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Via Facsimile (257-1800) and U.S. Mail

Todd M. Shaughnessy, Esq.
Snell & Wilmer
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101

Re: SCO v. IBM; Case No. 2-03CV-0294

Dear Todd:

You and I have spoken on the telephone and exchanged correspondence, as have our respective co-counsel, Robert Silver and David Marriott, regarding various discovery issues. The purpose of the Court's order extending the fact-discovery period from August 4, 2004 until February 11, 2005 was to permit the process of orderly discovery to go forward – in which SCO could first secure basic predicate discovery, use that to obtain more targeted discovery including depositions. As part of those discussions, Mr. Silver pointed out that that any discovery and deposition plan needs to deal with the timing issues presented by the fact that IBM continues to oppose our requests for predicate discovery (the hearings on the relevant motions are not until September 14th). More recent events have shown that these timing issues, combined with IBM's continued refusal provide even basic discovery, make any discovery and deposition plan absolutely impossible at this time.

For example, as the summer has developed it became clear that IBM was forcing SCO to litigate many discovery issues, even to secure the identities of deponents – information obviously essential to even rudimentary discovery planning. As discovery is at a near standstill until the hearing before Magistrate Wells scheduled for September 14th, it appears that IBM will not provide SCO with even rudimentary information until sometime this Fall. SCO believes that a discovery plan would be extremely useful and welcomes the opportunity to construct one – but until SCO has in hand at least the types of discovery ordinarily exchanged at the outset of the case, such a plan would be a futile exercise.

IBM has argued that SCO should take depositions now, and doubtless will argue that it should formulate a discovery plan and move forward now. But that position serves only the interests of a defendant that has been blocking basic discovery so that the plaintiff has to go into depositions blind. That result is not contemplated by the Rules or Judge Kimball's Order. SCO has explained to IBM that it cannot afford to waste its deposition opportunities by taking depositions without the predicate discovery and fact development needed to make them effective. There is no reason why SCO should be forced to do so, when the Court has extended the fact-discovery period precisely to insure that such artificial inefficiency and prejudice was not imposed. The impracticality and unfairness of IBM's position is made even plainer by the fact that

IBM has taken the position that it will not agree, without a court order, to more than the original limited number of depositions which were set before IBM added any of its many counterclaims to the case. As we have discussed, we believe IBM's position to be inconsistent with Judge Kimball's Order of June 10, 2004. We believe Judge Kimball, by extending the fact-discovery deadline, expected the parties to participate in the orderly process of full-discovery to proceed, precisely so that predicate document discovery could be secured before depositions, far less key depositions, were required to be taken.

Further, IBM has now filed a Motion for Partial Summary Judgment on Breach of Contract Claims ("Contract Motion") and a Motion for Partial Summary Judgment on IBM's Counterclaim for Copyright Infringement (Eighth Counterclaim) ("Copyright Motion"). The memoranda filed in support of IBM's motions contains numerous paragraphs of facts (66 separately numbered paragraphs, exclusive of subparagraphs, with respect to the Memorandum filed in support of the Copyright Motion and 154 separately numbered paragraphs, exclusive of subparagraphs, with respect to the Memorandum filed in support of the Contract Motion). While IBM characterizes its factual assertions as "undisputed," it undoubtedly comes as no surprise that SCO disagrees with and intends to dispute many of the facts as asserted.

While IBM has proceeded to seek the adjudication of multiple fact intensive dispositive motions, it has opposed the predicate discovery we need even to begin a useful preliminary discovery and deposition plan. If this expedited adjudication were to go forward on IBM's proposed schedule, the impact would be to undo the effect of the Court's June 10th Order extending the schedule to allow for orderly discovery and development of the facts.

We continue to believe it is in the best interests of our respective clients to agree upon a reasonable deposition and briefing schedule for the pending motions. Common sense and reason would suggest that we defer briefing of the pending summary judgment motions until discovery is completed. To act otherwise would only burden the court with obvious motions under Federal Rule of Civil Procedure 56(f) addressing SCO's need for substantial additional discovery before responding to IBM's motions. Before we approach the Court with this proposal, we felt it appropriate to raise the issue with you and request your agreement. Please let us know whether IBM is agreeable to extending the briefing schedule on the pending motions for summary judgment until after fact discovery has been concluded. We would also like to set a time to address the other discovery and deposition plan issues, including those raised above.

We look forward to your response. Please call me if you have any questions regarding this proposal. Given the timing of IBM's recently-filed dispositive motions, we would request a response to this proposal by no later than the end of the day tomorrow, so that, if necessary, we may take this matter up with the Court.

Sincerely yours,

Brent O. Hatch

c: Robert Silver