PRODUCT;

v) Such customer will not export or re-export the SUBLICENSED PRODUCT without the appropriate United States or foreign government licenses;

vi) Such customer will not reverse compile or disassemble the SUBLICENSED PRODUCT;

b) To use SUBLICENSED PRODUCTS on LICENSEE'S CPUs solely for LICENSEE'S own internal business purposes; and

c) To use, and to permit DISTRIBUTORS to use, SUBLICENSED PRODUCTS without fee solely for testing CPUs that are to be delivered to customers and for demonstrating SUBLICENSED PRODUCTS to prospective customers.

This sublicensing limitation prohibits, among other things, transfer of title, transfer of the software by a customer, and free use of the UNIX Software Code except for demonstration purposes.

68. As a result of the foregoing, SCO's rights include the following five separate and distinct enforcement rights:

a) Rights under trade secrets and developer agreements involving SCO OpenServer;

b) Rights under customer licensing agreements involving SCO OpenServer;

c) Rights under trade secrets and developer agreements involving SCO UnixWare;

d) Rights under customer licensing agreements involving SCO UnixWare; and

e) Rights under all other original UNIX licenses issued by AT&T Technologies and its successors.

Marketplace Value of UNIX

69. UNIX's value in the enterprise marketplace is largely a function of its reliability, extensibility, and robust performance capability. That is to say, it virtually never needs repair, it performs well under a wide variety of adverse circumstances, and it can be extended throughout an enterprise and across multiple processors to perform unified or disparate tasks in a seamless computing environment. Because of these features, UNIX-based equipment has replaced mainframe computers for all but the most demanding computing tasks. And, because UNIX-based equipment is far cheaper than mainframe computing equipment, a customer who cannot otherwise justify the cost of mainframe computers can otherwise gain the advantages of "supercomputing" operations through use of UNIX-based equipment.

70. One or more of the different versions of UNIX-based operating systems sold by Sun, IBM, SCO, SGI, and others, is the operating system of choice for large enterprise computing operations in virtually 100% of the Fortune 1000 companies.

71. UNIX gained this prominence in the computing marketplace because of twenty years of development and over one billion dollars invested by plaintiff and its predecessors to create a stable, reliable operating system to perform the mission critical work required by large enterprises.

72. The recent rise of the global technology economy has been powered in large part by UNIX. Virtually every mission critical financial application in the world is powered by UNIX, including electronic transfers of funds. Real time stock trades are powered by UNIX.

Inventory controls and distributions are powered by UNIX. All major power grids and all major telecommunications systems are powered by UNIX. Many satellite control and defense control systems are powered by UNIX. Virtually every large corporation in the world currently operates part or all of its information technology systems on a UNIX operating system.

73. Based on its value in the marketplace, UNIX has become the most widely used and widely accepted operating system for enterprise, institutional and manufacturing applications throughout the world.

The Introduction of Linux

74. A new operating system derived from and based on UNIX recently has become popular among computer enthusiasts for use on personal, educational-based, and not-for-profit projects and initiatives. This operating system is named Linux.

75. The name "Linux" is commonly understood in the computing industry to be a combination of the word "UNIX" (referring to the UNIX operating system) and the name "Linus." The name "Linus" was taken from the person who introduced Linux to the computing world, Linus Torvalds.

76. The initial market positioning of Linux was to create a free UNIX-like operating system to be used by developers and computer hobbyists in personal, experimental, and not-for-profit applications. As such, Linux posed little, if any, commercial threat to UNIX.

The General Public License

77. Related to the development of the open source software development movement in the computing world, an organization was founded by former MIT professor Richard Stallman entitled "GNU."

78. The primary purpose of the GNU organization is to create free software based on valuable commercial software. The primary operating system advanced by GNU is Linux.

79. In order to assure that the Linux operating system (and other software) would remain free of charge and not-for-profit, GNU created a licensing agreement entitled the General Public License ("GPL").

80. Any software licensed under the GPL (including Linux) must, by its terms, not be held proprietary or confidential, and may not be claimed by any party as a trade secret or copyright property.

