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.	)	

RED HAT'S MEMORANDUM IN
OPPOSITION TO SCO'S MOTION TO DISMISS

Josy W. Ingersoll (#1088)
Adam W. Poff (#3990)
Young Conaway Stargatt & Taylor, LLP
The Brandywine Building
1000 West Street, 17th Floor
P.O. Box 391
Wilmington, DE 19899-0391
Telephone: (302) 571-6672
Facsimile: (302) 571-1253

William F. Lee
Mark G. Matuschak
Michelle D. Miller
Donald R. Steinberg
Hale and Dorr LLP
60 State Street
Boston, MA 02109
Telephone: (617) 526-6000
Facsimile: (617) 526-5000

Introduction

The defendant The SCO Group, Inc. ("SCO") has explicitly threatened the plaintiff Red Hat, Inc. ("Red Hat") with a "day of reckoning." In fact, as alleged in Red Hat's Complaint, SCO has made a host of threats directed to Red Hat, Red Hat's customers, and the LINUX operating system that is the core of Red Hat's business. Nevertheless, SCO seeks to dismiss this action claiming 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. SCO also claims that it cannot be held accountable for its false, misleading and damaging statements because it claims those statements are not "commercial speech" even though all of them have been made to further SCO's business interests. SCO is wrong, and its motion should be dismissed.

As explained in detail in Red Hat's Complaint, SCO is engaged in a campaign to create fear, uncertainty and doubt about the LINUX operating system, with resulting direct harm to Red Hat. SCO's campaign, however, depends on SCO never actually having to support its claims with proof. For if SCO were required to disclose the basis for its claims, those claims would be shown for the fiction that they are, and SCO's campaign would fail. In effect, SCO's position is that no matter how nefarious its objectives or baseless its claims, SCO can completely avoid the reach of the Declaratory Judgment Act, the Lanham Act, and state laws prohibiting its conduct. This is not the law.

As an initial matter, SCO's motion fails the first test of a motion to dismiss – the facts alleged in the Complaint must be accepted as true for the purposes of this motion. However, SCO blithely ignores or seeks to contradict the facts set forth in Red Hat's Complaint. Among other things, SCO ignores or simply seeks to contradict the facts that:

- SCO has explicitly threatened Red Hat and Red Hat LINUX customers with litigation (Complaint ¶¶ 42, 49);

- SCO has publicly claimed that the LINUX operating system distributed by Red Hat infringes SCO's copyrights (Complaint ¶¶ 49-52);

- SCO has told Red Hat LINUX customers that they need a license from SCO to run Red Hat LINUX (Complaint, ¶¶ 37-39); and

- SCO's public statements about Linux are untrue and were made with intent to deceive, to harm Red Hat, and to interfere with Red Hat's business – the software code used in the LINUX operating system "is not the property of SCO, was not copied from LINUX, and was developed independently by engineers … who contribute to the open source software" (Complaint ¶¶1-5, 47).

As a legal matter, SCO's motion is premised on three fundamentally unsound theories. First, SCO's motion presumes that SCO may threaten Red Hat and Red Hat's customers with infringement, and claim that the LINUX operating system that is the centerpiece of Red Hat's business improperly uses SCO intellectual property, but that Red Hat is unable to do anything about SCO's claims. To the contrary, cases from the United States Court of Appeals for the Third Circuit, from this judicial district, and from other districts within and outside this circuit, all demonstrate that SCO is wrong. Red Hat is not seeking "general guidance" for the LINUX industry, because Red Hat ***is*** "the leading provider of the LINUX operating system and the most recognized LINUX brand name in the world." (Complaint, ¶ 14). Any claims that SCO makes about LINUX providers includes Red Hat. Any claims that SCO makes to all LINUX users plainly are directed to actual and potential Red Hat LINUX customers. Any claims that SCO makes about the LINUX operating system obviously include Red Hat LINUX. SCO well knows and recognizes this, and its actions, "including the climate of uncertainty fostered by SCO about LINUX, have been carried out with the obvious goal of adversely affecting Red Hat's business" (Complaint, ¶ 8). As set forth below, an actual controversy plainly exists here.

Second, SCO's motion is based on the flawed concept that an unfair and deceptive campaign, involving threats of baseless litigation, is somehow protected by the First Amendment and outside the reach of the Lanham Act's prohibitions against unfair competition. SCO's

theory would eviscerate the Lanham Act, and permit any company to threaten others with bad faith litigation without any recourse. The First Amendment provides no safe haven for such tactics.

Third, SCO's motion is based on the notion that SCO – and only SCO – is allowed to decide when its public claims of infringement will be heard. SCO has not retracted its claims that Red Hat LINUX infringes its copyrights. SCO has failed – as of this filing – to agree that Red Hat LINUX does not infringe SCO's intellectual property and has refused to covenant not to sue Red Hat LINUX customers for such claims. This is precisely the reason that the declaratory judgment statute exists – "to enable a person caught in controversy to obtain resolution of the dispute, instead of being forced to await the initiative of the antagonist." Chase Manhattan Bank, USA, N.A. v. Freedom Card, Inc., 265 F. Supp.2d 445, 450 n.8 (D. Del. 2003).

For these reasons, and as explained more fully below, SCO's motion should be denied.

Factual Background And Statement Of Nature And Stage Of Proceeding

As alleged in the Complaint, Red Hat is the leading provider of the LINUX operating system, and the most recognized LINUX brand name in the world. (Complaint ¶ 14.) Red Hat LINUX is open source software. (Id. ¶¶ 18-27.) Open source software allows programmers and users to read, redistribute, and modify software source code. This allows the software to evolve and improve more quickly, more efficiently and less expensively than proprietary software. (Id. at 19.) Unlike proprietary operating systems in which only a few programmers ever have access to the source code, thousands of unaffiliated open source programmers collaborate to improve and adapt open source software such as LINUX. (Id.) This has allowed Red Hat to distribute a more robust and adaptable operating system, and one in which changes, improvements and fixes can be implemented easily and quickly. (Id. 19, 22-24.) Red Hat and its LINUX products have been extremely successful. (Id. 28-32.)

SCO is a competitor of Red Hat's, and primarily provides a UNIX operating system, but also distributes its own version of LINUX. (Id. ¶ 33.) SCO uses an older, traditional business model that employs proprietary software. (Id. ¶¶ 28-32.) SCO's UNIX and its business model have not been financially successful, and SCO has faired poorly in financial terms. (Id. ¶¶ 35-37.)

