

ORIGINAL
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

_____)	
RED HAT, INC.,)	
)	
Plaintiff,)	Civil Action No.: 03-772-SLR
)	
v.)	
)	
THE SCO GROUP, INC. (formerly Caldera)	
International, Inc.),)	
)	
Defendant.)	
_____)	

MOTION TO SUPPLEMENT THE RECORD

Red Hat, Inc. ("Red Hat"), hereby moves pursuant to Local Rule 7.1.2(c), to supplement the record with regard to the motion to dismiss filed by The SCO Group, Inc. ("SCO").

As more fully explained below, letters sent by SCO after the motion to dismiss was fully briefed provide compelling further evidence that a justiciable case or controversy exists and contradict earlier representations made by SCO to this Court. These letters explicitly accuse one of Red Hat's customers of infringing SCO's copyrights by using the computer operating system Linux distributed to that customer by Red Hat. The existence of a justiciable controversy was also confirmed by the public statements made just this week by SCO's Darl McBride, that SCO intends to begin suing end users of Linux "within the next few weeks" and "by February 18." Because these letters and statements occurred only recently, this evidence was not available to Red Hat when it opposed SCO's motion.

In support of this motion to supplement the record, Red Hat respectfully represents as follows:

1. On August 4, 2003, Red Hat filed a complaint against SCO seeking, inter alia, a declaratory judgment that Linux software sold, used or distributed by Red Hat does not infringe any rights that SCO may have pursuant to Section 106 of the United States Copyright Act, or otherwise.

2. On September 15, 2003, SCO moved to dismiss Red Hat's Complaint claiming, inter alia, that this Court lacks subject matter jurisdiction to decide the copyright declaratory judgment claim, arguing that there is no "actual controversy" between the parties, and asserting that Red Hat is merely attempting to seek "general guidance" for the Linux industry. Red Hat opposed SCO's motion, and the matter has been fully briefed.

3. As explained in Red Hat's opposition to SCO's motion, threats to Red Hat's customers plainly establish an "actual controversy" justifying declaratory relief. Indeed, the Third Circuit specifically has held that "it is not necessary that notice be given directly to the plaintiff or that any threat be made to sue the plaintiff. Notice to plaintiff's customers is sufficient." Aralac, Inc. v. Hat Corp. of Am., 166 F.2d 286, 292-93 (3d. Cir. 1948). See also Cargill, Inc. v. Sears Petroleum & Transp. Corp., No. 02 Civ.1396, 2002 WL 31426308, at *5 (S.D.N.Y. Oct. 28, 2002)(stating that "informing customers of a potential patent dispute is exactly the sort of damaging claim that the [Declaratory Judgment Act] is designed to address"); Nippon Elec. Glass Co., v. Sheldon, 489 F. Supp. 119, 121-22 (S.D.N.Y. 1980)(stating that "accusation need not be made directly to the declaratory judgment plaintiff, but may be made to its customers or to the industry at large").

4. In Red Hat's Complaint and in its opposition to SCO's motion to dismiss, Red Hat detailed a number of statements that SCO had already made to Red Hat's customers and potential customers. SCO recently has sent a letter to a Red Hat customer claiming that the

customer's use of Linux infringes SCO's copyrights. In fact, the customer has advised both SCO and Red Hat that it is looking to Red Hat for a response. Red Hat's response is this declaratory judgment action to demonstrate – once and for all – that SCO's prominent public statements about copyright infringement are false. Only in this way can SCO's avowed campaign to discredit and inhibit the use and sales of Linux products and services distributed by Red Hat be stopped.

5. More specifically, on December 19, 2003, SCO sent a letter (Exhibit A) to Lehman Brothers Holdings, Inc., a Red Hat Linux customer. In this letter, SCO refers back to a May 2003 warning that use of Linux violates SCO's intellectual property rights in UNIX. The letter identifies a portion of the code that SCO alleges was copied without authorization, and explicitly states that use of the Linux operating system, and thus the one distributed to Lehman Brothers by Red Hat, violates SCO's rights under the United States Copyright Act. SCO demands that Lehman Brothers "discontinue these violations" and that SCO "will take appropriate actions to protect [its] rights."

