IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP, Plaintiff, vs. INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant/Counterclaim-Plaintiff	)	Case 2:03-CV-294

BEFORE THE HONORABLE DALE A. KIMBALL

APRIL 26, 2005

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

Reported by: KELLY BROWN, HICKEN CSR, RPR, RMR

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SALT LAKE CITY, UTAH, TUESDAY, APRIL 26, 2005

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THE COURT: We're here this afternoon in the matter of the SCO Group, Inc., vs. International Business Machines Corporation, 2:03-CV-294.

Let's see. For plaintiff, Mr. Brent Hatch and Mr. Ryan Tippets; correct?

MR. HATCH: Yes. Mr. Tippets is appearing for our client representative today, Your Honor.

THE COURT: Okay.

MR. TIPPETS: Yes, Your Honor.

THE COURT: And let's see. For IBM, right? Mr. Todd Shaughnessy and Ms. Amy Sorensen; correct?

MS. SORENSON: Yes.

MR. SHAUGHNESSY: Correct.

THE COURT: And for G2 Computer Intelligence, Inc., CNET Networks, Inc., and Forbes, Inc., Mr. Andrew Stone; correct?

MR. STONE: That's correct, Your Honor.

THE COURT: All right. Mr. Stone, you have a motion to intervene and unseal; right?

MR. STONE: That is correct.

THE COURT: Go ahead.

MR. STONE: Thank you.

THE COURT: If it helps, I've read this stuff.

MR. STONE: Thank you. I won't spend too much time going over it. I just want to highlight a few points.

By way of introduction, my clients are all media entities. G2 --

THE COURT: All what? Media entities?

MR. STONE: Yes. G2 publishes a couple of different trade newsletters promoting the IT industry, the Client Server News and another one called LinuxGram. CNET --

THE COURT: Called what?

MR. STONE: LinuxGram.

THE COURT: That's an interesting name.

MR. STONE: CNET is an online provider. They provide a variety of interactive online content and news and have a fairly strong emphasis on one of their sites, which is news, in particularly, technical business news. Forbes, Inc., the Court is probably somewhat familiar with.

THE COURT: I am.

MR. STONE: It's a known magazine, and Forbes.com.

I suppose since we are strangers to the case, it's a fair question to ask why are we here. Why are my clients interested in this case? I don't think it's secret.

THE COURT: You want in, and you want to see everything.

MR. STONE: That's exactly right. It's a case that is internationally significant. There are businesses being

made based on the perception of this case now on media corporations that are in this country and other ones. I think the Court understands this. The Court publishes its website online and identifies this as a high profile case.

My clients tell me --

THE COURT: Or somebody in the clerk's office.

MR. STONE: My clients tell me that every time they publish this case, they are faced with a blizzard of e-mails of interested parties, parties commenting and criticizing their positions or views in the case. Because of that, my client has been covering the case on an ongoing basis. And last October, they attended a hearing in front of Magistrate Wells where SCO produced in its motion to amend that the Court heard last week, reference was made to the e-mail sorting in that motion to amend and in open court. At least one of my clients reported on that. Their characterization of what happened was questioned by some of these online communities. And when my client went to verify its source, the hearing had been sealed on the Court's own motion. That raised a whole issue why are there sealed filings in this case.

THE COURT: So far I haven't sealed any of the hearings I've held.

MR. STONE: That's correct, Your Honor. This is sealed sua sponte by Magistrate Wells.

But anyway, I think it was sealed, or at least we assume it was sealed based on the discussion of material that had been sealed by the parties in this case. And that drew my client's attention to the protective order in the case.

The problem my client sees with the protective order is the protective order by its terms permits parties to unilaterally designate a document produced in discovery as confidential. And there is never any finding by the Court that that document has been sealed for any good reason.

Now, I'm not naive about protective orders. I've been there. I've been there in many cases where a protective order is very similar to the one in this case are used, and they serve a very good purpose. In a case such as this, there are hundreds of thousands of documents exchanged by the parties. The Court can't possibly review every document before it is exchanged to determine whether the claim of confidentiality is valid.