In order to reverse its failing fortunes, SCO recently has embarked upon a wide-ranging and wrongful campaign directed against LINUX generally, and Red Hat and Red Hat's LINUX customers specifically. SCO's campaign is designed to create an atmosphere of fear, uncertainty and doubt about LINUX, and thereby slow the growth of LINUX and improve SCO's own business fortune. (Id. ¶¶ 2, 6,15, 37.) As alleged in the Complaint, SCO has, among other things:

- claimed that "chunks" of software source code owned by SCO can be found in Red Hat Linux (Id. ¶ 51);
- • claimed that "[s]ince the year 2001 commercial LINUX customers [and thus, including Red Hat customers] have been purchasing and receiving software that includes misappropriated Unix software owned by SCO" (Id. ¶ 60);
- claimed that "there ***will*** be a day of reckoning for Red Hat ... when this is done" (Id. ¶ 50);
- asserted that SCO "may bring subsequent actions against LINUX software developers such as Red Hat" (Id. ¶ 50)
- sent a letter to 1,500 actual or potential users of LINUX [and thus Red Hat LINUX] , stating that SCO "intend[s] to aggressively protect and enforce" its alleged intellectual property rights in LINUX and that "[l]egal ability that may arise from the Linux development process may also rest with the end user [i.e., Red Hat LINUX customers as Red Hat is 'the leading provider of the LINUX operating system and the most recognized LINUX brand name in the world']" (Id. ¶ ¶ 14, 42);
- claimed "in its suit against IBM and generally that [version 2.4] of the Linux [and thus Red Hat LINUX] operating system . . . violated [SCO's] intellectual property rights" and that this is the version of the LINUX operating system distributed since 2001 [by definition, including by Red Hat] (Id. ¶ 27);
- claimed that "there is offending code in the Linux kernel" used in Red Hat LINUX, and that "[t]hat one is a no-brainer" (Id. ¶ 54);

- made false and misleading statements about infringement of SCO intellectual property rights by Red Hat at a meeting on July 22, 2003, to which Red Hat institutional investors were invited (Id. ¶ 7);

- announced a licensing program, claiming that LINUX users [and thus Red Hat LINUX users] need to pay SCO a license fee to use LINUX (Id. ¶¶ 59-60);

- stated that it expected end users who received SCO's licensing letters to "be looking around to the vendor or vendors involved in supplying to them whether it's Red Hat" or others, claiming that it would create a "beef" between Red Hat and its LINUX customers (Id. ¶ 61);

- acknowledged that its licensing plan will cause actual or prospective LINUX [and thus, Red Hat LINUXcustomers to go into a "hold pattern" (Id. ¶ 65)

- met with investors and made unsubstantiated claims of infringement, causing at least one investment bank to warn that LINUX [and thus, Red Hat LINUX] may include wrongfully copied code (Id. ¶ 66);

- made highly publicized, but vague, unsupported and false claims that portions of the LINUX operating system (and thus Red Hat LINUX) contain intellectual property owned by SCO, but refusing to disclose any specific information identifying the publicly-available LINUX software alleged to have been copied, as a way of creating fear, uncertainty and doubt about LINUX (and thus Red Hat LINUX) (Id. ¶¶ 1-4, 9-13, 27, 38-42, 46-49, 53-58); and

- caused industry analysts to conclude that SCO statements "appear to be laying the groundwork for copyright infringement claims against Red Hat" (Id. ¶ 45).

In sum, after devoting months to pursuing its attack on Red Hat and LINUX (including Red Hat LINUX), SCO now argues that there is no actual controversy between Red Hat and SCO. As demonstrated by the facts alleged in the Complaint, that argument is as unfounded as SCO's claims that LINUX infringes SCO's intellectual property rights.

Summary of Red Hat's Argument

1. SCO's argument that there is no actual controversy because it does not intend to sue Red Hat until after SCO concludes its separate lawsuit with IBM fails as a matter of fact and law to support SCO's motion. Putting aside SCO's effort to ignore or explain away its public statements and its failure to accept the factual allegations of the Complaint as true, the threat of suit does not need to be either explicit or imminent as SCO incorrectly claims. Instead, Red Hat

need only have a reasonable apprehension of suit. This can be established many ways, including by allegations of threats of suit against Red Hat, threats against Red Hat's customers, an attack on LINUX as a whole (because of Red Hat's preeminent role in that industry and because it is the core of Red Hat's business) or by any other facts demonstrating that there is an actual justiciable controversy between the parties. As the facts alleged in the Complaint and outlined above demonstrate, each of these independent bases for an actual controversy exists here.

2. The Court should not decline to hear Red Hat's well-founded Complaint. If this Court declines jurisdiction, Red Hat will have no forum in which it can refute SCO's accusations – including SCO's claims of copyright infringement, which are not part of SCO's litigation with IBM. That result would directly and adversely affect Red Hat's business (as SCO intends), and be inequitable, unjust and contrary to the policies underlying the Declaratory Judgment Act.

3. SCO's argument that its campaign against Red Hat does not constitute commercial speech, and, therefore, does not violate the Lanham Act, is incorrect as a matter of law. As alleged in the Complaint, SCO's campaign against Red Hat and LINUX (including Red Hat LINUX) has been solely for the purpose of increasing revenues and, thus, is exclusively commercial in nature. Many courts – including this Court – have found that conduct such as SCO's does, in fact, violate the Lanham Act.

4. SCO's argument that Counts IV through VII of the Complaint (alleging violations of Delaware's Deceptive Trade Practices statute, and common law claims of unfair competition, tortious interference, and trade libel) must be dismissed as unfounded for at least two reasons. First, SCO is simply wrong in arguing that its conduct does not constitute commercial speech. Second, SCO has not provided and cannot cite a single case holding that "commercial speech" is even an element of, or a defense to, any of those claims. SCO has not met its legal burden on a motion to dismiss.

Argument

I. On A Motion To Dismiss Under Rule 12(b)(6), The Well Pleaded Allegations Of The Complaint – And Only The Well Pleaded Allegations Of The Complaint – Must Be Accepted As True.

In analyzing a motion to dismiss pursuant to Rule 12(b)(6),[1] a court must accept as true all material allegations of the complaint, and it must construe the complaint in a light most favorable to the plaintiff. Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc., 140 F.3d 478, 483 (3d Cir. 1998) (internal citations omitted). Therefore, this Court may not dismiss Red Hat's Complaint unless, "after accepting as true all of the facts alleged in the complaint, and drawing all reasonable inferences in the plaintiff's favor, no relief could be granted under any set of facts consistent with the allegations of the complaint." Id. SCO bears the burden of persuading the Court that the allegations of Red Hat's Complaint warrant dismissal under this standard. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991).[2] This standard is not met here. The allegations contained in Red Hat's 105-paragraph complaint are

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[1] Although SCO's motion seeking to dismiss Red Hat's Declaratory Judgment claims technically challenges subject matter jurisdiction under Fed. R. Civ. P. ("Rule") 12(b)(1), the Court, as it does for a motion under Rule 12(b)(6), still looks to the facts alleged in the complaint to determine whether there is an actual controversy between the parties. See Maryland Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941) (facts alleged, under all the circumstances, determine whether there is a controversy for purposes of a claim for a declaratory judgment); United Sweetener USA, Inc. v. The NutraSweet Co., 760 F. Supp. 400, 407 (D. Del. 1991) (noting that court looks to facts alleged, under all the circumstances, and denying motion to dismiss counts for declaratory judgment).