6. Following up on its first letter, SCO then sent two more letters to the Lehman Brothers' Chairman and Chief Executive Officer, Richard Fuld (Exhibit B), and its Chief of Operations and Technology, Jonathan Beyman (Exhibit C). These letters reiterate SCO's position that use of Linux violates the Copyright Act. SCO concludes this letter by stating that:

If you fail to respond to our efforts to pursue a licensing arrangement, WE WILL TURN YOUR NAME OVER TO OUR OUTSIDE COUNSEL FOR CONSIDERATION OF LEGAL ACTION.

7. Lehman Brothers responded (attached as Exhibit D), and among other things, noted that it purchased Linux products and services from Red Hat

8. Further, at a public presentation at Harvard Law School on Monday, February 2, 2004, SCO's President and Chief Executive Officer, Darl McBride, emphasized that SCO is planning to begin suing end users of Linux. McBride promised that SCO would be "in the courtroom with an end user by February 18," that lawsuits against end users are "coming up within the next few weeks," and that SCO's outside legal counsel has told McBride that "we'll have them filed by February 18" and "we expect that to happen."

9. This information should be made a part of the record before this Court because it demonstrates – if any more demonstration was necessary – precisely the unfair tactics and unsubstantiated claims that SCO has utilized for almost one year to stall the growth and business of companies like Red Hat who distribute and support the Linux operating system. Red Hat and its customers should not be forced to wait for the hammer to fall before being able to demonstrate in court that SCO's year-long public campaign against Linux, companies like Red Hat, which distribute and support Linux, and companies like Lehman Brothers who utilize it, is an emperor without clothes. These circumstances are exactly those for which the declaratory judgment statute was created. SCO has yet again engaged in conduct that gives rise to an objectively reasonable apprehension on Red Hat's part that Red Hat and its customers will be sued and that conduct is, therefore, further evidence that a case or controversy does exist. See Interdynamics, Inc. v. Firma Wolf, 698 F.2d 157, 166 (3d Cir. 1982) (patent infringement); Dow Chem. Co. v. Exxon Chem. Patents, Inc., Civ. A. No. 94-572-SLR, 1995 WL 562289, at *7 (D. Del. Aug. 16, 1995).

10. These SCO letters and statements also contradict earlier representations made by SCO to this Court. See SCO Reply Br. p. 1- 2 ("...Red Hat has not alleged a 'reasonable apprehension' that SCO has threatened it or its customers with claims for copyright

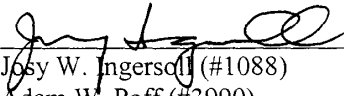
infringement...."); (SCO Reply Br. p. 5-6.) (denying that there is an "unmistakable threat of litigation" which would put customers "in reasonable apprehension of suit...."). Plainly, SCO's recent letters and statements due exactly what SCO previously denied.

WHEREFORE, Red Hat respectfully requests that this Court enter an order, in the form submitted herewith, permitting the submission of this information in further support of Red Hat's opposition to SCO's motion to dismiss.

DATED: February 11, 2004

Respectfully submitted,

RED HAT, INC.
By its attorneys



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Plaintiff,)	Civil Action No.: 03-772-SLR
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v.)	
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THE SCO GROUP, INC. (formerly Caldera International, Inc.),)	
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Defendant.)	
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ORDER

WHEREFORE, the Court having considered Red Hat, Inc.'s Motion to Supplement the Record, and the parties' submissions,

IT IS HEREBY ORDERED that Red Hat, Inc.'s Motion to Supplement the Record is granted.

Dated:

U.S.D.J.



December 19, 2003

Richard Fuld
Chairman & CEO
Lehman Brothers Holdings, Inc.
399 Park Avenue
New York, NY 10022

Re: The SCO Group, Inc. ("SCO")

Unix Licensee,

In May 2003, SCO warned about enterprise use of the Linux operating system in violation of its intellectual property rights in UNIX technology. Without exhausting or explaining all potential claims, this letter addresses one specific area in which certain versions of Linux violate SCO's rights in UNIX.

In this letter we are identifying a portion of our copyright protected code that has been incorporated into Linux without our authorization. Also, our copyright management information has been removed from these files. These facts support our position that the use of the Linux operating system in a commercial setting violates our rights under the United States Copyright Act, including the Digital Millennium Copyright Act. We are notifying you of these facts so you can take steps to discontinue these violations. We believe these violations are serious, and we will take appropriate actions to protect our rights. No one may use our copyrighted code except as authorized by us. The details of our position are set forth below. Once you have reviewed our position, we will be happy to further discuss your options and work with you to remedy this problem.