But the result is, and I've been here, as well, when a party receives a document from the opposing party, it's identified as confidential. I as an individual really have no interest in challenging that designation. I've got the information. It serves my individual interest to proceed with the litigation without getting into the collateral litigation about whether that document was appropriately sealed. I've been in cases where, I won't say it wasn't me, but opposing

party who designated virtually every document as confidential. It was no great handicap to my pursuit of the case as simply designating everything we filed as confidential whenever we felt contained something that was confidential. But there's no question in my mind that many of the filings were sealed appropriately. No doubt it is a common situation, but it is nevertheless an exception. It is an important exception. The Supreme Court has recognized that the Court's right of legitimacy from public acceptance of the decision that the courts are made accountable by an informed public decision, and even fact finding it may be advanced by making those materials available. All of these are recognized by the Supreme Court in Richmond Newspapers. In the criminal context, they were recognized by the Sixth Circuit in Brown & Williamson and in the Seventh Circuit in Continental Illinois Securities litigation.

I think in this case that the legitimacy aspect, the need for public acceptance of the decision, is particularly important given the intense focus that the public has on this case. Regardless of the Court's ultimate decisions in this case, it is subject to intense Monday morning quarterbacking by the public and the online community, in particular. If those communities both in this country and other countries are to accept the Court 's decision, they need to understand the bases for the Court's decision.

Let me give a couple of examples. Last week I attended the Court's hearing on the motion to amend the complaint brought by SCO. Both sides argued that public policy or the rule of law required that the Court rule one way or the other. Both sides relied on e-mails produced by the other side in advancing their positions. The Court's ultimate decision is by necessity to at least make reference to those e-mails. It is what was argued to the Court.

In order for the public to understand that decision on that motion and understand whether or not the Court permitted the amendment, to understand the basis for that decision, they need to understand that source of litigation. Instead, as of now, the public is left to rely on characterizations of those documents made by advocates from one side or the other.

I think it's -- again, it's particularly true in a case like this that receives attention not only in the United States but abroad, we take pride in this country in the openness of our society, including our courts. You know, the decisions are transparent. We demonstrate some confidence in that openness. To the extent that they're made on a secret basis, we tell the world that doesn't work. That's why we're here.

THE COURT: With respect to the last hearing, the decision has not been made or published yet. I'm trying to

think if in any of the decisions I have made in this case whether this has been a problem yet. I think those decisions, it's clear what I relied on and what I did and why I did it. Now, I suppose you could run up against a problem with arguably confidential documents where that may not be clear. But go ahead.

MR. STONE: I understand that. And I think when I get into the legal standard, the extent to which the Court relies on sealed materials may, indeed, have an affect on the process that the Court applies in determining whether to unseal or not. But nevertheless, materials that are part of the public record should be available to the public for their view.

I want to talk very generally about the legal standard, because as I'm going to suggest in a minute, I think it is premature to talk to or at least to argue the balancing that I think ultimately the Court needs to do. Courts very generally again recognize two sort of steps in the process of this unsealing. The first one is a sort of what seems inconsequential, but it's necessary, and that's intervention. The courts pretty much universally acknowledge that the public, in particularly the media entities, are entitled to intervene in order to challenge the sealing of documents in the file.

What does that mean here? It means that we become

parties to the protective order. With the Court's order allowing intervention, we would be allowed to view the documents or files so we can intelligently discuss and even determine whether the sealing -- whether there's an argument for sealing with respect to some of these documents.

SCO in this case has affirmatively stated that it doesn't oppose intervention. IBM hasn't argued against it. I think that's the easy part in today's motion.

Second, courts in determining the actual issue of unsealing engage in a balancing process. And what sort of balancing they do is, of course, the subject of a great deal of discussion in the circuit and district courts. And there is no ruling by the Supreme Court with regard to civil cases. There is no ruling in the 10th Circuit with regard to civil cases where that is from the 10th Circuit.

But very generally, it seems to range from courts that recognize the First Amendment right to access these documents and thereby apply something that looks like strict scrutiny down to simply balancing the interest of the parties in good cause standard under Rule 26 and recognizing some common law right of access to the public to access the Court's files.