[2] Even though the allegations pleaded in Red Hat's complaint must be taken as true, the same is not the case for a complaint filed *in another action*. In deciding this motion to dismiss, the court must disregard SCO's contrary allegations that it cites from SCO's separate litigation with IBM. Swedish Civil Aviation Admin. v. Project Mgmt. Enters., Inc., 190 F. Supp.2d 785, 790-91 (D. Md. 2002) (citing A.S. Abell Co. v. Chell, 412 F.2d 712, 715 (4th Cir. 1969)).)). It is also improper for SCO "in presenting its 12(b)(6) challenge, [to] attempt to refute the complaint or to present a different set of allegations." Gomez v. Ill. State Bd. of Educ., 811 F.2d 1030, 1039 (7th Cir. 1987)), superceded on other grounds, Bd. of Public Educ.for City of Savannah & County of Chatham v. State of Georgia, No. CV 490-101, 1990 WL 608208, at *6 (S.D. Ga. Sept. 24, 1990). The defendant's attack must be against the sufficiency of the complaint, and must demonstrate that the plaintiff's claims, as alleged in the complaint, are without legal consequence. Id. Rather than follow the legal standard for a motion to dismiss, SCO has introduced its complaint filed in a separate action as part of the basis of its motion. Red Hat does not dispute that the Court can take notice of SCO's complaint against IBM, but strongly opposes SCO's attempted use of the allegations in that complaint for factual purposes in this case. Allowing such would go far beyond what is permitted under the standards for a motion to dismiss.

not only specific and detailed, but plainly support a valid claim under each count of the Complaint. SCO's motion should be denied.

II. Red Hat Is Entitled To A Declaratory Judgment, Because The Allegations Of The Complaint Establish That An Actual Controversy Exists Between Red Hat And SCO.

Red Hat's Complaint sets forth an actual case or controversy. Therefore, this Court has jurisdiction pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201. Travelers Ins. Co. v. Obusek, 72 F.3d 1148, 1153 (3d Cir. 1995). "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Id. at 1154 (quoting Maryland Cas. v. Pac. Coal, 312 U.S. at 273). Here, the facts plainly do so.

Specifically, all of the elements of the Third Circuit's three part test to determine whether there is an actual controversy exist here: it presents a legal controversy that is (1) real and not hypothetical; (2) that affects an individual in a concrete manner so as to provide the factual predicate for reasoned adjudication; and (3) sharpens the issues for judicial resolution. Id. (citing Armstrong World Indus., Inc. v. Adams, 961 F.2d 405, 411 (3d Cir. 1992). An actual controversy exists where, as here, SCO has engaged in conduct giving rise to an objectively reasonable apprehension on Red Hat's part that it will be sued. 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).

These elements are met here for three independent reasons. First, SCO has threatened Red Hat and explicitly claimed that Red Hat's LINUX products infringe SCO's copyrights and utilize SCO's trade secrets. Second, SCO has threatened Red Hat's customers, claiming that they need a license from SCO to use Red Hat's LINUX software. Third, SCO has repeatedly

claimed that the LINUX operating system infringes its copyrights and uses its trade secrets. Even if not specifically identifying Red Hat, these statements create an actual controversy because Red Hat is "the leading provider of the LINUX operating system, and the most recognized LINUX brand name in the world." (Complaint, ¶ 14).

A) SCO's Threats Of Suit And Other Accusations Against Red Hat Demonstrate That An Actual Controversy Exists.

At bottom, SCO's argument is nothing more than one of timing, *i.e.*, that there is no actual controversy because SCO does not intend to sue Red Hat until after SCO's action against IBM is resolved. For example, SCO claims that its public threat about a "day of reckoning" for Red Hat would take place only when litigation against IBM is completed. (SCO Br. at 10.) However, timing is irrelevant in determining whether an actual controversy has been sufficiently pled, and Red Hat need not wait for SCO to bring its own suit.

In fact, the first case that SCO cites in its brief itself demonstrates that that a threat of immediate suit is not required. (See SCO Br. at 7.) In Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 242 (1937), the United States Supreme Court held that even though the insured did not bring suit over four cancelled disability policies, this did not preclude the insurance company from seeking a declaratory judgment that the policies were properly cancelled, where "the parties had taken adverse positions with respect to their existing obligations." Similarly, in Maryland Cas. Co. v. Consumers Fin. Serv. Inc. of Pa., 101 F.2d 514, 515-16 (3d Cir. 1938), the United States Court of Appeals for the Third Circuit held that a suit by insurance company seeking declaratory relief could proceed while defendant was involved in another action regarding the same automobile accident and the insured claimed that the accident was covered by the policy.

Subsequent cases have followed these decisions. For example, in Salvation Army v. Dept. of Cmty. Affairs of the State of New Jersey, 919 F.2d 183 (3d Cir. 1990), the Third Circuit held that, despite a state's waiver of enforcement of administrative regulations, there continued

to be a possibility that suit would eventually be commenced at some future time by private beneficiaries. Thus, threat of suit was sufficiently tangible and immediate. Id. at 203-04.

Similarly, in United Sweetener, Judge Roth held that the defendant's promise not to sue plaintiffs on a patent until an administrative reexamination proceeding was resolved did not render the plaintiffs' apprehension of suit unreasonable. The defendant neither abandoned its interest in protecting the patent nor promised to hold the plaintiff harmless. 760 F. Supp. at 407. In fact, the court specifically noted that "[r]ather than extinguishing the threat to the plaintiffs, [the defendant's] promise merely suspends it." Id. Thus, the defendant was "free to return to its old ways and sue whenever it wishes." Id. (internal quotations omitted). That is exactly the sort of result that SCO seeks here, and this is exactly why SCO's motion must be denied.

Likewise, in IMS Health, Inc. v. Vality Tech., Inc., 59 F. Supp.2d 454, 457 (E.D. Pa. 1999), the court refused to dismiss a licensee's declaratory judgment claim in a copyright case against a licensor that the licensee had not misused the licensed software. The court held that the licensee had a reasonable apprehension that the licensor would commence an action, even though the licensee had not expressly threatened to sue the plaintiff. Id. at 460. Although the parties were engaged in continuing efforts to settle the dispute out of court, the court found that "the specter of litigation undoubtedly hung over the ... dealings between the parties," because the "overall tone of the letters [between the parties] ... was adversarial." Id. at 461. There was no indication that a copyright infringement action by the licensor defendant was imminent, but the court concluded that "given the positions stated and the demands made by [the licensor], the disagreement in which [the licensee] found itself with these positions, and its unwillingness to acquiesce in those demands, [the licensee] could have justifiably believed, and acted upon the belief that [the licensor] might take such action in the near future." Id.

SCO does not deny that it may sue Red Hat at some point; it merely asserts (outside of the record on which this Court is to decide the motion) that such a suit will not be filed until the IBM suit is resolved. At best, SCO has done nothing more than characterize the overt public threats it has made against Red Hat as a potential suit that may or may not be commenced at some future date. Even if such allegations, completely outside of what is alleged in the Complaint, could somehow be taken as true, SCO's characterization is irrelevant. As the cases set forth above demonstrate, so long as there continues to be a threat of legal action, regardless of timing, an actual controversy exists.