Certain copyrighted application binary interfaces ("ABI Code") have been copied verbatim from the UNIX System V code base and contributed to Linux for distribution under the General Public License ("GPL") without proper authorization and without copyright attribution. While some *application programming interfaces* ("API Code") have been made available over the years through POSIX and other open standards, the UNIX System V *ABI Code* has only been made available under copyright restrictions. AT&T made these binary interfaces available in order to support application development to System V-based operating systems and to assist System V licensees in the development process. ***The System V ABIs were never intended or authorized for unrestricted use or distribution under the GPL in Linux.*** As the copyright holder, SCO has never granted such permission. Nevertheless, many of the ABIs contained in Linux, and improperly distributed under the GPL, are direct copies of UNIX System V copyrighted software code.

Any part of any Linux file that includes the copyrighted binary interface code must be removed. Files in Linux version 2.4.21 and other versions that incorporate the copyrighted binary interfaces include:

include/asm-alpha/errno.h
include/asm-arm/errno.h
include/asm-cris/errno.h
include/asm-i386/errno.h
include/asm-ia64/errno.h
include/asm-m68k/errno.h
include/asm-mips/errno.h
include/asm-mips64/errno.h
include/asm-parisc/errno.h
include/asm-ppc/errno.h
include/asm-ppc64/errno.h
include/asm-s390/errno.h
include/asm-s390x/errno.h
include/asm-sh/errno.h
include/asm-sparc/errno.h
include/asm-sparc64/errno.h
include/asm-x86_64/errno.h
include/asm-alpha/signal.h
include/asm-arm/signal.h
include/asm-cris/signal.h
include/asm-i386/signal.h
include/asm-ia64/signal.h
include/asm-m68k/signal.h
include/asm-mips/signal.h
include/asm-mips64/signal.h
include/asm-parisc/signal.h
include/asm-ppc/signal.h
include/asm-ppc64/signal.h
include/asm-s390/signal.h
include/asm-s390x/signal.h
include/asm-sh/signal.h
include/asm-sparc/signal.h
include/asm-sparc64/signal.h
include/asm-x86_64/signal.h
include/linux/stat.h
include/linux/ctype.h
lib/ctype.c

include/asm-alpha/ioctl.h
include/asm-alpha/ioctls.h
include/asm-arm/ioctl.h
include/asm-cris/ioctl.h
include/asm-i386/ioctl.h
include/asm-ia64/ioctl.h
include/asm-m68k/ioctl.h
include/asm-mips/ioctl.h
include/asm-mips64/ioctl.h
include/asm-mips64/ioctls.h
include/asm-parisc/ioctl.h
include/asm-parisc/ioctls.h
include/asm-ppc/ioctl.h
include/asm-ppc/ioctls.h
include/asm-ppc64/ioctl.h
include/asm-ppc64/ioctls.h
include/asm-s390/ioctl.h
include/asm-s390x/ioctl.h
include/asm-sh/ioctl.h
include/asm-sh/ioctls.h
include/asm-sparc/ioctl.h
include/asm-sparc/ioctls.h
include/asm-sparc64/ioctl.h
include/asm-sparc64/ioctls.h
include/asm-x86_64/ioctl.h
include/linux/ipc.h
include/linux/acct.h
include/asm-sparc/a.out.h
include/linux/a.out.h
arch/mips/boot/ecoff.h
include/asm-sparc/bsderrno.h
include/asm-sparc/solerrno.h
include/asm-sparc64/bsderrno.h
include/asm-sparc64/solerrno.h

The code identified above was also part of a settlement agreement entered between the University of California at Berkeley and Berkeley Systems Development, Inc. (collectively "BSDI") regarding alleged violations by BSDI of USL's rights in UNIX System V technology. The settlement agreement between USL and BSDI addressed conditions upon which BSDI could continue to distribute its version of UNIX, BSD Lite 4.4, or any successor versions. One condition was that BSD retain USL copyrights in 91

files (the "UNIX Derived Files"). A complete listing of the UNIX Derived Files is attached. The ABI Code identified above are part of the UNIX Derived Files and, as such, must carry USL / SCO copyright notices and may not be used in any GPL distribution, inasmuch as the affirmative consent of the copyright holder has not been obtained, and will not be obtained, for such a distribution under the GPL.