The 10th Circuit at least has given some hint about the procedure to follow, and that's in the criminal cases of McVeigh and Gonzales. They apply the Press-Enterprise II

analysis from the Supreme Court, which first asked, is this process that we're seeking to seal something that's traditionally open? And I submit that is pretty easy in this case. Normally the filings are available to the public. And then second they ask whether the public will play a significant positive role in the litigation if it is unsealed.

Getting back to the fact that this is traditionally open, I do want to make one point. IBM has cited Judge Greene's decision in Grundberg II to suggest that seals of filings aren't traditionally open, and therefore it fails that prong of test.

I think, with all respect, Judge Greene got it wrong. And both the 10th Circuit in adopting this process in McVeigh and the Supreme Court in Press-Enterprise II were addressing hearings that had been sealed. In the case of Press-Enterprise II, they looked at a preliminary hearing that had been sealed. And they didn't begin with the prospect of, well, this is a sealed preliminary hearing and sealed preliminary hearings aren't ordinarily open to the public. They simply looked at the broad issue and said, preliminary hearings are ordinarily open to the public.

Likewise, the suppression hearing in the McVeigh, though it had been sealed, the 10th Circuit didn't say, sealed suppression hearings are ordinarily open. The 10th Circuit said, ordinarily suppression hearings are open to the public.

The second part is to look at the role the public might play in this litigation. And again, that's set out in Richmond Newspapers, the factors I read to the Court recently regarding the legitimacy of the courts, the aid to fact finding and the accountability of the courts. Again, I think that's particularly important in this case.

Even if the First Amendment isn't implicated in this test, there is still the common law right of access. And the weight given to the right of access, I'll acknowledge, may very well -- really ought to by sliding scale. Both IBM and the proposed interveners have cited the Amodeo case from the Second Circuit which suggests that ultimately the Court's going to need to look at the use to which a sealed document was put by the Court and to determine the presumption of access that results from that use in making weight against assertions of confidentiality.

I want to be clear that at this point I can't really intelligently argue that balancing test. I haven't seen the documents. So at this point what I'm really asking is that the Court establish a process where we can have intelligent discussion about whether the sealed documents in this case are appropriately sealed. That would begin by permitting intervention and providing that the interveners then have access to those documents on file. They're only looking at filed documents. We are not seeking to look at

documents exchanged in discovery but not filed with the court. And being entitled to use the procedures under the existing protective order for challenging any designations of confidentiality. And under that protective order, that adequately protects the party's interest pending any court decision. They remain sealed pending decision. That would permit some informed argument.

I can make some suggestions about what I've heard so far. I know what I know about this case primarily from this valuable amendment of the complaint of the deposition of Mr. Paul Palmisano. I attended that hearing. I know what I know about the documents referenced in those motions and the bases for those motions are what I heard in the hearing. I would say that it seems to me that there needs to be a compelling reason to seal documents that justify this whole new claim, whether they may or may not justify the whole claim, but it may be relied on SCO's claim. And given what I've heard about the documents, there's nothing on their face that makes them appear that they're properly sealed.

It might facilitate this process, and I offer this only as a suggestion, given that there are I think fewer than 50 sealed documents in the docket in this case, that the parties who contend that a document is appropriately sealed give intervenors some statement why -- what they think the basis for the sealing is. Again, I've experienced it. I've

been there. I've experienced it where pleadings are essentially sealed by default because of a massive document production. People designate, you know, in an overly cautious approach and no one ever challenges the designation. We may not have much disagreement on some of these pleadings.

The alternative is that I review the documents, make my own assumptions about the basis for the sealing and challenge them under the protective order division. It just seems more efficient to me to give the parties an opportunity to first at least say what they think is properly sealed and why.

One final point is I think this should apply to, at this point at least, to all sealed filings. IBM has cited authority from circuits that there is no right of access that attaches to discovery motions. And they argue essentially that the Court rule that per se anything attached to a discovery motion, there is no right of access to.