Consistent with those cases, Red Hat has more than sufficiently alleged that an actual controversy exists between Red Hat and SCO. The allegations of the Complaint unequivocally establish that SCO has threatened Red Hat, Red Hat's customers and Red Hat LINUX with legal action and made other statements outlining the controversy between them. SCO attempts to explain away only a carefully chosen select few of the many statements in the Complaint, and ignores in its motion the host of allegations that SCO has overtly, publicly and repeatedly threatened to commence legal action against Red Hat, its customers, and its chief product. See supra pp. 5-8.

Red Hat's apprehension of suit is more than reasonable: SCO has made statements concerning Red Hat's alleged wrongdoing; SCO's executive officers have made specific statements that explicitly threaten litigation against Red Hat; and SCO has publicly implicated Red Hat claiming Red Hat's use of misappropriated trade secrets.[3] These pleaded facts conclusively establish that an actual controversy exists.[4]

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[3] Similarly, the facts of the CAE Screenplates Inc. v. Beloit Corp., 957 F. Supp. 784, 789-90 (E.D. Va. 1997) and Phillips Plastics Corp. v. Kaisha, 57 F.3d 1051, 1053 (Fed. Cir. 1995) (cited in SCO Br. at 13-14) are not comparable to this case, because the decisions in those cases were based on the mere offer of a license and ongoing negotiations between the parties. Here, by contrast, SCO has made repeated public threats against Red Hat, Red Hat customers, and Red Hat's principal product (LINUX). Indeed, as alleged in the Complaint, SCO publicly stated that it only intends to offer licenses to end users of LINUX and not to distributors such as Red Hat. (Compl. ¶ 61.)

B) SCO's Threats Of Suit And Other Accusations Against Red Hat's Customers Demonstrate That An Actual Controversy Exists.

1) SCO Has Targeted Red Hat's Customers And Potential Customers And Threatened Legal Action Against Them.

On July 21, 2003, SCO stated that "[s]ince the year 2001 commercial LINUX customers [and thus all Red Hat LINUX customers] have been purchasing and receiving software that includes misappropriated Unix software owned by SCO." (Id. ¶ 60.) In May 2003, SCO sent approximately 1,500 letters to actual or potential users of LINUX (all of whom are by definition at least prospective Red Hat customers), claiming that those companies could be liable to SCO for using LINUX. (Id. ¶ 42.) The letters stated in no uncertain terms that SCO "believe[s] that LINUX infringes on [its] Unix intellectual property and other rights." (Id.) Further, the letter stated that SCO "*intend[s] to aggressively protect and enforce these rights*" and that "*[l]egal liability* that may arise from the LINUX development process may also rest with the end user." (Id. (emphasis added).)

Contrary to SCO's assertions (SCO Br. at 9-10), an actual controversy exists between Red Hat and SCO because SCO has threatened Red Hat's customers. As the Third Circuit has specifically held, "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). Thus, when an intellectual property owner (in this case a patent owner) "makes his position clear with respect to a manufacturer's customer, and the manufacturer finds his business affected by such assertions, the manufacturer may then bring an action for declaratory relief." (Id.). Put simply, the "accusation need not be

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[4] SCO's argument that Count II regarding misappropriation of trade secrets should be summarily dismissed (see SCO Br. at 14-15) is baseless for at least two reasons. First, SCO's threats of litigation do not differentiate its misappropriation claims from its copyright infringement allegations. Second, as alleged in the Complaint, SCO has explicitly linked Red Hat to its public statements and has directly accused Red Hat of incorporating the allegedly misappropriated code in its products. (Compl. ¶¶ 51-52.)

made directly to the declaratory judgment plaintiff, but may be made to its customers or to the industry at large." Nippon Elec. Glass Co., v. Sheldon, 489 F. Supp. 119, 121-22 (S.D.N.Y. 1980) (citing Aralac, Inc., 166 F.2d at 292-93).

The Nippon court reasoned that, when an intellectual property owner (in that case a patent owner) "complains that a manufacturer's customers are guilty of direct infringement due to their use or sale of plaintiff's products, the patent holder is impliedly charging the manufacturer with contributory infringement as well." Id. at 122. In fact, "informing customers of a potential patent dispute is exactly the sort of damaging claim that the [Declaratory Judgment Act] is designed to address." Cargill, Inc. v. Sears Petroleum & Transp. Corp., No. 02 Civ.1396, 2002 WL 31426308, at *5 (S.D.N.Y. Oct. 28, 2002). In Cargill, the Court denied a similar motion to dismiss, holding that asserting intellectual property rights to one's customers constitutes reasonable apprehension. Id.

The case upon which SCO relies is not comparable, because the facts at issue in that case were not similar in scope or in kind. That is, in Bonterra America v. Bestmann, 907 F. Supp. 4, 7 (D.D.C. 1995) (cited in SCO Br. at 13-14), the defendant merely sent a letter to the plaintiffs informing the plaintiffs of the existence of its patent. The court emphasized that the defendant refused to offer legal advice regarding the patent, and that "*no express charges of infringement were made to plaintiff.*" Id. at 8 (emphasis added). That stands in stark contrast to the actions of SCO, which has charged Red Hat and all end users of LINUX with wrongdoing including infringement of SCO intellectual property. Moreover, SCO has demonstrated its intention to conduct a continuous ongoing public campaign in the press and by open letters to the public, in which it makes far flung accusations of wrongdoing in an attempt to generate as much licensing revenue as possible as soon as possible. See, e.g., Complaint ¶ 42; Decl., Ex. C (SCO's Letter

dated May 12, 2003 sent to at least 1,500 companies in which SCO accused users of LINUX with infringement by accusing LINUX of being "an unauthorized derivative of UNIX" and in which SCO threatens to "aggressively protect and enforce these rights"). The conduct of the defendant in Bonterra is not remotely comparable to SCO's.

2) SCO's Threats To Seek Licenses From Red Hat's Customers Establish An Actual Controversy.

