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U.S. DISTRICT COURT
DISTRICT OF UTAH

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**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.

**IBM'S MEMORANDUM IN
OPPOSITION TO SCO'S "RENEWED"
MOTION TO COMPEL DISCOVERY**

Case No. 2:03CV0294 DAK

Honorable Dale A. Kimball

Magistrate Judge Brooke C. Wells

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Defendant/Counterclaim-Plaintiff International Business Machines Corporation (“IBM”) respectfully submits this memorandum in opposition to Plaintiff/Counterclaim-Defendant The SCO Group, Inc.’s (“SCO”) “renewed” motion to compel discovery.

Preliminary Statement

In its second “renewed” motion to compel, SCO seeks documents that SCO has never before requested and an order compelling IBM to produce witnesses to testify on topics that are inappropriate for a deposition under Federal Rule of Civil Procedure 30(b)(6). Contrary to SCO’s claims, IBM has complied with SCO’s written discovery requests and this Court’s orders of March 3, 2004 and October 20, 2004. SCO’s motion should be denied.

SCO first complains that IBM has failed to meet its discovery obligations because it has not produced documents requested for the very first time by SCO in its “renewed” motion—specifically, all documents from the files of Mr. Palmisano, Mr. Wladawsky-Berger, and IBM’s Board of Directors that contain the word “Linux”. SCO has never properly requested these documents, which are not relevant merely because they mention the word “Linux”, and the Court has never ordered IBM to produce them. What SCO requested, what IBM produced, and what the Court required, was the production of documents from the files of Mr. Palmisano, Mr. Wladawsky-Berger, and IBM’s Board of Directors relating to IBM’s Linux strategy. IBM has even provided declarations describing its efforts to locate responsive documents. SCO is not entitled to non-responsive documents merely because it does not like the responsive documents IBM has produced. The simple reality, which SCO refuses to accept, is that IBM has produced all the responsive, non-privileged documents located after a reasonable search, and there is no basis to compel IBM to do anything further. (See Section I below.)

SCO also complains about IBM’s response to SCO’s notices of Rule 30(b)(6) depositions. SCO fails to mention that IBM designated four witnesses to testify about the majority of the topics identified in SCO’s notices and that all of those depositions have been

taken. IBM has declined to designate a witness to testify only on a limited number of topics that the applicable case law makes clear are not appropriate for discovery under Rule 30(b)(6), including topics clearly crafted to circumvent this Court's prior rulings on the scope of appropriate discovery. SCO should not be allowed to use Rule 30(b)(6) to circumvent this Court's prior discovery orders or to obtain information that IBM already has provided in the form of answers to interrogatories and responses to requests for the production of documents or that is otherwise not discoverable. To the extent the information SCO seeks is discoverable at all, it is not discoverable by way (a) Rule 30(b)(6) deposition. (See Section II below.)

Argument

I. IBM HAS COMPLIED WITH ITS DISCOVERY OBLIGATIONS TO PRODUCE DOCUMENTS CONCERNING ITS LINUX STRATEGY.

SCO's most recent demand—made by way of motion, not document request—that IBM produce all documents “from the files of Samuel Palmisano, Irving Wladawsky-Berger, and IBM's Board of Directors . . . that refer to or mention Linux” (SCO Mem. at 8), should be denied. IBM has not, as SCO contends, adopted a narrow view of its discovery obligations. On the contrary, IBM has produced, as requested, non-privileged documents from these files that concern IBM's Linux strategy (even though IBM's Linux strategy is irrelevant to any claim in the case), and IBM has described in sworn declarations the efforts it has undertaken to do so. In short, IBM has complied with the Court's March 3, 2004, and October 20, 2004, orders, and SCO's request that IBM produce every single document from these files that contain the word “Linux” is entirely unfounded.

SCO's Request for Production No. 53 requested all documents “concerning IBM's decision to adopt, embrace or otherwise promote Linux, including . . . documents in the possession of Sam Palmisano [and] Irving Wladawsky-Berger.” (SCO Mem. at iii.) To date,

IBM has produced over 3,000 pages of documents in response to this request.¹ Following SCO's first unfounded complaint regarding the documents produced by IBM in response to this request, the Court ordered the production of documents concerning IBM's "ambitious Linux strategy" from Mr. Palmisano's and Mr. Wladawsky-Berger's files. (3/3/04 Order at II.4.) IBM complied with this order. Following SCO's second unfounded complaint regarding documents produced by IBM in response to this request, counsel for IBM volunteered, and the Court ordered IBM, to provide declarations regarding IBM's efforts to locate and produce responsive documents, in the hope that doing so would finally put this issue to rest. (10/20/04 Order at 1.) Again, IBM complied. Now, for the third time, SCO asks the Court to intervene despite the fact that the documents SCO has requested have been produced.