I think first that that takes a very unjustified and narrow view of the importance in discovery in our civil litigation practice nowadays. We've cited Mokhiber case on that particular point that I think has a good analysis of the importance of civil discovery. But I think we have a good example right here in this case about how important, potentially at least, a discovery motion would be, and that is the motion to compel Mr. Palmisano's deposition.

Again, regardless of how the Court rules on that motion, it is an important motion. The Court heard it itself, did not refer it to the magistrate, devoted substantial time to it. And both sides again argue strong public policy positionings for requiring or shielding that witness from deposition. The community, the world community is going to look at that, and here it is, a CEO of a Fortune 100 company. And the Court's decision, it seems to me, on whether to require that deposition is the very essence of Article III power. Only really a federal judge finds himself in a position to make that kind of a decision.

Yet, IBM would say that because it relates to discovery, there can never be a right of access, no matter how important the decision and no matter how weak the justification, if any, for the sealing of the underlying documents -- the document underlying that motion is. That's simply not the message I think the Court should communicate to the rest of the country and the community watching this and, in fact, court rule.

We suggested in short that the Court ultimately after applying the 10th Circuit test of experience and logic determine the weight of the presumption of access to be given and to weigh that presumption of whatever weight it gives it against the justification offer for the sealing. I think often a discovery motion may be entitled to lesser weight than

perhaps a successful summary judgment motion. But I think it is premature to say as simply a blanket rule, we will not hear claims of access to the motions that really only relates to discovery.

So in summary, I would ask the Court to permit intervention and order that we have access to all filings and transcripts on file with the Court pursuant to the provisions of protective order for now, that they retain their protection for now. I would again request that the Court order that the parties state the basis for confidentiality of all filings currently on file and why they should remain sealed, if they contend they should. And if the Court is inclined, the Court should provide a timetable to afford us this.

THE COURT: Thank you, Mr. Stone.

Who's going to go first here?

MS. SORENSON: I will, Your Honor.

THE COURT: Ms. Sorenson? Go ahead.

MS. SORENSON: Thank you. Good afternoon.

THE COURT: Good afternoon.

MS. SORENSON: As we just heard from Mr. Stone, it's clear that in its motion, G2 is seeking an order unsealing each of the sealed documents filed that are exchanged with the Court in this case unless the parties can demonstrate specific competitive injury requiring parties to file pleadings with only actually confidential information

redacted and modifying protective order to permit counsel for interveners to review the sealed documents in this case. And that last point I think I'll spend the most time on. I think that's important.

G2 cannot credibly claim that these proceedings, this lawsuit has been closed to it or to anyone else, and it cannot credibly claim that the media has somehow suffered from an inability to report on this case. In fact, Mr. Stone points out that this Court has made an effort to, in fact, list the case and provide a link to it on its website as a high profile case.

Instead of making such claims, G2 does request relief pursuant to the common law right of law access we just heard of from Mr. Stone to judicial records and pursuant to a vaguely defined First Amendment right of access to all documents filed in this civil lawsuit.

Three reasons justify denial of this motion today, Your Honor, and I'll summarize them here and go into them in more detail. First the conduct of the parties and of this Court in entering the existing protective order in this case, in producing the documents pursuant to it, and then filing documents designated confidential under seal with the Court. Further, making briefs referring to such documents publicly available by filing them with the limited redactions of the references to confidential information is entirely proper and

fully satisfies the qualified common law right of access to judicial record.

Second, G2's claim that the First Amendment also compels the burden that it sets forth in its motion is not found in any decision in the United States Supreme Court, as Mr. Stone acknowledges both in his brief and in argument today.

Finally, G2's claim that it must be made a party to the protective order in order to arbitrate the parties' decisions as to confidentiality is completely unnecessary, unsupported and very inefficient.

As the Court is aware, the Court -- the parties have produced literally hundreds of thousands of documents in reliance on the protective order here. It has greatly facilitated that production. And even with it in place, I think it's fair to say that this case has not been without its time-consuming discovery disputes. It requires that each of the parties in good faith designate information confidential that is not publicly known that would be a value to third parties, including actual and potential competitors, and that you would not normally reveal to third parties without some sort of a confidentiality agreement. It also allows either of the parties to challenge the confidentiality designations of the other at any time.