In addition to the allegations that SCO addresses in its motion, Red Hat alleges a second set of facts that independently establish an actual controversy between Red Hat and SCO: SCO has sought to coerce Red Hat's customers into paying for a license with SCO to use Red Hat LINUX. Further, Red Hat has alleged that while explaining its licensing program at its recent conference call on July 21, 2003, SCO specifically stated that it anticipated such a disruption. (Complaint ¶ 61.) The Complaint quotes the transcript from the SCO's conference call: "And so I'm guessing that those end users are going to be looking around to the vendor or vendors involved in supplying [LINUX software] to them whether it's Red Hat or IBM and saying, 'What's up, guys? You know what's happening here?' But, you know, that is going to be their beef with their particular vendor." (Id.) [5]

The Third Circuit has found that such public statements aimed at the plaintiff's customers establish an actual controversy. Treemond Co. v. Schering Corp., 122 F.2d 702, 705 (3d Cir. 1941) (reversing dismissal of complaint for declaratory judgment of patent invalidity and

[5] In response to this motion, Red Hat sent a letter to SCO asking it to stipulate that it did not intend to sue Red Hat on some or all of the claims it has been espousing publicly against Red Hat. SCO responded by stating that "[i]n fact, the request for a covenant not to sue Red Hat's customers highlights one of the significant defects in Red Hat's Complaint; namely, Red Hat does not have standing to seek an advisory opinion for these third parties. SCO did not stipulate that it will not sue Red Hat, which emphasizes that there is, in fact, a real threat of litigation. The letter also makes clear that SCO intends to retain the right to continue to pursue its claims against Red Hat's customers, which, as stated in the cases cited above, independently establishes an actual controversy sufficient to support Red Hat's claims for declaratory judgment. Furthermore, as the cases cited above demonstrate, SCO's characterization of Red Hat as seeking "an advisory opinion" on behalf of third parties misses the mark and is legally irrelevant. SCO's industry-wide attacks establish as a matter of law that Red Hat itself has an actual controversy with SCO.

noninfringement based on finding that defendant's notice in trade journal threatened purchasers with suits if they purchased plaintiff's product). SCO's motion must be denied on this basis as well.

3) Because Red Hat's Business Is Linux And It Is The Leading Distributor of Linux, General Statements By SCO Targeting LINUX Establish An Actual Controversy Here.

SCO repeatedly claims that Red Hat's Complaint simply seeks "general guidance" for the LINUX industry as a whole, and asserts that Red Hat lacks standing to do so. (SCO Br. at 9). SCO, however, completely misses the point. Red Hat's business is all about LINUX. Red Hat is the "leading provider of the LINUX operating system, and the most recognized LINUX brand name in the world." (Complaint, ¶ 14). Red Hat is "the most well-known" provider of LINUX software (Id. ¶ 28). Red Hat was hardly acting primarily on behalf of someone else, or seeking "general guidance" for others, when it brought this case. Red Hat is seeking a resolution to a controversy that directly affects its core product. SCO knows this, and the Complaint, fairly read, plainly states as much.

In these circumstances, even if SCO's assertions and threats are targeted at LINUX generally – without any specific mention of Red Hat – an actual controversy exists. See Nippon Glass, 489 F. Supp. at 121-22 (accusation may be made "to the industry at large" and still be actionable) Cargill, 2002 WL 31426308, at *5 (alerting industry as a whole to alleged infringement constitutes "reasonable apprehension"); see also Dr. Reddy's Labs., Ltd. v. aaiPharma, Inc., No. 01 Civ. 10102, 2002 WL 31059289, at *7 (S.D.N.Y. Sept. 13, 2002) (denying motion to dismiss and stating "threats of infringement suits against an entire product industry can create reasonable apprehension among all individual members of that industry).

C) This Court Should Not Decline To Hear This Case, Because The IBM Action Involves Different Claims And Parties And Will Not Resolve The Issues In This Case.

SCO requests that this Court decline to exercise jurisdiction even though it exists, purportedly because the action SCO commenced against IBM "addresses most, if not all, of the issues of copyright infringement and misappropriation." (SCO Br. at 15.) SCO, however, is not correct.

First, the parties are not the same. Red Hat is not a party to the IBM action, and is not bound by any decision in that case. See Declaration of Mark J. Heise In Support of The SCO Group, Inc.'s Motion To Dismiss ("Decl."), Ex. A.

Second, Red Hat seeks a declaratory judgment that Red Hat and its customers have not infringed any SCO copyright. In the IBM action, there is no copyright claim asserted against IBM. Id.

Third, the subject matter of the two suits is vastly different. The IBM action is contractual in nature. It involves three counts for breaches of software and licensing agreements and a count for interference with contract. As SCO itself acknowledges, "Red Hat, unlike IBM, has never signed a license agreement giving it access to SCO's confidential trade secrets." (See SCO Br. at 14; Decl., Ex. A at 26-43.) In contrast, this case focuses on the infringement of intellectual property rights and the unfair actions that SCO has taken with respect to Red Hat. (See Complaint, Counts I-VII.) Nor is Red Hat's declaratory judgment claim for non-misappropriation of trade secrets dependent on the result in the IBM litigation. Red Hat may prevail simply upon a showing that the alleged trade secrets are in fact public and not trade secrets at all. Red Hat has alleged that SCO itself publicized the alleged trade secrets, destroying their status as such – if in fact they ever were. (Complaint, ¶ 2).

This Court may not refrain from hearing a case "merely because of the pendency of another suit, if the controversy between the parties will not necessarily be determined in that suit." Maryland Cas. Co. v. Consumers, 101 F.2d at 515 (holding dismissal of petition for declaratory judgment was abuse of discretion, because action pending in separate court with different parties did not address same issue); see also La Reunion Francaise, S.A. v. Fleming, No. 97 C 1714, 1998 WL 111686, at *3 (N.D. Ill. Mar. 12, 1998) (denying motion to dismiss and refusing to decline jurisdiction because other pending suit was not duplicative and plaintiff was not a party to it). A suit is duplicative "only if it involves the same claims, parties, and available relief." La Reunion Francaise, 1998 WL 111686, at *3.

That is not the case here. As set forth above, the claims in this action will not be resolved in the IBM action, because (1) Red Hat is not a party, (2) there is no copyright claim asserted against IBM, and (3) the subject matter of the two actions is not the same. Further, no judicial economy will be achieved by dismissing Counts I and II for declaratory judgment because Red Hat's allegations in the remaining Counts III through VII will require resolution in any event.

Moreover, refusing jurisdiction in this case would be inequitable, unjust and contrary to the policies underlying the Declaratory Judgment Act. One of the primary purposes of that statute is "to enable a person caught in controversy to obtain resolution of the dispute, instead of being forced to await the initiative of the antagonist." Chase Manhattan Bank, 265 F. Supp.2d at 450 n.8. Declining jurisdiction will prejudice Red Hat and merely delay the "day of reckoning" that SCO itself has announced. In the meantime, SCO will be able to continue to "aggressively" pursue its licensing program and make repeated claims to the public about Red Hat and its products without taking any steps to establish that those claims have any validity or support. As Red Hat alleges, this tactic has already had an adverse impact on Red Hat and its business, and it

will apparently continue. If this Court refuses to exercise its jurisdiction, Red Hat will have no recourse to stop that ongoing harm.

III. SCO's Motion To Dismiss Count IV Alleging Violations Of The Lanham Act Should Be Denied Because SCO's Statements Are Not Protected Speech And Are Not Privileged.

A) SCO's Conduct Alleged In The Complaint Violates The Lanham Act.

Red Hat's Complaint states a claim for false advertising under Section 43(a) of the Lanham Act. That Act provides, in pertinent part:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any [...] false or misleading description of fact, or false or misleading representation of fact, which [...] (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a).