As we previously have stated, and as is described in the declarations filed by IBM with the Court, IBM did not produce documents from the files of Mr. Palmisano, Mr. Wladawsky-Berger, or IBM's Board of Directors that merely refer to or mention Linux but that were not responsive to SCO's document requests or the Court's prior order. Apparently based on this, SCO baldly accuses IBM and its counsel of exhibiting a "lack of candor" toward this Court and of attempting to hide "damaging documents." (SCO Mem. at 4.) There is no

¹ SCO correctly notes that after the October 19, 2004, hearing, Mr. Wladawsky-Berger located two folders of documents overlooked in prior review of his files. IBM promptly produced to SCO responsive documents in those two folders. (SCO Mem. at v.) SCO admits that the 239 pages of documents "consist largely of the same PowerPoint presentations and Linux Strategy Updates previously produced from Mr. Palmisano's files", thereby acknowledging that it has had these documents all along. (SCO Mem. at vii n. 4.) IBM's prompt production of these documents once they came to counsel's attention does not begin to prove that IBM somehow has improperly withheld responsive documents. On the contrary, it demonstrates that IBM has complied with its obligation to produce additional, responsive documents when they are discovered.

It is ironic, however, that SCO accuses IBM of withholding documents given its recent conduct. Despite having represented to the Court that it had produced to IBM all responsive documents, on December 17, 2004, days before dozens of depositions were scheduled to be taken, SCO delivered, without explanation, more than 75,000 pages of new documents to IBM, including nearly 23,000 pages of documents for four witnesses that IBM had deposed months earlier. In the case of one witness in particular, SCO elected to produce no documents from him at the time of his October 7, 2004, deposition only to come forward with more than 6,000 pages of documents in late December.

basis for SCO's charges, and SCO offers none. Nor is there any reason for the Court to order the production of non-responsive documents merely because they refer to or mention "Linux".

Significantly, SCO deposed Mr. Wladawsky-Berger on January 18, 2005. During that deposition, SCO was afforded a full and fair opportunity to inquire about whether he had additional documents and whether he had provided counsel for IBM all responsive documents. More importantly, SCO was able to question Mr. Wladawsky-Berger for a full day about IBM's Linux strategy based on the documents IBM did produce.

SCO offers no legitimate basis for requiring IBM to read every single document in every single file of Mr. Palmisano, Mr. Wladawsky-Berger, or the Board of Directors and search for the word "Linux." IBM has produced documents responsive to the requests SCO has made, and has complied with the Court's orders in this regard. No further relief is warranted, and SCO's second "renewed" motion on this issue should be denied.

II. IBM SHOULD NOT BE REQUIRED TO DESIGNATE A RULE 30(b)(6) WITNESS ON THE TOPICS CHALLENGED BY SCO.

In response to SCO's Rule 30(b)(6) notices, IBM designated four witnesses to testify on the majority of the topics identified. IBM declined to designate a witness only on a few topics where the subject matter of those topics was inappropriate for a Rule 30(b)(6) deposition. In each instance, IBM either has already provided SCO with information responsive to the topic, the Court has ruled that IBM need not provide the requested information, or an oral deposition of a witness on the topic is simply impractical or not authorized under the rules.

Rule 30(b)(6) allows a party to depose a corporation by "describ[ing] with reasonable particularity the matters on which examination is requested." Fed. R. Civ. P. 30(b)(6). The rule is designed as an alternate discovery tool appropriate when it is the most efficient method to obtain the requested information. Smithkline Beecham Corp. v. Apotex Corp., 2000 U.S. Dist. LEXIS 667 at *24 (N.D. Ill. Jan. 21, 2000) ("Rule 30(b)(6) is a vehicle for streamlining the

discovery process”) (copy attached as Exhibit A). That is, Rule 30(b)(6) should be used only when it is more efficient and accurate in comparison to other less intrusive methods of discovery. See McCormick-Morgan, Inc. v. Teledyne Industries, Inc., 134 F.R.D. 275, 286 (N.D. Cal. 1991). Courts evaluating a Rule 30(b)(6) deposition request must therefore ask “which of the available [discovery] devices is most appropriate, i.e., which device would yield most reliably and in the most cost-effective, least burdensome manner information that is sufficiently complete to meet the needs of the parties and the court in a case like this”. McCormick-Morgan, Inc., 134 F.R.D. at 286; Exxon Research and Eng'g Co., 44 Fed. Cl. 597, 601-02 (Fed. Cl. 1999).