Mr. Stone spent some time saying that he's been

here, and he feels that as a party you have no interest in challenging the confidentiality designation of the other party. I think it's fair to say that in this case, Your Honor, both of the parties are highly motivated in terms of monitoring the conduct of the other. And in this is no exception. And as the Court is aware, these sort of protective orders are routinely upheld and even described as preferred and complex litigation, which Mr. Stone's argument makes it as clearly as I could.

Second and as briefly as I can, the parties have tried to make as much of this record publicly available as possible, as has the Court. We've attempted to make briefs in this case publicly available by filing them with limited redactions. And, in fact, IBM made both of its dispositive motions, the only dispositive motions -- excuse me -- IBM has made both of its summary judgment briefs as long ago as last August publicly available by filing them in redacted form with limited redactions of quotations of confidential material. And that's long before we have heard from Mr. Stone and the media representatives he represents today.

Finally, IBM has recently proposed in some correspondence to SCO that any remaining sealed memoranda be unsealed except for any limited portions which do quote from confidential materials attached therewith.

In any event, in light of the party's willingness

to file unsealed or appropriately redacted briefs to the extent that G2's motion seeks to have the Court order the parties to file pleadings with only actually confidential information redacted, we submit that that portion of G2's motion has been addressed.

THE COURT: You're saying you're doing that already; that is right?

MS. SORENSON: We have filed certain motions and memoranda already under seal and in redacted form. And I have sent recently in the last week and then again today correspondence addressing all of the remaining memoranda on the docket in this case that have been filed under seal. Either they can be -- the memoranda could be released and freely publicly available, or in a couple of cases there would still be some limited redactions of quotations -- of confidential information by either party.

And, of course, G2 I think will complain in response to what I've just told you that this is not going to address their desire to look at each of those confidential exhibits submitted with those motions. I think it's clear even from their authority that any common law right of access G2 may claim here giving them the right to inspect exhibits either does not exist or is fully satisfied.

First, I think we should look at the Nixon vs. Warner Communications Supreme Court case from 1978. And

speaking of high profile cases and of national/international significance, I think that qualifies, certainly. The Nixon case makes perfectly clear that the common law right to inspect and copy records is a qualified one and is one that will yield in certain situations.

The Nixon court stated:

> It is clear that the courts in this country recognize a general right to inspect and copy public records and documents including judicial records and documents. It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has a supervisory power over its own records and files, and access has been denied where court files might become a vehicle for improper purposes.

The Court goes on to list those improper purposes. And they say:

> For example, the common just law right of inspection may yield where records are sought to promote public scandal, become a reservoir of libelous statements or be used as, quote, sources of business information that might harm a litigant's competitive standing.

Ultimately, the Supreme Court's decision in Nixon concludes:

Weighing the public right of access to documents filed in a case against the concern of the public records may violate confidentiality rights is a matter best left to the District Court's sound discretion. The few cases that have recognized such a right to agree that the decision as to access is best left at the sound discretion of the trial court, it is a discretion to be exercised in light of relevant facts and circumstances of the particular case.

In other words, the right of access on which G2 fundamentally bases its motion provides that it will yield in situations where competitive harm may result, which is exactly and only what the confidentiality provision in our protective order here with its requirement that the information be of value to competitors is designed to avoid.

Moreover, we heard from Mr. Stone about the Amodeo case. And I think this concept in this case appears in all of the party's memoranda, and that is when the Court is exercising its sound discretion, when it comes to the common law right of access, the strength of the presumption changes and, in fact, grows weaker I think the farther documents at issue are from the core judicial process, which is trial.

Once a court decides where in the continuum of documents at issue falls, it can balance the weight of that presumption against the parties' interest in confidentiality

to determine whether or not to unseal.

On one end of this continuum, we've argued and Mr. Stone points out that it's clear that the documents submitted with discovery motions are subject to the weakest possible presumption, such that courts have held that they're not subject to a common law right of access at all.