The Third Circuit has held that to state a prima *facie* case under Section 43(a), a plaintiff need only allege that: (1) defendant made false or misleading statements about its product [or another's product]; (2) there is deception or a tendency to deceive a considerable portion of the relevant consumers; (3) this deception is significant and likely to influence purchasing decisions of these consumers; (4) the goods advertised are in interstate commerce; and (5) a likelihood that plaintiff will be injured. See U.S. Healthcare, Inc. v. Blue Cross of Greater Phila., 898 F.2d 914, 922-23 (3d Cir.1990) (quoting Max Daetwyler Corp. v. Input Graphics, Inc., 545 F. Supp. 165, 171 (E.D. Pa.1982)).

Red Hat has alleged each of these elements in its Complaint: SCO has intentionally made false accusations that LINUX infringes SCO's intellectual property rights (Complaint ¶ 51); SCO has made these false claims for the purpose of influencing LINUX end-users to pay SCO for the UNIX license it is offering as part of its licensing program (Id. ¶¶ 60-62); SCO has

sent 1,500 letters to large companies to promote its claims of infringement (Complaint ¶ 42; Decl., Ex. C); SCO generally has attempted to disrupt the LINUX industry and has specifically targeted Red Hat's customers (Complaint ¶¶ 8, 61); SCO has wrongfully attempted to interfere with and disrupt Red Hat's business (Id. ¶ 61) by attempting to convince LINUX users that they need to pay SCO a license fee in order to use Red Hat's product (Id. ¶ 6), and; SCO has stated publicly that it is aware that it has deterred LINUX customer from proceeding to implement LINUX. (Id. ¶ 65.)

In its motion, SCO erroneously claims that its conduct does not constitute advertising under the Lanham Act, because it has not engaged in commercial speech. (SCO Br. at 17-18.) SCO's characterization of its conduct as protected speech is indefensible given the allegations of the Complaint. SCO's campaign against Red Hat is undeniably commercial in nature. SCO seeks to generate licensing revenues from its UNIX technology through commercial transactions with Red Hat's LINUX customers. (Complaint ¶¶ 6, 61.) SCO has conducted the campaign broadly and openly in the public, even sending letters containing false statements about LINUX to over 1,500 potential customers/licensees. (Id. ¶¶ 42, 59.) SCO's CEO, Darl McBride, has stated publicly that portions of UNIX code were taken and can be found in Red Hat LINUX. (Id. ¶ 51.) In addition to targeting Red Hat's customers, SCO also has made presentations to Red Hat's investors, industry analysts and financial analysts that falsely characterize both SCO's rights and Red Hat's alleged infringement of those rights. (Id. ¶¶ 63-66.) Everything about SCO's campaign is commercial in nature. It is the last gasp of a failing company attempting to generate much-needed revenues any way it can, including by making false statements about its competitors. (Id. ¶¶ 67, 68.)

Advertising and promotion under the Lanham Act are broadly defined and encompass the same types of conduct alleged in the Complaint. Courts routinely have held that, to achieve the

purposes of the Lanham Act, its provisions are to be broadly construed. See, e.g., Seven-Up Co. v. Coca-Cola Co., 86 F.3d 1379, 1383 (5th Cir.1996). To that end, courts have adopted the following test to determine whether speech qualifies as "commercial advertising and promotion" under the Lanham Act:

> (1) [the statement is] commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services; (4) that is disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry.

Unisource Worldwide, Inc. v. Heller, No. CIV.A. 99-266, 1999 WL 374180, at *6 (E.D. Pa. June 9, 1999); see also Seven-Up Co., 86 F. 3d at 1384; Gordon and Breach Science Publishers, S.A. v. American Inst. of Physics, 859 F. Supp. 1521, 1535-36 (S.D.N.Y. 1994).

The Lanham Act has been interpreted to protect against a broad range of misrepresentations, and it is not limited to advertisement and promotion in the vernacular sense of a commercial or a printed advertisement. See Seven-Up Co., 86 F. 3d at 1384 (holding that presentation made to seventy-four bottlers constituted advertising and promotion under the Lanham Act); Pearson Indus., Inc. v. Pet Friendly, Inc., 33 F. Supp.2d 1322, 1325 (M.D. Ala. 1999) (holding that defendant's dissemination of defamatory letter concerning potential trademark infringement constituted advertisement and promotion under the Lanham Act); Unisource Worldwide, 1999 WL 374180, at *7 (denying motion to dismiss and holding that defamatory statements made in press release, memoranda and to suppliers constituted advertising and promotion under the Lanham Act)[6]; In re Warfarin Sodium Antitrust Litig., No. MDL 98-

[6] In Unisource, a party, who made statements in a press release and an employee memorandum, moved to dismiss claims under the Lanham Act on the basis that those statements did not constitute advertising and promotion. Denying the motion to dismiss, the court held that it "cannot rule out that some of Plaintiff's publications and comments were commercial speech made to the relevant purchasing public, nor can it confidently say that they were not advertising or promotion of plaintiff's services over those of defendants. Defendants' counterclaims under the Lanham Act will therefore go forward." Unisource Worldwide, 1999 WL 374180, at *7. The court made clear that, so long as the alleged facts articulate a plausible scenario by which the wrongful statements were promoted, the claim will survive a motion to dismiss.

1232-SLR, 1998 WL 883469, at *12 (D. Del. Dec. 7, 1998), rev'd on other grounds 214 F.3d 395 (3d Cir. 2000) ("Here, defendant's allegedly false and misleading statements did not appear in the classic form of an advertising campaign. Instead, they were made in the context of press releases, computer software, letters, and facsimile transmissions.").

B) SCO's Conduct Is Commercial Speech That Does Not Warrant First Amendment Protection.

1) SCO's Conduct Is Commercial In Nature.

Both SCO and Red Hat agree that "commercial speech" is simply "speech proposing a commercial transaction." United States v. Edge Broad. Co., 509 U.S. 418, 426 (1993); SCO Br. at 18.

The most poignant factor indicating that SCO's actions are commercial in nature and propose a commercial transaction is Red Hat's allegation in the Complaint that, on July 21, 2003, SCO, in fact, proposed a commercial transaction publicly to all users of LINUX as part of its overall campaign. (Complaint ¶¶ 60.) Specifically, Red Hat alleges in the Complaint ¶¶ 60 that "SCO announced that it would launch a licensing program for LINUX end users, in which end users would pay a license fee to SCO in order to continue using LINUX. In the same announcement, SCO stated that '[s]ince the year 2001 commercial Linux customers have been purchasing and receiving software that includes misappropriated Unix software owned by SCO.'"