Use in Linux of any of ABI Code or other UNIX Derived Files code identified above constitutes a violation of the United States Copyright Act. Also, distribution of copyrighted code identified above as part of a source or binary distribution of Linux, with copyright management information deleted or altered, violates the Digital Millennium Copyright Act ("DMCA") codified by Congress at 17 U.S.C. §1202. DMCA liability extends to those who have reasonable grounds to know that a distribution (or re-distribution as required by the GPL) of the altered code or copyright information will induce, enable, facilitate, or conceal an infringement of any right under the DMCA. In addition, neither SCO nor any predecessor in interest has ever placed an affirmative notice in Linux that the copyrighted code in question could be used or distributed under the GPL. As a result, any distribution of Linux by a software vendor or a re-distribution of Linux by an end user that contains any of the identified System V code violates SCO's rights under the DMCA, insofar as the distributor knows of these violations.

As stated above, SCO's review is ongoing and will involve additional disclosures of code misappropriation. Certain UNIX code, methods and concepts, which we also claim are being used improperly in Linux, will be produced in the pending litigation between SCO and IBM under a confidentiality order.

Thank you for your attention to these matters.

Sincerely,

THE SCO GROUP, INC.

By: 

Ryan E. Tibbitts
General Counsel



January 16, 2004

Richard Fuld
Chairman & CEO
Lehman Brothers Holdings, Inc.
745 Seventh Avenue
New York, NY 10022

Dear Mr. Fuld:

I am following up on the SCO letter dated December 19th, regarding the use of SCO copyright protected code that has been incorporated into Linux without our authorization. As stated in the letter:

"No one may use our copyrighted code except as authorized by us."

...Certain copyrighted application binary interfaces ("ABI Code") have been copied verbatim from our copyrighted UNIX code base and contributed to Linux for distribution under the General Public License ("GPL") without proper authorization and without copyright attribution. While some application programming interfaces ("API Code") have been made available over the years through POSIX and other open standards, the UNIX ABI Code has only been made available under copyright restrictions. AT&T made these binary interfaces available in order to support application development to UNIX operating systems and to assist UNIX licensees in the development process. The UNIX ABIs were never intended or authorized for unrestricted use or distribution under the GPL in Linux

...Use in Linux of any ABI Code or other UNIX Derived Files identified above constitutes a violation of the United States Copyright Act. Distribution of the copyrighted ABI Code, or binary code compiled using the ABI code, with copyright management information deleted or altered, violates the Digital Millennium Copyright Act ("DMCA") codified by Congress at 17 U.S.C. §1202. DMCA liability extends to those who have reasonable grounds to know that a distribution (or re-distribution as required by the GPL) of the altered code or copyright information will induce, enable, facilitate, or conceal an infringement of any right under the DMCA. In addition, neither SCO nor any predecessor in interest has ever placed an affirmative notice in Linux that the copyrighted code in question could be used or distributed under the GPL. As a result, any distribution of Linux by a software vendor or a re-distribution of Linux by an end user that contains any of the identified UNIX code violates SCO's rights under the DMCA, insofar as the distributor knows of these violations."

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Please contact me immediately so we may schedule a meeting. My telephone number is (508) 655-8464 or email gregoryp@SCO.com.

Yours truly,

Gregory Pettit
Regional Director, Intellectual Property Licensing
SCO
Encl: Letter December 19, 2003
Cc: Ryan E. Tibbitts, SCO General Counsel



December 19, 2003

Lehman Brothers Holdings, Inc.
745 Seventh Avenue
New York, NY 10022

Re: The SCO Group, Inc. ("SCO")