There's the Chicago Tribune case in our brief and the Daugerdas case cited by SCO in their brief, both of which state that material filed with the discovery motion is not subject to the common law right of access. And that includes exhibits, et cetera.

Counsel for G2 and the other intervenors points to a case, the first party which I can't pronounce, so I'll say the second party. It's Davis. It's cited on Page 7 of their reply. And he cites Davis, which is a District of Columbia lower court case. He cites Davis for the proposition that discovery motions are now really important, and all materials that you submit therewith also necessarily, you know, are going to fall closer to this trial the core judicial function somehow.

And, in fact, if you look at the Davis case, and I think I have the language right here, the Court actually made this observation about discovery motions.

Full disclosure of discovery motions or supporting documents could undermine or destroy the

utilities of the protective order whether the disclosure was sought at the time of the motion or sometime after it was entered. The Court asked to keep a discovery motion secret to consider whether redacting appropriate portions of the motion or exhibits would accomplish the purpose.

In fact, what the Court recommends is exactly what's gone on in this case, not that discovery motions are somehow subject to a rule other than the rule that SCO in their brief and IBM in our brief have cited.

Closer to the other end for obvious reasons are dispositive motions. These I think become closer to the core judicial function of trial, particularly after they've been granted. However, all of the briefing filed in connection with IBM's two motions for summary judgment has been made available other than some limited redactions to quotations from some confidential exhibits. And we have recently proposed that all of these briefs be made publicly available, except that there are certain existing redactions in IBM's motion in support of its summary judgment on the copyright counterclaim that SCO would like to have continued to be redacted.

Of course, even if none of that were true, these motions have now been denied without prejudice. So the presumption of access again becomes due, they move back away

from the core judicial function. And we think that simply no further action need be taken.

To summarize, we think that material submitted with discovery motions aren't subject to the public right to inspect. And given that only dispositive motions in this case have been denied without prejudice at this time, we don't see anything to which a public right of access might attach. And we don't at this time see any reason for the Court to undertake such an evaluation in the absence of an objection made by one of the parties.

G2 also urges that the Court find a First Amendment right of access to every document filed under seal in the litigation. I think it's important to note that not even G2 contends that there's United States Supreme Court decision that creates such a First Amendment right. Instead, they argue that the 10th Circuit has assumed that there could be such a right and that other circuits have conducted constitutional analysis.

We don't really think that the Court need go any further than to find that there is no First Amendment right that currently exists for what they seek. The 10th Circuit cases they cite not only assume that might exist in a criminal case, not in a civil case, but the case -- the Court in McVeigh went on to uphold the District Court decision sealing and redacting the motions at issue, because neither tradition

nor logic the test that Mr. Stone would have the Court apply support access to inadmissible evidence and because of the access to the redacted information is not needed for a full understanding of the Court's decision.

And that's one of the points that Mr. Stone made when he was arguing. He was concerned I think that e-mails submitted in connection with the Court's decision on the motion to amend need to be I think revealed in full in order for the public to appreciate or understand the Court's ruling.

I think there's a couple of responses to that, and one is if that were true, then it should also be true that those e-mails should be attached to any ruling explaining whether the motion to amend is granted or denied. And I don't think there's any precedent for that. Second of all, I think it confuses the identity of a motion to amend. A motion to amend is not anything like a dispositive motion. It's not dismissing an existing claim in the case. And, in fact, SCO's motion to amend really is, in their words, and I think it's fair to characterize their argument, they contend it's based on material they found in discovery and that's something that resulted from discovery. So I think it's clear that the motion to amend doesn't approach this sort of fundemental judicial process that trial and dispositive motions occupy under this area of law.

If the Court is for any reason interested in

undertaking this constitutional exercise that G2 would urge under the First Amendment, I think we simply draw the Court's attention to the opinion of then Circuit Court Judge Scalia in the In Re Reporters' Committee for Freedom of the Press case where Justice Scalia applied the experience and logic test that Mr. Stone would have applied here to the claims of reporter interveners in a libel case in typically thorough going detail and held that the District Court could categorically refuse the reporter's access to the documents filed for summary judgment motions and used at trial without violating the First Amendment to the Constitution until after the trial ended.