According to SCO, its licensing program will be "very targeted" towards the people who are using the product. (Id. ¶ 61.) Indeed, SCO will offer a runtime-only license – a license that provides the end user with only the right to operate or run the software. (Id.) SCO's campaign has been blatantly commercial in nature, because at its heart it is designed to further a commercial transaction by making false statements to generate license revenues from LINUX users who are Red Hat's customers. (See id. ¶¶ 59-62.) Thus, SCO is not – and should not be –

insulated from its wrongdoing by the First Amendment. See In re Warfarin Sodium Antitrust Litig., 1998 WL 883469, at *15 (speech in violation of Lanham Act not entitled to First Amendment protection even where only a portion of speech was commercial in nature). Though SCO contends that its licensing program is nothing more than "legal demands" and "legal releases" that are not commercial speech as a matter of law, SCO does not cite any legal authority in support of this argument. (SCO Br. at 22.) Rather, SCO cites three cases that were decided on summary judgment, each of which is distinguishable on its facts as found by the Court. (See SCO Br. at 19-21) (citing Mikohn Gaming Corp. v. Acres Gaming, Inc., 165 F. 3d 891, 897 (Fed. Cir. 1998); Symbol Technologies, Inc. v. Proxim Inc., No. C.A.01-801-SRL, 2003 WL 21840774, at * 4 (D. Del. Jul. 30, 2003); and Avery Dennison Corp. v. Acco Brands, No. CV99-1877DT (MCX), 2000 WL 986995, at * 23-24 (C.D. Cal. Feb. 22, 2000).) These cases do not support SCO's contention that its speech is protected.

In two of the cases cited by SCO, the court made a finding of fact that the patentee had acted in good faith with a reasonable belief that its intellectual property rights had been infringed. See Mikohn Gaming Corp., 165 F. 3d at 897 (no bad faith in view of finding on the merits that information was not false, but rather objectively accurate); Symbol Techs., Inc., 2003 WL 21840774, at *4 (finding on the merits that patent owner acted in good faith). In contrast, Red Hat has specifically alleged that SCO – knowingly, wrongfully and in bad faith – has made false representations concerning Red Hat, and those allegations must be accepted as true for purpose of this Motion to Dismiss. (See, e.g., Complaint ¶¶ 39, 51, 60-62, 84.); see supra pp. 10-11.

Similarly, SCO's reliance on Avery Dennison, is misplaced. In Avery, the court decided that the plaintiff was entitled to summary judgment only to the extent that the Lanham Act claim was based on private letters between two companies. Avery Dennison, 2000 WL 986995 at *19.

That ruling is not applicable here for at least two reasons. First, the Court in Avery specifically emphasized that the letters were sent to existing customers of the sending party, which is not the case here. SCO's letters, however, were mass-mailed to 1,500 large companies in an attempt to create a new market for SCO's licensing program. (Complaint ¶ 42.) Second, Red Hat's claims are based on all of the allegations of the Complaint, including SCO's false statements made during public press conferences to industry analysts, financial analysts and investors. (See id. ¶¶ 65-69.)

In contrast, to the inapposite cases cited by SCO, a number of cases decided by this Court found that statements similar to those made by SCO do constitute advertising and promotion under the Lanham Act. For example, statements made in press releases touting the benefits of one product over another or characterizing a competitor's product can constitute commercial speech. See, e.g., In re Warfarin Sodium Antitrust Litig., 1998 WL 883469, at *14 ("Statements such as these satisfy the court that defendant's press releases and other communications were not confined solely to defendant's efforts to influence public policy on generic substitution of warfarin sodium drugs."); see also Pearson Indus., Inc. v. Pet Friendly, Inc., 33 F. Supp.2d at 1325 (M.D. Ala. 1999) (dissemination of defamatory letter); Unisource Worldwide, 1999 WL 374180, at *6 (issuance of false press release indicating that defendant was only able to secure contracts through the use of stolen trade secrets).

SCO's argument that even if its speech has commercial characteristics, it is protected because it is "inextricably intertwined" with protected speech is also contrary to the decisions of this Court. (See SCO Br. at 23.) This court has found violations of the Lanham Act even when the speech at issue had both commercial and non-commercial elements. See In re Warfarin Sodium Antitrust Litig., 1998 WL 883469, at *15 (court held that defendant's commercial speech misleading consumers and disparaging plaintiff's product was "voluntarily intertwined"

in that nothing required defendant to make those statements while expressing its protected opinions on the government standards); see also Company, Inc. v. Weaving, 769 F. Supp. 1224, 1235 (S.D.N.Y. 1991) (denying motion to dismiss and stating "[s]peech may be classified as commercial, [...], even when, in addition to having a business purpose, it has an informational or a social purpose.").

2) SCO's Governmental Interests Argument Is Flawed.

SCO argues that there are four categories of governmental interests that require treatment of SCO's public statements as protected speech, outside the purview of the Lanham Act, but cites no legal authority supporting this proposition. (SCO Br. at 24.) SCO's governmental interest argument sets up four hollow constructs in an effort to hide the fact that the allegations of the Complaint undoubtedly describe wrongful commercial activity by SCO.

SCO attempts to find support for its governmental interest argument by citing Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 68 (1983) for the proposition that "[t]he protection available for particular commercial expressions turns on the nature both of the expression and the governmental interests served by its regulation." (SCO Br. at 23.) The Bolger court articulated a four-part test in which the third and fourth parts are "to determine whether the regulation [of speech] directly advances the government interest asserted, and whether it is more extensive than necessary to serve that interest." Bolger, 463 U.S. at 68-69. The Bolger test requires that any substantial government interest in regulating speech be measured against the regulation to ensure that it is properly tailored in light of the speech at issue. See id. However, SCO failed to apply the Bolger test. Instead, SCO merely asserts four reasons why it believes commercial speech should not be regulated: to protect copyrights, to ensure access to courts, to ensure efficient adjudications and to promote a free and impartial press.

The first of these four purported reasons relied upon by SCO, to protect "the set of rights granted to copyright holders under the Copyright Act, 17 U.S.C. § 101 et. seq." (SCO Br. at 24), is offered without any case citation or other legal authority. In any event, it is entirely clear that the Copyright Act does not confer any right to make false claims that a competitor's product infringes one's copyright. The second reason why SCO believes its commercial speech should not be regulated is "the constitutional guarantee to free and uninhibited access to courts." (SCO Br. at 24.) As described below, SCO's statements, unrelated to its lawsuit against IBM, are not privileged communications. See infra pp. 30-31. Similarly, the third reason, "regulation of litigation and court proceedings in an efficient and fair manner" (SCO Br. at 26), is non-sensical because Red Hat is not a party to the IBM case upon which SCO premises its argument that hearing Red Hat's claims here is "inefficient." See supra pp. 20-21. Finally, the fourth reason asserted by SCO why its commercial speech should be privileged, "the constitutional guarantee of a free and impartial press" (SCO Br. at 27), borders on absurd. Red Hat has not asserted any claim against any member of the press, but rather seeks legal redress against its competitor, SCO, for making false statements about Red Hat's products.

C) The IBM Action Does Not Provide A Privilege That Allows SCO To Defame And Disparage Red Hat In Bad Faith.