A party also is not entitled to conduct a Rule 30(b)(6) deposition where the topics identified are duplicative of previous or forthcoming discovery.² In addition, a party is not entitled to take discovery by means of Rule 30(b)(6) deposition where interrogatories can secure the same information “with infinitely less intrusion upon privilege concerns, in a more workable form, and from the individuals who have actual knowledge of the matters at issue.” Smithkline Beecham Corp., 2000 U.S. Dist. LEXIS 667 at *28. Finally, courts generally recognize that _____ interrogatories or document requests are more appropriate for complicated and factually intensive topics where “no one human being can be expected to set forth, especially orally in

² See Snoddy v. City of Nacogdoches, 2004 U.S. App. LEXIS 10221 at *3-6 (5th Cir. May 25, 2004) (affirming district court’s decision to quash plaintiff’s Rule 30(b)(6) deposition because it was “unreasonably cumulative and duplicative” because plaintiff had already obtained the information sought from two other depositions) (copy attached as Exhibit B); Grant v. Evans, 216 F.R.D. 515, 519 (N.D. Okla. 2003) (granting protective order from plaintiff’s Rule 30(b)(6) notice on grounds that it was cumulative and duplicative of prior discovery); In re: Applied Micro Circuits Corp. Sec. Lit., 2003 U.S. Dist. LEXIS 9371 at *14-15 (S.D. Cal. May 20, 2003) (because information sought was duplicative of the ample discovery already provided including interrogatory responses, deposition testimony, and document production, its marginal relevance was outweighed by burden and expense of Rule 30(b)(6) deposition); Novartis Pharms. Corp. v. Abbott Labs., 203 F.R.D. 159, 163 (D. Del. 2001) (Rule 30(b)(6) deposition was duplicative where defendant offered non-Rule 30(b)(6) deposition testimony of individual who testified as to the subject at issue); Padana Assicurazioni-Societa Azioni v. Carribbean Express I, 1999 U.S. Dist. LEXIS 699 at *6-7 (E.D. La. Jan. 20, 1999) (holding that plaintiff could not compel an additional Rule 30(b)(6) deposition where already had deposition testimony on the topic) (copy attached as Exhibit C).

deposition, a reliable and sufficiently complete account of all the bases for the contentions made and the positions” at issue. McCormick-Morgan, Inc., 134 F.R.D. at 286.³ It serves neither SCO’s, IBM’s, nor this Court’s purposes to undertake a deposition in which the witness cannot reasonably be expected to recall or to fully understand all of the requested information, but in many instances this is exactly what SCO is asking the Court to compel IBM to do. As explained in more detail below, SCO’s proposed deposition topics are inappropriate, and its motion should be denied.

A. SCO’s November 30, 2004, Rule 30(b)(6) Notice.

In its November 30, 2004, notice, SCO has asked IBM to produce a witness to testify to the following:

1. The extent to and manner in which UNIX Software Products were used, directly or indirectly, in the creation, derivation or modification of any source code that IBM contributed to Linux, including but not limited to, the following:
 - a. The date and nature of IBM’s contributions of source code from AIX or Dynix, whether copied in a literal or non-literal manner, to Linux;
 - b. IBM’s and Sequent’s use of structures, sequences, organization, ideas, methods or concepts contained within any UNIX Software Product in developing source code that IBM contributed to Linux; and
 - c. The identity of the programmers who were exposed to any UNIX Software Product.

³ See also United States v. Taylor, 166 F.R.D. 356, 362 n.7 (M.D.N.C. 1996) (holding that some inquiries are better answered through interrogatories); Canal Barge Co. v. Commonwealth Edison Co., 2001 U.S. Dist. LEXIS 10097 at *6 (N.D. Ill. July 18, 2001) (same) (copy attached as Exhibit D); Smithkline Beecham Corp., 2000 U.S. Dist. LEXIS 667 at *28 (stating that “defendants could readily have obtained the same information in a more efficient manner by propounding the ‘standard’ interrogatories on its opponent”); EEOC v. American Int’l Group Inc., 1994 U.S. Dist. LEXIS 9815 at *8-9 (S.D.N.Y. July 18, 1994) (“Rule 30(b)(6) is not designed to be a memory contest. It is not reasonable to expect any individual to remember every fact in an EEOC investigative file.”) (copy attached as Exhibit E).

2. Identification of and role of IBM employees or contractors involved in work responsive to Topic 1 above.

3. Identification of the steps taken by corporate representative witness to be able to respond fully and accurately to Topics 1 and 2 above, including but not limited to documents reviewed, employees consulted, and databases consulted.