Looking at the two prongs of the test experience and logic, Justice Scalia concluded that he and the Court could not find any tradition of public access pre- or post-judgment to all documents consulted by a court in ruling on pretrial motions. And applying the logic prong, the Court reasoned that the role of public access in a civil trial is not greatly enhanced by access to documents, which unlike live proceedings do not contain unreported subtleties before judgment.

Finally, I'd like to address G2's contention they should be made a party to the protective order and given access to confidential documents. We think two short points need only be made to dispense with this.

First, in the event that the Court agrees with G2 that some showing under the right of access -- common law right of access must be made as to the propriety of exhibits maintained under seal at this point in this case, and that showing must be made now, G2 can offer no assistance to the Court in making that analysis. The Court is in the best position and can and should assess whether any documents are properly designated as confidential under the definition set forth in this case's stipulated protective order. The Court would have access to the document. The Court obviously is the correct arbiter of that. And the idea that a third party, a stranger to the action somehow would shed some light for you in making that analysis simply doesn't make any sense.

Second of all, G2 cites no authority in any of their briefs for this idea that they need to be made a party to a protective order for the purpose of looking at all the documents in the first instance in order to object to them. And he actually cites the Amodeo case. We can't look at these presumptions that attach to categories of documents without looking at individual confidential exhibit e-mails and other information.

Well, I think that's clearly not the case, given that the Amodeo case, that court standard is based on the role that documents play. That's clear from the docket. It's clear from the nature of the motions they are filed in

connection with, whether it's filed with motions for summary judgment or discovery motions, et cetera. And I think that access to individual documents will not add anything to that.

Finally and quickly, this lawsuit has in no way been conducted in secret, nor need it be. The Court has carefully balanced the party's interest in maintaining the confidentiality of out information while keeping every hearing in this case appropriately and fully open to the public, as you pointed out during Mr. Stone's argument. And the Court has also taken pains to issue lengthy and thoughtful memoranda decisions in these cases explaining the basis for its decisions in full.

We don't believe in light of these things that there's credible argument that these proceedings have been closed or that the media has suffered from any lack of raw material in order to make its report.

Given the party's willingness to make its briefs publicly available subject to certain limited actions and in light of the fact that common law right of access yields in the face of concerns articulated in our protective order and that we don't see any reason to reach out and create a First Amendment right in this situation, we submit that G2's motion should be denied.

THE COURT: Thank you, Ms. Sorenson.

MS. SORENSON: Thank you.

THE COURT: Mr. Hatch?

MR. HATCH: I don't have a lot to add, other than we find ourselves somewhat in the middle here. I agree entirely with Ms. Sorenson that properly designated documents under the rules and under the protective order here that designate in good faith that Mr. Stone's claims to a right to access to those do not prevail.

Where I probably differ a little bit with Ms. Sorenson is in the application that has happened so far in this case. We have had numerous hearings in front of Your Honor and in front of the magistrate, as well, where at the very beginning an issue has arisen as to how to deal with confidential documents. And as Your Honor will recall from those times we've been in front of you, we've always prefaced it by, we don't see how this could possibly be confidential documents. But we proceeded with the proceedings in a way that allowed us not to address those things at that time.

And in that sense, I think there is probably an issue of over designation here. Because of the pressing discovery, of course, we need in our ability to get through the hearings, at least to cover our interests, those things haven't been pushed. But I can give you a couple examples.

Judge Wells required certification, for instance, of Mr. Palmisano, who was a subject of a motion that's pending before Your Honor, to provide a certification that he comply

with discovery. Mr. Palmisano did so, provided certification. I'm not sure we believe it was adequate, but he did provide it. They filed that as confidential and under seal in a pleading with the Court. I can't imagine what the basis for that type of a designation is.

A lot of things we argued in front of Your Honor in the hearing just the other day involved Project Monterey, which is a project that's been long and dead for four or five years now. And the acts of that were much older than that. All of that has been designated as confidential and there is probably little likelihood or reason for that.

