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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

**REPLY OF RED HAT INC. IN SUPPORT
OF MOTION TO SUPPLEMENT THE RECORD**

On February 11, 2004, the plaintiff, Red Hat, Inc. (“Red Hat”) moved to supplement the record with regard to the motion to dismiss for lack of a justiciable controversy filed by The SCO Group, Inc. (“SCO”). SCO argues that no supplementation should occur because the test for the existence of a justicable controversy – a “reasonable apprehension” of suit – is determined by evidence that exists as of the date that suit was brought, and the supplemental materials submitted by Red Hat are dated after that time. SCO’s arguments completely miss the point. Red Hat’s motion to supplement cites additional evidence to demonstrate that an apprehension of suit was indeed reasonable when Red Hat filed its Complaint, because SCO’s threatening conduct has continued unabated and has escalated – exactly as Red Hat predicted. Simply put, by explicitly stating now that suits against end users of Linux are going to be

commenced, SCO has demonstrated that Red Hat's fears that exactly that would happen were not misguided or ill-founded, but were objectively reasonable.

As an initial matter, both parties agree that the test for a justiciable controversy is whether a "reasonable apprehension" of suit exists. Red Hat, in its opposition to SCO's motion to dismiss, detailed an exhaustive list of factual evidence and case law that plainly establish such a reasonable apprehension in this case. Among other things, in its Complaint, Red Hat specifically noted that "in May 2003, SCO sent approximately 1,500 letters to actual or potential users of LINUX, claiming that those companies could be liable to SCO for using LINUX." (Complaint, ¶ 42). Red Hat quoted from the letters themselves, in which SCO plainly stated that LINUX "infringes on [its] Unix intellectual property and other rights," explicitly threatened "to aggressively protect and enforce these rights," and warned that "legal liability" to SCO may rest with end users of LINUX. (*Id.*). In its opposition to SCO's motion to dismiss, Red Hat noted these threats. *See* Red Hat Opposition to SCO's Motion to Dismiss, at 12-14.

SCO's recent letters and public statements – as articulated in the motion to supplement – are simply proof that Red Hat's apprehension of suit against Red Hat or its customers was reasonable at the time Red Hat filed its Complaint – the apprehension, according to SCO itself, is about to become a reality.¹ Nothing in the law requires an actual suit to have been commenced for "reasonable apprehension" to exist, but the fact that a suit is subsequently filed or even more explicitly threatened plainly demonstrates that an earlier apprehension was in fact more than reasonable. That is exactly the case here.

¹ Indeed, even SCO does not question that its recent statements would constitute a "reasonable apprehension" of suit.

Second, the letters attached to Red Hat's motion demonstrate that a specific Red Hat customer was one of the recipients of SCO's May 2003 threats, prior to the filing of this case by Red Hat, and that SCO's conduct since that time demonstrates that the apprehension that a Red Hat customer will be sued was reasonable. That is, SCO's December 19, 2003 letter to a Red Hat customer (attached to the motion to supplement) explicitly makes reference to SCO's May 2003 letter. In its December 19 letter, SCO itself characterizes its earlier, pre-suit letter as a warning: "In May 2003, SCO warned about enterprise use of the Linux operating system violation of its intellectual property rights in UNIX technology." (Red Hat Motion to Supplement, Ex. A). In December, SCO asked that steps be taken to "discontinue these violations," and then publicly promised to begin suing Linux end users this month. (Motion to Supplement, at ¶8). These post-suit activities are proof that exactly the kind of campaign and tactics that Red Hat predicted would continue in its Complaint have in fact continued and escalated – from warnings and threats to aggressively enforce intellectual property rights to explicit statements about the imminent commencement of lawsuits.

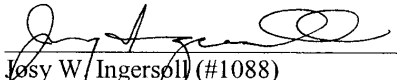
At bottom, the notion underlying SCO's opposition to the motion to supplement – that nothing it later does can be proof that an earlier fear of suit was in fact reasonable – is simply

wrong. Accordingly, Red Hat's motion to supplement should be allowed, and SCO's motion to dismiss should be denied.

DATED: February 26, 2004

Respectfully submitted,

RED HAT, INC.
By its attorneys



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CERTIFICATE OF SERVICE

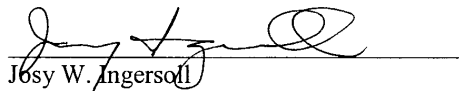
I, Josy W. Ingersoll, Esquire, hereby certify that copies of the foregoing document were caused to be served on February 26, 2004 upon the following counsel of record:

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