81. In addition, the GPL provides that, unlike SCO's UNIX operating system or IBM's AIX operating system or Sun's Solaris operating system, no warranty whatsoever runs with its software. The GPL includes the following language:

NO WARRANTY

BECAUSE THE PROGRAM IS LICENSED FREE OF CHARGE, THERE IS NO WARRANTY FOR THE PROGRAM, TO THE EXTENT PERMITTED BY APPLICABLE LAW...THE ENTIRE RISK AS TO THE QUALITY AND PERFORMANCE OF THE PROGRAM IS WITH YOU. SHOULD THE PROGRAM PROVE DEFECTIVE, YOU ASSUME THE COST OF ALL NECESSARY SERVICING, REPAIR OR CORRECTION.

Limitations of Linux Before IBM's Involvement

82. Linux started as a hobby project of a 19-year old student. Linux has evolved through bits and pieces of various contributions by numerous software developers using single processor computers. Virtually none of these software developers and hobbyists had access to enterprise-scale equipment and testing facilities for Linux development. Without access to such equipment, facilities, sophisticated methods, concepts and coordinated know-how, it would be difficult or impossible for the Linux development community to create a grade of Linux adequate for enterprise use.

83. As long as the Linux development process remained uncoordinated and random, it posed little or no threat to SCO, or to other UNIX vendors, for at least two major reasons: (a) Linux quality was inadequate since it was not developed and tested in coordination for enterprise use and (b) enterprise customer acceptance was non-existent because Linux was viewed by enterprise customers as a "fringe" software product.

84. Prior to IBM's involvement, Linux was the software equivalent of a bicycle. UNIX was the software equivalent of a luxury car. To make Linux of necessary quality for use by enterprise customers, it must be re-designed so that Linux also becomes the software equivalent of a luxury car. This re-design is not technologically feasible or even possible at the enterprise level without (1) a high degree of design coordination, (2) access to expensive and sophisticated design and testing equipment; (3) access to UNIX code, methods and concepts; (4) UNIX architectural experience; and (5) a very significant financial investment.

85. For example, Linux is currently capable of coordinating the simultaneous performance of 4 computer processors. UNIX, on the other hand, commonly links 16 processors and can successfully link up to 32 processors for simultaneous operation. This difference in memory management performance is very significant to enterprise customers who need extremely high computing capabilities for complex tasks. The ability to accomplish this task successfully has taken AT&T, Novell and SCO at least 20 years, with access to expensive equipment for design and testing, well-trained UNIX engineers and a wealth of experience in UNIX methods and concepts.

86. It is not possible for Linux to rapidly reach UNIX performance standards for complete enterprise functionality without the misappropriation of UNIX code, methods or concepts to achieve such performance, and coordination by a larger developer, such as IBM.

IBM's Scheme

87. As market awareness of Linux evolved, IBM initiated a course of conduct with the purpose and effect of using Linux to **unfairly** compete in the enterprise market. At that point in time, four important events were occurring simultaneously in the enterprise software computing marketplace:

a) Intel chips were becoming widely demanded by enterprise customers since Intel's processing power had increased and its cost had remained low;

b) SCO's market power in the enterprise marketplace was increasing based on the combined capabilities of SCO OpenServer, SCO UnixWare and SCO's unique position as UNIX on Intel;

c) Free Linux had carved a niche in not-for-profit and non-business uses; and

d) IBM was in the process of evolving its business model from products to services.

88. In the process of moving from product offerings to services offerings, IBM dramatically increased its staff of systems integrators to 120,000 strong under the marketing brand "IBM Global Services." By contrast, IBM's largest historic competitor as a seller of UNIX software, Sun Microsystems, has a staff of approximately 12,000 systems integrators. With ten times more services-related personnel than its largest competitor, IBM sought to move the corporate enterprise computing market to a services model based on free software on Intel processors.

89. By undermining and destroying the entire marketplace value of UNIX in the enterprise market, IBM would gain even greater advantage over all its competitors whose revenue model was based on licensing of software rather than sale of services.

90. To accomplish the end of transforming the enterprise software market to a services-driven market, IBM set about to deliberately and improperly destroy the economic value of UNIX and particularly the economic value of UNIX on Intel-based processors.

