

FILED CLERK

2003 NOV 10 P 5:31

U.S. DISTRICT COURT
DISTRICT OF UTAH

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, NY 10019
Telephone: (212) 474-1000

*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,

vs.

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Defendant/Counterclaim-
Plaintiff.

**DEFENDANT/COUNTERCLAIM-
PLAINTIFF IBM'S MOTION TO STRIKE
AFFIRMATIVE DEFENSES**

Civil No. 2:03CV0294 DAK

Honorable Dale A. Kimball

Magistrate Judge Brooke Wells

73

Pursuant to Rules 12(f) and 9(b) of the Federal Rules of Civil Procedure Defendant/Counterclaim-Plaintiff International Business Machines Corporation (“IBM”), through counsel, hereby moves to strike the Fifth, Fifteenth and Nineteenth Affirmative Defenses asserted by Plaintiff/Counterclaim-Defendant The SCO Group, Inc. (“SCO”) in its Answers to IBM’s Amended Counterclaims.

Under Rule 12(f), the Court “may order stricken from any pleading any insufficient defense”. Fed. R. Civ. P. 12(f). Rule 9(b), in turn, requires that, “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.”

As detailed in IBM’s Memorandum in Support of Motion to Strike Affirmative Defenses, SCO’s Fifth, Fifteenth and Nineteenth affirmative defenses—which allege fraud and inequitable conduct—are improperly pleaded under Rule 9(b) and thus should be stricken. Specifically, SCO fails to allege any facts concerning the fraud that IBM is alleged to have committed. Under any interpretation of Rule 9(b)’s requirements, therefore, SCO’s affirmative defenses are defective.

DATED this 10th day of November, 2003.

SNELL & WILMER L.L.P.



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*

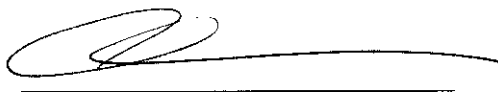
CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of November, 2003, a true and correct copy of the foregoing **DEFENDANT/COUNTERCLAIM PLAINTIFF IBM'S MOTION TO STRIKE AFFIRMATIVE DEFENSES** 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 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

A handwritten signature in black ink, consisting of a large, stylized initial 'S' followed by a long horizontal line extending to the right.

SORENSA\SLC\273983.2