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SNELL & WILMER L.L.P.  
Alan L. Sullivan (3152)  
Todd M. Shaughnessy (6651)  
Amy F. Sorenson (8947)  
15 West South Temple, Suite 1200  
Salt Lake City, Utah 84101-1004  
Telephone: (801) 257-1900  
Facsimile: (801) 257-1800

CRAVATH, SWAINE & MOORE LLP  
Evan R. Chesler (admitted pro hac vice)  
David R. Marriott (7572)  
Worldwide Plaza  
825 Eighth Avenue  
New York, New York 10019  
Telephone: (212) 474-1000  
Facsimile: (212) 474-3700

*Attorneys for Defendant/Counterclaim-Plaintiff  
International Business Machines Corporation*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH**

THE SCO GROUP, INC.,  
Plaintiff/Counterclaim-Defendant,

v.

INTERNATIONAL BUSINESS MACHINES  
CORPORATION,  
Defendant/Counterclaim-Plaintiff.

**DEFENDANT/COUNTERCLAIM-PLAINTIFF  
IBM'S MOTION TO STRIKE MATERIALS  
SUBMITTED BY SCO IN OPPOSITION TO  
IBM'S CROSS-MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

**(ORAL ARGUMENT REQUESTED)**

Civil No. 2:03CV-0294 DAK

Honorable Dale A. Kimball

Magistrate Judge Brooke C. Wells

246

Defendant/Counterclaim-Plaintiff International Business Machines Corporation (“IBM”) respectfully submits this motion to strike materials submitted by Plaintiff/Counterclaim-Defendant The SCO Group, Inc. (“SCO”) in opposition to IBM’s cross-motion for partial summary judgment on its Tenth Counterclaim.

*In an attempt to create a fact dispute in opposition to IBM’s cross-motion for partial summary judgment on its Tenth Counterclaim, SCO has submitted, and seeks to rely on, incompetent and inadmissible evidence. Under Rule 56(e) of the Federal Rules of Civil Procedure and the Federal Rules of Evidence, the Court should exclude these materials from the record on IBM’s motion.*

*Specifically, SCO offers the declarations of three witnesses, Sandeep Gupta, Chris Sontag and John Harrop, consisting almost entirely of testimony not made on personal knowledge and improper opinion testimony. Indeed, SCO does not even attempt to show that these witnesses may properly offer opinion testimony, either because the testimony is “rationally based on the perception” of the witnesses, Fed. R. Evid. 701, or that the witnesses are “qualified as . . . experts by knowledge, skill, experience, training, or education” and have applied “reliable principles and methods” in reaching their conclusions, Fed. R. Evid. 702. Furthermore, Mr. Harrop’s declaration is replete with pure legal argument (which notably is primarily addressed to SCO’s motion to dismiss, and not IBM’s motion for summary judgment). Accordingly, the offending portions of the Gupta, Sontag and Harrop declarations should be stricken.*

*In addition, SCO seeks improperly to rely on certain news articles for the truth of their contents. That is classic inadmissible hearsay and should also be stricken. See Fed. R. Evid. 802.*

*For the foregoing reasons, IBM respectfully submits that the Court strike the Gupta and Sontag Declarations in their entirety, as well as paragraphs 4-9, 11-24, 27, 29-30, 32-34, 36-41, 43, 44, 47, 50-52, 54, 56, 58-65, 67, 69-72, 76-95 of the Harrop Declaration, and not consider*

them in ruling on IBM's Cross-Motion for Partial Summary Judgment on its Tenth Counterclaim. In addition, IBM respectfully submits that the Court should strike Exhibits 24, 25A, 33, 36, 38, 41, 42, 44, 50-52, 56-59, 61, 63-65 and S-3. Finally, IBM respectfully submits that all portions of SCO's opposition brief relying on the improper testimony of Mr. Gupta, Mr. Sontag and Mr. Harrop or inadmissible documents also be stricken from the record, including in particular ¶¶ 1 n.3, 3, 8, 10, 10 n.5, 11, 12-14, 40, 44 and 47 of SCO's statement of facts.

IBM further respectfully requests that the Court hold oral argument on this motion. This motion is further supported by the memorandum of points and authorities and by such argument as shall be presented at hearing.

DATED this 26<sup>th</sup> day of August, 2004.

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Alan L. Sullivan  
Todd M. Shaughnessy  
Amy F. Sorenson

CRAVATH, SWAINE & MOORE LLP  
Evan R. Chesler  
David R. Marriott

*Attorneys for Defendant/Counterclaim-Plaintiff  
International Business Machines Corporation*

Of counsel:

INTERNATIONAL BUSINESS MACHINES CORPORATION  
Donald J. Rosenberg  
Alec S. Berman  
1133 Westchester Avenue  
White Plains, New York 10604  
(914) 642-3000

*Attorneys for Defendant/Counterclaim-Plaintiff  
International Business Machines Corporation*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 23<sup>rd</sup> day of August, 2004, a true and correct copy of the foregoing was hand delivered to the following:

Brent O. Hatch  
Mark F. James  
HATCH, JAMES & DODGE, P.C.  
10 West Broadway, Suite 400  
Salt Lake City, Utah 84101

and was sent by U.S. Mail, postage prepaid, to the following:

Stephen N. Zack  
Mark J. Heise  
BOIES, SCHILLER & FLEXNER LLP  
100 Southeast Second Street, Suite 2800  
Miami, Florida 33131

Robert Silver  
BOIES, SCHILLER & FLEXNER LLP  
333 Main Street  
Armonk, New York 10504



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Amy F. Sorenson