91. Among other actions, IBM misappropriated the confidential and proprietary information from SCO in Project Monterey. IBM thereafter misused its access to the UNIX Software Code. On or about August 17, 2000, IBM and Red Hat Inc. issued a joint press release through M2 Presswire announcing, *inter alia*, as follows:

> "IBM today announced a global agreement that enables Red Hat, Inc. to bundle IBM's Linux-based software.
>
> IBM said it would contribute more than 100 printer drivers to the open source community. With these announcements, IBM is making it easier for customers to deploy e-business applications on Linux using a growing selection of hardware and software to meet their needs. ***The announcements are the latest initiative in IBM's continuing strategy to embrace Linux across its entire product and services portfolio.***
>
> ***Helping build the open standard, IBM has been working closely with the open source community, contributing technologies and resources.***"

92. Thereafter, on December 20, 2000, IBM Vice President Robert LeBlanc disclosed IBM's improper use of confidential and proprietary information learned from Project Monterey to bolster Linux as part of IBM's long term vision, stating:

> "Project Monterey was actually started before Linux did. When we started the push to Monterey, the notion was to have one common OS for several architectures. The notion actually came through with Linux, which was open source and supported all hardware. ***We continued with Monterey as an extension of AIX [IBM UNIX] to support high-end hardware.*** AIX 5 has the best of Monterey. ***Linux cannot fill that need today, but over time we believe it will. To help out we're making contributions to the open source***

> ***movement like the journal file system.*** We can't tell our customers to wait for Linux to grow up.
>
> If Linux had all of the capabilities of AIX, where we could put the AIX code at runtime on top of Linux, then we would.
>
> Right now the Linux kernel does not support all the capabilities of AIX. We've been working on AIX for 20 years. Linux is still young. We're helping Linux kernel up to that level. We understand where the kernel is. We have a lot of people working now as part of the kernel team. At the end of the day, the customer makes the choice, whether we write for AIX or for Linux.
>
> ***We're willing to open source any part of AIX that the Linux community considers valuable.*** We have open-sourced the journal filesystem, print driver for the Omniprint. AIX is 1.5 million lines of code. If we dump that on the open source community then are people going to understand it? You're better off taking bits and pieces and the expertise that we bring along with it. We have made a conscious decision to keep contributing."

93. IBM, however, was not and is not in a position legally to "open source any part of AIX that the Linux community considers valuable." Rather, IBM is obligated ***not*** to open source AIX because it contains SCO's confidential and proprietary UNIX operating system and, more importantly, the code that is essential for running mission critical applications (*e.g.*, wire transfers) for large businesses.

94. Over time, IBM made a very substantial financing commitment to improperly put SCO's confidential and proprietary information into Linux, the free operating system. On or about May 21, 2001 IBM Vice President Richard Michos, stated in an interview to Independent Newspapers, New Zealand, *inter* alia:

> "***IBM will put US $1 billion this year into Linux, the free operating system.***
>
> IBM wants to be part of the community that makes Linux successful. It has a development team that works on improvements to the Linux kernel, or source code. ***This includes programmers who work in the company's Linux technology center, working on making the company's technology Linux-compatible.***"

That team of IBM programmers is improperly extracting and using SCO's UNIX technology from the same building that was previously the UNIX technology center.

95. In a news article issued by e-Business Developer on or about August 10, 2001, the following conduct was attributed to IBM regarding participation in the open source software movement:

> "Another example is when IBM realized that the open-source operating system (OS) Linux provided an economical and reliable OS for its various hardware platforms. However, IBM needed to make changes to the source to use it on its full range of product offerings.
>
> IBM received help from the open-source community with these changes and in return, released parts of its AIX OS to open source. IBM then sold its mainframes running Linux to Banco Mercantile and Telia Telecommunications, replacing 30 Windows NT boxes and 70 Sun boxes respectively - obviously a win for IBM, which reduced its cost of maintaining a proprietary OS while increasing its developer base. ***IBM's AIX contributions were integrated into the standard Linux source tree, a win for open source.***"

96. Again, "IBM's AIX contributions" consisted of the improper extraction, use, and dissemination of SCO'S UNIX source code and libraries, and unauthorized misuse of UNIX methods, concepts, and know-how.