So I think it does beg the question somewhat, that just to say because we say it's so, just because IBM says it's confidential, then it makes it so, that is not the rule. And so those things probably need to be addressed at some point.

As far as just as Mr. Stone wanting access to all documents, I mean, there are plenty of things that we designated and that IBM have designated, such as source code, current third-party customer information, the types of things that are contemplated under the rules that they certainly have no right to see, particularly at a pretrial stage.

So given that, I would say Mr. Stone's motion needs to be denied. But at some point, the Court may wish to address the confidentiality issues in a more general sense.

Thank you.

THE COURT: Thank you, Mr. Hatch.

You get to reply, Mr. Stone.

MR. STONE: Yeah. I'll be very brief, Your Honor.

I have no real problem with genuinely confidential material remaining sealed. But what I have problem with is relying on the parties' unilateral designation of it being confidential without any intervention by the Court. And Mr. Hatch has just acknowledged that because of the press of discovery, despite the fact that they see some over-designation issues, they haven't pressed it. And that is precisely the problem here. Why should we be added to the protective order? What can we add? We don't seek to be an arbiter of what is appropriately sealed. What we seek is to be an advocate of what is appropriately sealed -- unsealed. The Court relies on the advocacy system in order to frame the argument in order to understand the positions. And there's no one here with an interest in unsealing it that is in a position to make those arguments.

With respect to the quote from the Mokhiber case, the lines counsel read -- that's the Davis case -- the language counsel read refer to discovery materials before they were filed with the Court. We don't seek those. And when I say that I want to become a party to the protective order, I do not seek access to the mountains of documents that the parties have exchanged, only those documents that have been

placed on file with the Court. And the Mokhiber court said this:

> We perceive an important difference between the two sorts of material and include as a general matter that the presumptive public right of access does apply to motions filed with the Court concerning discovery to end the significance of such motions including materials produced during discovery and during the Court's dispositions, if any, by submitting pleadings and motions to the Court for decision. When enters the public arena, the Court proceedings exposes oneself as well as the opposing party to the risk but by no means the certainty of public scrutiny.

And then the Court goes on with the analysis that I recommended to the Court that concludes that discovery is indeed important, and these discovery motions are something that are worthy of public scrutiny.

THE COURT: What's your reaction or response to Ms. Sorenson's quoting Justice Scalia when he was a DC Circuit judge?

MR. STONE: I lose in the DC Circuit. But I will say that that case is now approaching, it will be 20 years old in September, and I find no other court has ever adopted that reasoning. It is, with respect to the justice, chilling, if

one thinks about it, to suggest that courts are at liberty to seal every single document pre-judgment without any balance of the interest in the public.

THE COURT: What about pre-judgment pretrial?

MR. STONE: Pre-judgment was the decision of Mister -- then Judge Scalia. It was pre-judgment. And I think that may explain why it has not been cited by the courts.

All I'm looking for is a process. If the Court takes a look informed by an advocate for openness at these documents and conclude that they are indeed appropriately sealed, we're happy. What we're concerned about is exactly what counsel for SCO mentioned. There are documents slipping through, being sealed, submitted to the Court, used by the Court that are not appropriately sealed. And there is no one here to speak in favor of that witness.

That's all I have, Your Honor.

THE COURT: Thank you. Thank you all. I'll take this motion under advisement and get a ruling out in due course.

Thank you. We'll be in recess.

(Whereupon, the court proceedings were concluded.)

* * * * *

STATE OF UTAH)

) ss.

COUNTY OF SALT LAKE)

I, KELLY BROWN HICKEN, do hereby certify that I am a certified court reporter for the State of Utah;

That as such reporter, I attended the hearing of the foregoing matter on April 26, 2005, and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting; and the foregoing pages number from 3 through 34 constitute a full, true and correct report of the same.

That I am not of kin to any of the parties and have no interest in the outcome of the matter;

And hereby set my hand and seal, this 24th day of January 2006.

KELLY BROWN HICKEN, CSR, RPR, RMR