(A copy of SCO's November 30, 2004, notice is appended hereto as Ex. F.) SCO's request for the production of a 30(b)(6) witness on these topics is flawed for at least the following reasons:

First, these portions of SCO's November 30 notice seek to end run the Court's March 3, 2004 Order. SCO's Interrogatory No. 5 asked IBM to "[i]dentify IBM or Sequent personnel that work or worked on developing source code, derivative works, modifications or methods for AIX, Dynix, and Linux, specifying for each person their precise contributions to each." (Emphasis added.) IBM declined to produce its Linux contributions because they are a matter of public record. SCO moved to compel IBM, and the Court essentially denied the motion. In its March 3, 2004, Order, the Court ruled that "SCO should use its best efforts to obtain relevant discovery from the Linux contributions that are known to the public, including those contributions publicly known to be made by IBM." (Emphasis added.) The Court required IBM to provide only its "non-public contributions . . . to Linux" (Order, at 4), which IBM has done. SCO's Rule 30(b)(6) notice mirrors its Interrogatory No. 5 and is plainly intended to get (albeit in an even less efficient way) precisely the information the Court said IBM did not need to provide. SCO admits as much in its supporting memorandum. (See SCO Mem. at 5.) The Court should not permit SCO to circumvent its March 3, 2004, Order by requesting, in the form of a Rule 30(b)(6) deposition, discovery the Court already has ruled IBM need not provide.⁴

⁴ To the extent these portions of SCO's notice ask IBM to provide a witness to describe contributions by IBM to Linux of code based on Unix System V source code, there is no witness to produce. IBM has not contributed to Linux any code that is based on Unix System V source code.

~~Second, to the extent SCO intends these portions of the November 30 notice to request a~~
witness to testify regarding the development and composition of IBM's AIX and Dynix products, they are inappropriate. IBM also already produced hundreds of millions of lines of code relating to AIX and Dynix. There is no reason for the Court also to require IBM to provide a witness to testify about all of the specific contents of AIX and Dynix. Moreover, to the extent these portions of the notice seek the identification of the individuals involved in the development of AIX and Dynix, IBM has clearly produced this information in its response to SCO's interrogatories.

Third, no human could reasonably be expected to testify as to the challenged subject matter of SCO's notice; it is far too broad. For example, SCO is, in part, asking IBM to designate a witness to identify in a deposition each and every IBM programmer who was ever "exposed" to a "UNIX Software Product" (which SCO's notice defines very broadly and incorrectly to include at least AIX and Dynix) and to explain the work performed by each. It would be impossible for any witness to testify in a deposition on such broad topics—a witness could not be expected to remember each of the thousands of persons who have had access to AIX and Dynix source code, let alone to describe the work each of them did.

B. SCO's December 2, 2004, Rule 30(b)(6) Notice.

SCO's complaints about IBM's response to its December 2, 2004, notice are equally flawed. SCO's motion overlooks the fact that SCO either already has the information requested or it is privileged and SCO is not entitled to its production under Rule 30(b)(6) or otherwise.

1. Topic 1.

SCO's complaint that IBM must provide a witness who can respond to its Topic 1 is puzzling. Topic 1 asks that IBM designate a witness who can speak to:

The negotiation and execution of all license agreements between IBM and AT&T regarding any UNIX Software Product, and any and all amendments or modifications thereto.

(A copy of SCO's December 2, 2004, notice is appended hereto as Ex. G.) The negotiation and execution of the agreements is a topic best addressed by the individuals who negotiated and executed the agreements in their individual capacity. The parties have exchanged information about the persons who negotiated and signed the agreements, and many of them have been deposed. SCO is free to depose others should it desire to do so. SCO's Rule 30(b)(6) request is cumulative and duplicative, purporting to seek from IBM information already known to SCO or available to it by other, less burdensome means. There is no reason for a 30(b)(6) deposition on this topic.

2. Topic 7.

SCO's insistence that IBM produce a witness in response to Topic 7 is equally misplaced. Topic 7 asks that IBM designate a witness who can speak to the:

Identification of all individual(s) (by name, position, particular responsibility, and current location) who were principally responsible for (1) the programming development of AIX and Dynix (including Dynix/ptx); and (2) the programming development of Linux using, in any manner whatsoever, materials from those programs. This request includes, without limitation, identification of all relevant chief technology officers, chief software architects, and chief software engineers.