97. In a news article issued by IDC on or about August 14, 2001, the following was reported:

> "IBM continued its vocal support of the Linux operating system Tuesday, saying the company will gladly drop its own version of UNIX from servers and replace it with Linux if the software matures so that it can handle the most demanding tasks.
>
> IBM executives speaking here at the company's solutions developer conference outlined reasons for the company's Linux support, pointing to features in the operating system that could push it past UNIX for back-end computing. ***While they admit that Linux still has a way to go before it can compete with the functions available on many flavors of UNIX, IBM officials said that Linux could prove more cost-effective and be a more user-friendly way to manage servers.***

> '*We are happy and comfortable with the idea that Linux can become the successor, not just for AIX, but for all UNIX operating systems,*' said Steve Mills, senior vice president and group executive of the IBM Software Group, during a news conference."

98. Continuing with its "happy and comfortable" idea that Linux succeeds at the expense of UNIX, on or about January 23, 2003, IBM executive Steve Mills' gave a keynote speech at LinuxWorld, a trade show, which was reported by Computer Reseller News, *IBM's Mills: Linux Will be on Par with UNIX in No Time*, January 23, 2003, *inter alia*, as follows:

> "***IBM will exploit its expertise in AIX to bring Linux up to par with UNIX,*** an IBM executive said Thursday.
>
> During his keynote at LinuxWorld here, IBM Senior Vice President and group executive Steve Mills acknowledged that ***Linux lags behind UNIX in scalability, SMP support, fail-over capabilities and reliability--but not for long.***
>
> ***'The pathway to get there is an eight-lane highway,' Mills said, noting that IBM's deep experience with AIX and its 250-member open-source development team will be applied to make the Linux kernel as strong as that of UNIX. 'The road to get there is well understood.'***
>
> * * *
>
> ***Mills hinted that the company's full development capabilities will be brought to bear in engineering the Linux kernel to offer vastly improved scalability, reliability and support for mixed workloads--and to obliterate UNIX.***"

99. The only way that the pathway is an "eight-lane highway" for Linux to achieve the scalability, SMP support, fail-over capabilities and reliability of UNIX is by the improper extraction, use, and dissemination of the proprietary and confidential UNIX Software Code and libraries. Indeed, UNIX was able to achieve its status as the premiere operating system only after decades of hard work, beginning with the finest computer scientists at AT&T Bell Laboratories, plaintiff's predecessor in interest.

100. Based on other published statements, IBM currently has over 7,000 employees involved in the transfer of UNIX knowledge into the Linux business of IBM, Red Hat and SuSE (the largest European Linux distributor). On information and belief, a large number of the said IBM employees currently working in the transfer of UNIX to Linux have, or have had, access to the UNIX Software Code.

IBM's Coordination of Linux Development Efforts

101. On information and belief, IBM has knowingly induced, encouraged, and enabled others to distribute proprietary information in an attempt to conceal its own legal liability for such distributions:

> "What is wrong about this [Linux] distribution, is basically the millions of lines of code that we never have seen. We don't know if there are any patent infringements [in this code] with somebody we don't know. ***We don't want to take the risk of being sued for a patent infringement. That is why we don't do distributions, and that's why we have distributors.*** Because distributors are not so much exposed as we are. So that's the basic deal as I understand it."
>
> Karl-Heinz Strassemeyer, IBM The Register, 11/19/2002, www.theregister.co.uk/content/4/28183.html

102. IBM is affirmatively taking steps to destroy all value of UNIX by improperly extracting and using the confidential and proprietary information it acquired from UNIX and dumping that information into the open source community. As part of this effort, IBM has heavily invested in the following projects to further eliminate the viability of UNIX:

a) The Linux Technology Center was launched in 2001 with the advertised intent and foreseeable purpose of transferring and otherwise disposing of all or part of UNIX, including its concepts, ideas, and know-how, into an open source Linux environment;

b) The IBM Linux Center of Competency was launched to assist and train financial services companies in an accelerated transfer of UNIX to Linux with the advertised intent and foreseeable purpose of transferring and otherwise disposing of all or part of UNIX, including its concepts, ideas, and know-how, into an open source Linux environment;

c) A carrier-grade Linux project has been undertaken to use UNIX code, methods, concepts, and know-how for the unlawful purpose of transforming Linux into an enterprise-hardened operating system;

d) A data center Linux project has been undertaken to use UNIX code, methods, concepts, and know-how for the unlawful purpose of transforming Linux into an enterprise-hardened operating system; and

e) Other projects and initiatives have been undertaken or supported that further evidence the improper motive and means exercised by IBM in its efforts to eliminate UNIX and replace it with free Linux.