SCO's statements to the press and others outside the context of and unrelated to SCO's lawsuit with IBM are not privileged communications. Delaware law does recognize a qualified privilege for the publication of *fair* reports of judicial proceedings and an absolute privilege that protects statements made by judges, parties, witnesses and attorneys from defamation, where those statements are offered *in the course of a judicial proceeding*. See Barker v. Huang, 610 A. 2d. 1341, 1345 (Del. 1992) ("The absolute privilege is a common law rule, long recognized in Delaware, that precludes actions for defamation based on statements of judges, parties, witnesses and attorneys offered in the course of judicial proceedings so long as the party claiming the

privilege shows that the statements were issued as part of a judicial proceeding and were relevant to a matter at issue in the case."); Read v. News-Journal Co., 474 A.2d 119, 120 (Del. 1984) (recognizing the existence of both a qualified privilege as to reports of judicial proceedings and an absolute privilege as to statements offered in the course of judicial proceedings); Klein v. Sunbeam Corp., 94 A.2d 385, 392 (Del. 1953) (recognizing same as to absolute privilege).

SCO's false statements concerning Red Hat's products are neither fair reports of a judicial proceeding entitled to a qualified privilege nor were they statements made in the course of a judicial proceeding and entitled to an absolute privilege. SCO cannot, as it suggests, continue to malign Red Hat and its products in the press simply because it has a lawsuit pending against IBM. Red Hat is not a party to that suit, and the privilege, thus, does not extend to statements concerning Red Hat. See Klein, 94 A.2d at 392 (privilege only extends to parties of suit). The absolute privilege is strictly limited and does not extend to statements made outside of the courtroom, such as here, in interviews with the press. See Barker, 610 A. 2d at 1347 (finding that false and defamatory statements were outside of the judicial context and were not privileged because interviews occurred wholly outside of and not in the course of any judicial proceeding); See also Rodriguez v. Panayioyou, 314 F. 3d 979, 988-89 (9th Cir. 2002) (finding there was no privilege because there was no litigation pending between the parties; a functional connection between interview statements and the purposes of litigation proceeding was absent); Bridge CAT Scan Assocs. v. Ohio-Nuclear, Inc., 608 F. Supp. 1187, 1195 (S.D.N.Y. 1985) ("delivery of a copy or report of a complaint to the press is not a statement made during the course of judicial proceedings and therefore is not protected by the common law privilege afforded such statements").

As alleged in the complaint, SCO is conducting its campaign against Red Hat and its LINUX products publicly, outside of the courtroom. (See Complaint ¶¶ 45-48.) The privilege

relied upon by SCO simply does not extend to such a campaign of false statements gratuitously provided to the press and public.

IV. SCO Has Not Provided Any Legal Authority In Support Of Its Motion To Dismiss Counts IV-VII Of The Complaint.

Red Hat has alleged four additional valid claims against SCO: Deceptive Trade Practices in violation of 6 Del. C. § 2532 (Count IV), unfair competition (Count V), tortious interference with prospective business opportunities (Count VI), and trade libel and disparagement (Count VII). Though SCO has indicated that these Counts of the Complaint should also be dismissed, SCO has not provided any legal authority warranting their dismissal. Therefore, SCO has not met its burden of persuading this Court that Counts IV through VII are legally insufficient. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991) (defendant has the burden of showing no claim has been stated).

SCO asserts without any supporting authority or analysis that Red Hat's state law claims are "related" to its Lanham Act claim. (See SCO Br. at 17.) With respect to the state law claims, SCO states only that "SCO's Public Statements fall outside the scope of the Lanham Act and related state law claims and are protected under the First Amendment to the U.S. Constitution." (Id.) SCO argues that its public statements do not constitute "commercial speech," but it never establishes that "commercial speech" has any legal bearing on any of the four state law claims. (See SCO Br. at 16-22.) The cases upon which SCO relies to define the "nature" of its "speech" address only the issue whether press releases and letters to potential infringers of intellectual property constitute commercial speech. (See SCO Br. at 19-22) (citing Mikohn Gaming, 165 F. 3d at 897 (letter concerning patent infringement); Symbol Techs., 2003 WL 21840774, at *3 (press release concerning patent infringement); Avery Dennison Corp., 2000 WL 986995, at *19 (letters concerning trademark infringement)). SCO does not cite any case law for the necessary corollary that, assuming SCO's "speech" is in fact non-commercial, non-commercial speech is

automatically subject to additional First Amendment protections that would preclude liability under each of Counts IV through VII. SCO apparently asks this Court to presume that "commercial speech" is an element of each of the state law claims of that there exists some affirmative defense for non-commercial speech. This Court should not make either presumption. See Trump Hotels, 140 F.3d at 483.

Though commercial speech is a required element of Count III under the Lanham Act, see Seven-Up Co., 86 F.3d at 1384 (requiring commercial speech to state a claim for false advertising under the Lanham Act), commercial speech is not an element of any claims asserted in Counts IV through VII. The Delaware Deceptive Trade Practices Act ("DTPA") asserted in Count IV applies when "there is business or trade interest at stake which is the subject of interference by the unfair or deceptive trade practices of another." Grand Ventures, Inc. v. Whaley, 632 A.2d 63, 70 (Del. 1993). A claim for unfair competition as asserted in Count V consists of "any unfair conduct, the natural and probable result of which is to permit the goods or one person, of the same kind, to be passed off for those of another. See Brandywine Mushroom Co. v. Hockessin Mushroom Prods., Inc., 682 F. Supp. 1307, 1313 n.5 (D. Del. 1988). The elements of tortious interference with prospective business opportunities asserted in Count VI are (a) the reasonable probability of a business opportunity; (b) the intentional interference by defendant with that opportunity; (c) proximate causation; and (d) damages, all of which must be considered in light of a defendant's privilege to compete or protect his business interests in a fair and lawful manner. TruePosition, Inc. v. Allen Telecom, Inc., No. C.A. 01-823 GMS, 2003 WL 151227, at *2 (D. Del. Jan. 21, 2003). The elements of trade libel and disparagement asserted in Count VII are the publication of oral or written false statements regarding another's property or business practice. INTA, State Trademark and Unfair Competition Law at DE-27 (USTA 2003) (1989). Thus, there is no legal basis for this Court to presume that commercial speech applies to

any of Counts IV-VII at all, much less precludes all of them as a matter of law. SCO clearly has not met its burden to show why Counts IV-VII fail to state a claim, and those Counts should not be dismissed.

Conclusion

For the reasons stated above, this Court should deny SCO's motion to dismiss in its entirety.

RED HAT, INC.
By its attorneys

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Josy W. Ingersoll (#1088)
Adam W. Poff (#3990)
Young Conaway Stargatt & Taylor, LLP
The Brandywine Building
1000 West Street, 17th Floor
P.O. Box 391
Wilmington, DE 19899-0391
Telephone: (302) 571-6672
Facsimile: (302) 571-1253

William F. Lee
Mark G. Matuschak
Michelle D. Miller
Donald R. Steinberg
Hale and Dorr LLP
60 State Street
Boston, MA 02109
Telephone: (617) 526-6000

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