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include/asm-m68k/errno.h

```
include/asm-mips/errno.h
include/asm-mips64/errno.h
include/asm-parisc/errno.h
include/asm-ppc/errno.h
include/asm-ppc64/errno.h
include/asm-s390/errno.h
include/asm-s390x/errno.h
include/asm-sh/errno.h
include/asm-sparc/errno.h
include/asm-sparc64/errno.h
include/asm-x86_64/errno.h
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include/asm-mips64/signal.h
include/asm-parisc/signal.h
include/asm-ppc/signal.h
include/asm-ppc64/signal.h
include/asm-s390/signal.h
include/asm-s390x/signal.h
include/asm-sh/signal.h
include/asm-sparc/signal.h
include/asm-sparc64/signal.h
include/asm-x86_64/signal.h
include/linux/stat.h
include/linux/ctype.h
lib/ctype.c
include/asm-alpha/ioctl.h
include/asm-alpha/ioctls.h
include/asm-arm/ioctl.h
```

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include/asm-ppc/ioctl.h
include/asm-ppc/ioctls.h
include/asm-ppc64/ioctl.h
include/asm-ppc64/ioctls.h
include/asm-s390/ioctl.h
include/asm-s390x/ioctl.h
include/asm-sh/ioctl.h
include/asm-sh/ioctls.h
include/asm-sparc/ioctl.h
include/asm-sparc/ioctls.h
include/asm-sparc64/ioctl.h
include/asm-sparc64/ioctls.h
include/asm-x86_64/ioctl.h
include/linux/ipc.h
include/linux/acct.h
include/asm-sparc/a.out.h
include/linux/a.out.h
arch/mips/boot/ecoff.h
include/asm-sparc/bsderrno.h
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By: _____
Ryan E. Tibbitts
General Counsel

January 16, 2004



Jonathan Beyman
Chief of Operations and Technology
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745 Seventh Avenue
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Please contact me immediately so we may schedule a meeting. My telephone number is (508) 655-8464 or email gregorvo@scs.com.

Yours truly,

A handwritten signature in black ink that reads "Gregory Pettit".

Gregory Pettit
Regional Director, Intellectual Property Licensing
SCO

Encl: Letter December 19, 2003

Cc: Ryan E. Tibbitts, SCO General Counsel



December 19, 2003

Richard Fuld
Chairman & CEO
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include/asm-ppc/errno.h
include/asm-ppc64/errno.h
include/asm-s390/errno.h
include/asm-s390x/errno.h
include/asm-sh/errno.h
include/asm-sparc/errno.h
include/asm-sparc64/errno.h
include/asm-x86_64/errno.h
include/asm-alpha/signal.h
include/asm-arm/signal.h
include/asm-cris/signal.h
include/asm-i386/signal.h
include/asm-ia64/signal.h
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include/asm-mips64/signal.h
include/asm-parisc/signal.h
include/asm-ppc/signal.h
include/asm-ppc64/signal.h
include/asm-s390/signal.h
include/asm-s390x/signal.h
include/asm-sh/signal.h
include/asm-sparc/signal.h
include/asm-sparc64/signal.h
include/asm-x86_64/signal.h
include/linux/stat.h
include/linux/crypt.h
lib/crypt.c

include/asm-alpha/ioctl.h
include/asm-alpha/ioctls.h
include/asm-arm/ioctl.h
include/asm-cris/ioctl.h
include/asm-i386/ioctl.h
include/asm-ia64/ioctl.h
include/asm-m68k/ioctl.h
include/asm-mips/ioctl.h
include/asm-mips64/ioctl.h
include/asm-mips64/ioctls.h
include/asm-parisc/ioctl.h
include/asm-parisc/ioctls.h
include/asm-ppc/ioctl.h
include/asm-ppc/ioctls.h
include/asm-ppc64/ioctl.h
include/asm-ppc64/ioctls.h
include/asm-s390/ioctl.h
include/asm-s390x/ioctl.h
include/asm-sh/ioctl.h
include/asm-sh/ioctls.h
include/asm-sparc/ioctl.h
include/asm-sparc/ioctls.h
include/asm-sparc64/ioctl.h
include/asm-sparc64/ioctls.h
include/asm-x86_64/ioctl.h
include/linux/ipc.h
include/linux/acct.h
include/asm-sparc/a.out.h
include/linux/a.out.h
arch/mips/boot/ecoff.h
include/asm-sparc/bsderrno.h
include/asm-sparc/solerrno.h
include/asm-sparc64/bsderrno.h
include/asm-sparc64/solerrno.h

The code identified above was also part of a settlement agreement entered between the University of California at Berkeley and Berkeley Systems Development Inc. (collectively "BSDI") regarding alleged violations by BSDI of USL's rights in UNIX System V technology. The settlement agreement between USL and BSDI addresses conditions upon which BSDI could continue to distribute its version of UNIX, BSD L 4.4, or any successor versions. One condition was that BSD retain USL copyrights in!

files (the "UNIX Derived Files"). A complete listing of the UNIX Derived Files attached. The ABI Code identified above are part of the UNIX Derived Files and, such, must carry USL / SCO copyright notices and may not be used in any GI distribution, inasmuch as the affirmative consent of the copyright holder has not been obtained, and will not be obtained, for such a distribution under the GPL.