103. But for IBM's coordination of the development of enterprise Linux, and the misappropriation of UNIX to accomplish that objective, the Linux development community would not timely develop the quality or customer support necessary for wide-spread use in the enterprise market.

FIRST CAUSE OF ACTION
(Misappropriation of Trade Secrets—*Utah Code Ann.* §13-24-1 *et seq.*)

104. Plaintiff incorporates and re-alleges by reference paragraphs 1-103 above.

105. Plaintiff is the owner of unique know how, concepts, ideas, methodologies, standards, specifications, programming, techniques, UNIX Software Code, object code, architecture,

design and schematics that allow UNIX to operate with unmatched extensibility, scalability, reliability and security (hereinafter defined as "SCO's Trade Secrets"). SCO's Trade Secrets provide SCO with an advantage over its competitors.

106. SCO's Trade Secrets are embodied within SCO's proprietary SCO OpenServer and its related shared libraries and SCO's UnixWare and its related shared libraries.

107. SCO and its predecessors in interest have expended over one billion dollars to develop SCO's Trade Secrets.

108. IBM, through improper means acquired and misappropriated SCO's Trade Secrets for its own use and benefit, for use in competition with SCO and in an effort to destroy SCO.

109. At the time that IBM acquired access to SCO's Trade Secrets, IBM knew that it had a duty to maintain the secrecy of SCO's Trade Secrets or limit their use.

110. SCO's Trade Secrets derive independent economic value, are not generally known to third persons, are not readily ascertainable by proper means by other persons who can obtain economic value from their disclosure and use, and are subject to reasonable efforts by SCO and its predecessors to maintain secrecy.

111. The acts and conduct of IBM in misappropriating and encouraging, inducing and causing others to commit material misappropriation of SCO's Trade Secrets are the direct and proximate cause of a near-complete devaluation and destruction of the market value of SCO OpenServer and SCO UnixWare that would not have otherwise occurred but for the conduct of IBM.

112. Pursuant to *Utah Code Ann.* §13-24-4, plaintiff is entitled to an award of damages against IBM in the following amounts:

a) Actual damages as a result of the theft of trade secrets; together with

b) Profits from IBM's Linux-related business on account of its misappropriation through the time of trial; together with

c) Additional foreseeable profits for future years from IBM's Linux-related business on account of its misappropriation in an amount to be proven at the time of trial.

113. Because IBM's misappropriation was willful, malicious, and in reckless disregard of Plaintiff's rights, SCO is entitled to an award of exemplary damages against IBM in an amount equal to two times the amount of damages, pursuant to *Utah Code Ann.* §13-24-4(2).

114. Plaintiff is also entitled to an award of attorneys' fees and costs in an amount to be proven at the time of trial pursuant to *Utah Code Ann.* §13-24-5.

SECOND CAUSE OF ACTION
(Unfair Competition)

115. Plaintiff incorporates and re-alleges by reference paragraphs 1-114 above.

116. Plaintiff and its predecessors have built the UNIX System V Technology, the Unix Software Code, SCO OpenServer, UnixWare and their derivatives through very substantial efforts over a time span in excess of 20 years and expenditure of money in excess of $1 billion.

117. IBM has engaged in a course of conduct that is intentionally and foreseeably calculated to undermine and/or destroy the economic value of the UNIX Software Code anywhere and everywhere in the world, and to undermine and/or destroy plaintiff's rights to fully exploit and benefit from its ownership rights in and to UNIX System V Technology, the Unix Software Code, SCO OpenServer, UnixWare and their derivatives, and thereby seize the value of UNIX System V Technology, the Unix Software Code, SCO OpenServer,

UnixWare and their derivatives directly for its own benefit and indirectly for the benefit of its Linux distribution partners.

