ADDENDUM E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP, INC. Plaintiff/Counterclaim-Defendant, vs. INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant/Counterclaim-Plaintiff.	)	Case No. 2:03-CV-294 DAK

BEFORE THE HONORABLE DALE A. KIMBALL
DATE: OCTOBER 24, 2006
REPORTER'S TRANSCTIPT OF PROCEEDINGS
MOTION HEARING

Reporter: REBECCA JANKE, CSR, RMR

We think that stems from a second related failure, Your Honor, and that, as we point out at tab 12, is the failure to hold an evidentiary hearing. Now, SCO expressly requested an evidentiary hearing at the argument in this case. IBM has said, well, we didn't request it in writing earlier. Well, the first time that they submitted any evidence -- their initial motion was a ten-page motion. No declarations. And it really just talked about the July 2005 order, not about other discovery requests. We responded to that fully.

In the reply below is when IBM submitted its first declaration from Mr. Davis, one of their experts. Therefore, it was appropriate at oral argument -- and we submitted then or got leave to submit a responding declaration from Mr. Rochkind, but at that point you have an evidentiary conflict, and at that point we asked for an evidentiary hearing so that these issues could be decided not just based on declarations or arguments of counsel but on the facts.

Let's hear Mr. Wright and Mr. Lindsley say, even though they are the developers from IBM who disclosed this method and concept, that they don't know where in Dynix it's found, but yet we should be thrown out of court on those items because we can't tell IBM.

Some of the issues that an evidentiary hearing

would have been required for: The disputes between the respective experts; Davis on their side, Rochkind on our side over whether sufficient specificity was provided; whether we in fact have but are simply not disclosing more specific code locations, the idea that somehow we're sandbagging IBM. And it should be noted that Courts in many cases have recognize that if there is a concern with sandbagging, the remedy is -- you don't throw out the evidence and the detail that's provided. What you do is you stop that party later at trial from introducing evidence or disclosing an item that should have been mentioned earlier.

And IBM has full rights to object if that were ever to occur later in this case; at the trial of this case or otherwise, if we say, "Forget the 294 items. We have item number 295." And they, of course, know how to object to that. There has not been sandbagging going on, and this is not an appropriate remedy for it. An evidentiary hearing could have looked at the prejudice to IBM on an item-by-item basis rather than a generalized discussion.

And it could also have dealt with an item which is the subject of a separate motion before the Court, which is the effect of IBM's own actions in this case after this lawsuit was filed, and directing people in

their Linux technology center to do what's been called cleaning their sandboxes. Their sandboxes are actually work spaces where they are working on this. The Linux technology center is the heart of this lawsuit. That's where this work is being done.

After this lawsuit was filed, directions went out, confirmed by Dan Frye, the head of the center, for those developers to take off their system, to clean their sandboxes of the AIX and the Dynix code. We think that is wrong, and we have a motion dealing with that pending before the Court. But that is also a factual matter that relates to our ability to come up now with all those code locations relating to those developers' work.

In addition, as pointed out in the cases on tab 13, the Court did not make any express findings about alternative remedies. That's required under the Ehrenhaus case, a Tenth Circuit case, which says that a lesser sanction needs to be considered before you throw out claims. There is nothing in this order that supports it. As I mentioned, there are clear alternatives that should have been considered. If there is a concern that SCO is sandbagging someone, that is addressed at the time of trial by excluding improperly withheld evidence.

Moreover, we argued and still argue that the specificity and the prejudice involved here should have