Use in Linux of any of ABI Code or other UNIX Derived Files code identified above constitutes a violation of the United States Copyright Act. Also, distribution of copyrighted code identified above as part of a source or binary distribution of Linux, with copyright management information deleted or altered, violates the Digital Millennium Copyright Act ("DMCA") codified by Congress at 17 U.S.C. §1202. DMCA liability extends to those who have reasonable grounds to know that a distribution (or a distribution as required by the GPL) of the altered code or copyright information will induce, enable, facilitate, or conceal an infringement of any right under the DMCA. In addition, neither SCO nor any predecessor in interest has ever placed an affirmative notice in Linux that the copyrighted code in question could be used or distributed under the GPL. As a result, any distribution of Linux by a software vendor or a re-distribution of Linux by an end user that contains any of the identified System V code violates SCO's rights under the DMCA, insofar as the distributor knows of these violations.

As stated above, SCO's review is ongoing and will involve additional disclosure of code misappropriation. Certain UNIX code, methods and concepts, which we also claim are being used improperly in Linux, will be produced in the pending litigation between SCO and IBM under a confidentiality order.

Thank you for your attention to these matters.

Sincerely,

THE SCO GROUP, INC.

By: _____
Ryan E. Tibbitts
General Counsel

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Thank you for your attention to these matters.

Sincerely,

THE SCO GROUP, INC.

By: _____
Ryan E. Tibbitts
General Counsel

LEHMAN BROTHERS

DAUNA WILLIAMS
ASSOCIATE GENERAL COUNSEL AND VICE PRESIDENT
TECHNOLOGY INTELLECTUAL PROPERTY
CORPORATE LAW

30 January 2004

VIA FACSIMILE and OVERNIGHT COURIER

Mr. Ryan E. Tibbetts
General Counsel

Mr. Gregory Petit
Regional Director, Intellectual Property Licensing
SCO
355 South 520 West
Lindo, Utah 84042
Fax Number: (801) 765-1313

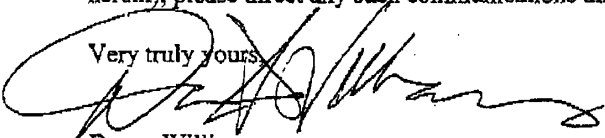
Gentlemen:

SCO's letters of December 19, 2003 and January 16, 2004 to Mr. Richard Fuld and of January 16, 2004 to Mr. Jonathan Beyman (all attached) have been forwarded to me for reply.

The issues you raised concerning use of Linux software have been directed to our vendor, Red Hat Inc., for response. Understandably, they are the appropriate recipient and are better positioned than we to respond to your issues and concerns.

Please direct any further correspondence on the subject to Red Hat. To the limited extent you must communicate with Lehman Brothers in the future (admittedly unlikely, given our request herein), please direct any such communications directly to my attention.

Very truly yours,


Dauna Williams
Associate General Counsel and Vice President

Enclosures

LEHMAN BROTHERS INC.
399 PARK AVENUE 11TH FLOOR
NEW YORK, NY 10022-6679
TEL. (212) 526-7135 FAX (212) 526-9799

CERTIFICATE OF SERVICE

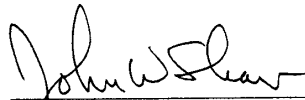
I, John W. Shaw, Esquire, hereby certify that copies of the foregoing document were caused to be served on February 11, 2004 upon the following counsel of record:

BY HAND DELIVERY

Jack B. Blumenfeld, Esquire
Morris, Nichols, Arsht & Tunnell
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Wilmington, DE 19801

BY FEDERAL EXPRESS

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John W. Shaw