118. In furtherance of its scheme of unfair competition, IBM has engaged in the following conduct:

a) Misappropriation of trade secrets and confidential information of plaintiff;

b) Violation of confidentiality provisions running to the benefit of plaintiff;

c) Inducing and encouraging others to violate confidentiality provisions and to misappropriate trade secrets and confidential information of plaintiff;

d) Contribution of trade secret protected software code for incorporation into one or more Linux or other free UNIX-like software releases, intended for transfer of ownership to the general public and distribution to the enterprise software market under the General Public License, with the effect and intent of transferring ownership thereto;

e) Use of deceptive means and practices in dealing with plaintiff with respect to its software development efforts; and

f) Other methods of unlawful and/or unfair competition.

119. IBM's unfair competition has directly and/or proximately caused significant foreseeable and consequential harm to plaintiff in the following particulars:

a) Plaintiff's revenue stream from UNIX licenses for Intel-based processing platforms has decreased substantially;

b) As Intel-based processors have now become the processing platform of choice for a rapidly-increasing customer base of enterprise software users, plaintiff has been deprived of the opportunity to fairly exploit its market-leading position for UNIX on

Intel-based processors, which revenue opportunity would have been very substantial on a recurring, annual basis but for IBM's unfairly competitive practices;

c) Plaintiff stands at imminent risk of being deprived of its entire stream of all UNIX licensing revenue in the foreseeably near future;

d) Plaintiff has been deprived of the effective ability to market and sell its new UNIX-related improvements, including a 64-bit version of UNIX for Intel-based processors (based on Project Monterey) and its new web-based UNIX-related products, including UNIX System VI;

e) Plaintiff has been deprived of the effective revenue licensing opportunity to transfer its existing UNIX System V customer base to UNIX System VI; and

f) Plaintiff has been deprived of the effective ability to otherwise fully and fairly exploit UNIX's market-leading position in enterprise software market, which deprivation is highly significant given the inability of Microsoft Windows NT to properly support large-scale enterprise applications.

120. As a result of IBM's unfair competition and the marketplace injury sustained by plaintiff as set forth above, plaintiff has suffered damages in an amount to be proven at trial, but no less than $1 billion, together with additional damages through and after the time of trial foreseeably and consequentially resulting from IBM's unfair competition in an amount to be proven at the time of trial.

121. IBM's unfairly competitive conduct was also intentionally and maliciously designed to destroy plaintiff's business livelihood and all opportunities of plaintiff to derive value from the UNIX Software Code in the marketplace. As such, IBM's wrongful acts and course of conduct has created a profoundly adverse effect on UNIX business worldwide. As such,

this Court should impose an award of punitive damages against IBM in an amount to be proven and supported at trial.

THIRD CAUSE OF ACTION
(Interference with Contract)

122. Plaintiff incorporates and re-alleges by reference paragraphs 1-121 above.

123. SCO has contracts with customers around the world for licensing of UNIX Software.

124. IBM knew and should have known of these corporate software licensing agreements between SCO and its customers, including the fact that such agreements contain confidentiality provisions and provisions limiting the use to which the licensed code can be put.

125. IBM, directly and through its Linux distribution partners, has intentionally and without justification induced SCO's customers and licensees to breach their corporate licensing agreements, including but not limited to, inducing the customers to reverse engineer, decompile, translate, create derivative works, modify or otherwise use the UNIX software in ways in violation of the license agreements. These customers include Sherwin Williams, Papa John's Pizza, and Auto Zone, among others. The licensees include Hewlett-Packard, Fujitsu, NEC and Toshiba, among others.

126. IBM's tortious interference has directly and/or proximately caused significant foreseeable damages to SCO, including a substantial loss of revenues.

127. IBM's tortious conduct was also intentionally and maliciously designed to destroy plaintiff's business livelihood and all opportunities of plaintiff to derive value from the UNIX Software Code in the marketplace. As such, this Court should impose an award of punitive damages against IBM in an amount to be proven and supported at trial.