(Ex. G.) This topic is duplicative, at least in part, of Topics 1, 2, and 3 in the November 30, 2004, notice, and therefore should not be allowed for the same reason Topics 1, 2 and 3 in the November 30 notice should not be allowed. (See, supra, Part II.A.) As for the development of AIX and Dynix, IBM already has produced document son this subject. As for the development of Linux, it is a matter of public record, and the Court has already ordered that SCO can discover it from the public domain. And in any event, no witness could be expected to testify in a deposition about all of IBM's contributions of source code to AIX, Dynix, and Linux. The Court should deny SCO's motion to compel on this issue.

3. Topic 3.

IBM objected to designating a witness for Topic 3 on the grounds that the topic improperly asks for information protected by the attorney-client privilege, and IBM already has provided all non-privileged information responsive to similar requests in answering SCO's interrogatories. Topic 3 asks that IBM designate a witness who can speak to:

Consideration and discussion concerning UNIX licensing rights, limitations, and potential liabilities, in connection with IBM's acquisition of Sequent.

(Ex. G.) Consideration and discussion of these issues, if any, necessarily would have occurred in connection with IBM's attorneys doing due diligence in connection with IBM's acquisition of Sequent. A litigant is not required to designate a witness for a Rule 30(b)(6) topic that seeks only information protected by the attorney-client privilege. See New York v. Solvent Chem. Co., 214 F.R.D. 106, 111 (W.D. N.Y. 2003) (holding that Rule 30(b)(6) notice that "serves only to ascertain the substance of confidential communications" protected by the attorney client privilege is improper); see also Novartis Pharms. Corp. v. Abbott Labs., 203 F.R.D. 159, 163 (D. Del. 2001) (holding that defendant did not have to provide deponent to testify as to information protected by attorney work product). SCO cannot use Rule 30(b)(6) to gain access to privileged material any more than it could gain such access to such material through other discovery devices. SCO's motion on this point should be denied.

4. Topic 4.

Finally, Topic 4 requests that IBM designate a witness that can speak to:

All communications with Novell, Inc. ("Novell") relating to SCO and/or any of its predecessor entities, including, but not limited to, communications relating to the Asset Purchase Agreement between Novell and the Santa Cruz Operation, Inc., and any amendments thereto.

(Ex. G.) SCO's contention that IBM must designate a witness as to Topic 4 is without merit for at least three independent reasons.

First, the topic is hopelessly overbroad. It seeks production of a witness to speak to each and every communication that ever took place between IBM and Novell relating in any way to “SCO and/or any of its predecessor entities”, which, according to SCO, would include AT&T, USL, The Santa Cruz Operation, Caldera, as well as Novell itself. These “communications” could span decades, involve hundreds of people and thousands of topics, and, most important, have absolutely nothing to do with any of the claims or defenses in this case. See Banks v. Office of the Senate Sergeant-At-Arms, 222 F.R.D. 7, 18-19 (D. D. C. 2004) (topic requesting information on “all conversations between Ann Harkins and any employee of the SAO concerning Mr. Banks” was “absurdly overbroad; conversations about Mr. Banks’ hair style or his new suit cannot possibly be relevant to this lawsuit.”).

Second, both IBM and Novell have produced documents relating to this topic, and there are better ways than a Rule 30(b)(6) deposition for SCO to pursue additional discovery on this topic. For example, SCO is free to depose in their individual capacity persons involved in communications with Novell relating to the Asset Purchase Agreement referenced in the topic.

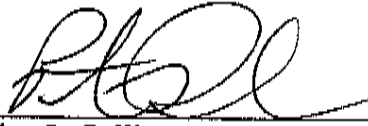
Third, it is unrealistic to expect any witness to provide oral testimony about “all communications” with Novell. A deposition on such a broad topic would be a waste of time, especially when the information SCO seeks is available by other means. SCO’s motion should therefore be denied on this topic as well.

Conclusion

For the foregoing reasons, SCO's "renewed" motion to compel should be denied in its entirety.

DATED this 4th day of February, 2005.

SNELL & WILMER L.L.P.



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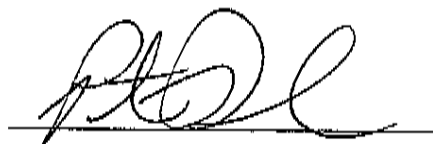
CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of February, 2005, a true and correct copy of **IBM'S MEMORANDUM IN OPPOSITION TO SCO'S "RENEWED" MOTION TO COMPEL DISCOVERY** was served by U.S. Mail, postage prepaid, on the following:

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A handwritten signature in black ink, appearing to be 'RS', is written over a horizontal line.