FOURTH CAUSE OF ACTION
(Breach of Contract)

128. Plaintiff incorporates and realleges by reference paragraphs 1-127 above.

129. IBM has numerous obligations under the AT&T / IBM UNIX Agreements, some of which are detailed below.

130. Paragraph 11 of the Side Letter contains the following language regarding the intent of the parties to prevent unrestricted disclosure of UNIX:

> You [IBM] recognize the proprietary nature of SOFTWARE PRODUCTS and the need to protect SOFTWARE PRODUCTS from unrestricted disclosure.

131. IBM is prohibited under §7.10 of the Software Agreement from transferring or disposing of UNIX in a way that destroys its economic value. The applicable contract language reads as follows:

> Except as provided in Section 7.06(b), nothing in this Agreement grants to Licensee the right to sell, lease or otherwise transfer or dispose of a SOFTWARE PRODUCT in whole or in part.

132. IBM has a duty of confidentiality to protect the confidentiality of SCO's trade secrets. The Side Letter ¶9 provides, in part, as follows:

> LICENSEE [IBM] agrees that it shall hold SOFTWARE PRODUCTS subject to this Agreement in confidence for AT&T. LICENSEE further agrees that it shall not make any disclosure of such SOFTWARE PRODUCTS to anyone, except to employees of LICENSEE to whom such disclosure is necessary to the use for which rights are granted, LINCENSEE shall appropriately notify each employee to whom any such disclosure is made that such disclosure is made in confidence and shall be kept in confidence by such employee.
>
> IBM is further required by ¶2.01 of the Sublicensing Agreement to obtain confidentiality agreements from its distributors and customers, and by ¶3 of the Side letter to obtain the same from contractors.

133. IBM is prohibited under Section 2.05 of the Software Agreement from using UNIX for others. The applicable language provides:

> No right is granted by this Agreement for the use of SOFTWARE PRODUCTS directly for others, or for any use of SOFTWARE PRODUCTS by others.

134. The cumulative effect of these provisions requires IBM to protect SCO's valuable UNIX trade secrets against *unrestricted disclosure, unauthorized transfer or disposition* and *unauthorized use* by others.

135. Notwithstanding these provisions, IBM has subjected SCO's UNIX trade secrets to unrestricted disclosure, unauthorized transfer and disposition, unauthorized use, and has otherwise encouraged others in the Linux development community to do the same. SCO, therefore, has terminated IBM's license to use UNIX-based software products. (See letter dated March 6, 2003, attached hereto and incorporated herein as Exhibit E).

136. As a result of IBM's breaches, SCO has suffered substantial damages in an amount to be proven at trial.

Prayer for Relief

WHEREFORE, having fully set forth its complaint, plaintiff prays for relief from this Court as follows:

1. For relief under the First Cause of Action for misappropriation of trade secrets arising from *Utah Code Ann.* §13-24-1 et seq., and damages for violations thereof, together with additional damages through and after the time of trial;

2. For relief under the Second Cause of Action for unfair competition arising from common law, and damages for violations thereof, together with additional damages through and after the time of trial;

3. For relief under the Third Cause of Action for tortious interference, and damages for violations thereof, together with additional damages through and after the time of trial;
4. For damages under the Fourth Cause of Action for breach of contract of the AT&T / IBM UNIX Agreements together with additional damages through and after the time of trial foreseeably and consequentially resulting from IBM's breach of contract in an amount to be proven at the time of trial;
5. For punitive damages under common law for IBM's malicious and willful conduct in an amount to be proven at trial;
6. For exemplary damages under *Utah Code Ann.* § 13-24-1 in an amount equal to twice the award under the First Cause of Action for misappropriation of trade secrets;
7. For attorneys' fees as provided by *Utah Code Ann.* §13-24-5 and by contract in an amount to be proven at trial; and
8. For all other relief deemed just and proper by this Court.

Jury Trial Demand

Pursuant to U.R.Civ.P. Rule 38(b), plaintiff demands trial by jury of any issue triable of right by jury and tenders the statutory jury fee upon the filing of this Complaint.

DATED this 6 day of March, 2003.

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