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October 28, 2004

By Facsimile and U.S. Mail

David Marriot, Esq.

Cravath, Swaine & Moore

825 Eighth Avenue

New York, New York 10019-7475

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

Dear David:

I write to ask IBM to produce any affidavits, declarations, and witness statements in its possession, custody, or control concerning any subject matter on which IBM has submitted declarations in support of its pending summary judgment motions, including any declarations concerning the meaning, intent, or interpretation of AT&T's Software Agreements with IBM and Sequent.

IBM's prior selective disclosures of such materials effected a waiver of any work-product protections (which you claimed) over such materials. See Quark, Inc. v. Harley, 141 F.3d 1185, 1998 WL 161035, at *3 (10th Cir. 1998) ("The district court's ruling that the attorney-client and work product protections are waived by selective disclosure comports with the law of this circuit."); Coleco Indus., Inc. v. Universal Studios, Inc. 110 F.R.D. 688, 691 (S.D.N.Y. 1986) (selective disclosure "constitutes an implied waiver of all work product relevant to the same issue").¹

Although SCO's pending discovery requests (e.g., Requests Nos. 1 and 64) have called for IBM's production of such witness statements, IBM has continually failed to produce them. Instead, IBM has held back such statements until IBM used them with its dispositive motions, or else first produced them at the beginning of a declarant's deposition to have the witness adopt the declaration as his testimony.

We understand that IBM has undisclosed affidavits, declarations, and/or witness statements concerning the same subject matters discussed in the declarations that IBM

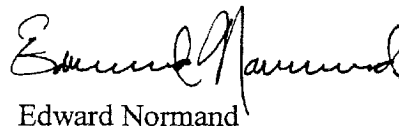
¹ SCO has previously explained that we do not share your view that the sworn statements IBM has obtained from witnesses for purposes of future disclosure (either during depositions or in support of dispositive motions) are work product, nor do we agree with your assertion that such work-product protection attaches to such materials until the very moment that you disclose them.

has disclosed.² Such selective disclosure confers on IBM an unfair tactical advantage and thus constitutes an implied waiver of the work-product privilege as to the undisclosed documents. See, e.g., Frontier Ref., Inc. v. Gorman-Rupp Co., 136 F.3d 695, 704 (10th Cir. 1998) (“[A] litigant cannot use the work product doctrine as both a sword and a shield by selectively using the privileged documents to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion.”); Coleco, 110 F.R.D. at 691 (The “privilege impedes a fair adversarial presentation of the facts when it is involved to avoid disclosure of anything other than a necessarily biased presentation of the relevant facts.”).

The rationale for waiver is even stronger here, because IBM has relied on the disclosed declarations to try to establish facts that IBM believes will entitle it to judgment as a matter of law, while at the same time IBM withholds other declarations or statements that may reveal triable issues of fact. See, e.g., Saint-Gobain/Norton Indus. Ceramics Corp. v. Gen. Elec. Co., 884 F. Supp. 31, 33 (D. Mass. 1995) (“Courts have recognized that it would be fundamentally unfair to allow a party to disclose opinions which support its position and to simultaneously conceal those that are unfavorable or adverse to its position.”); Diamond v. Mohawk Rubber Co., 33 F.R.D. 264, 268 (D. Colo. 1963) (ordering defendant to disclose witness statement where defendant enjoyed unfair advantage by withholding facts essential to preparation of plaintiff’s case).

As you know, SCO’s memoranda in opposition to IBM’s two pending summary judgment motions are due on November 23, 2004. Accordingly, I ask that you produce the requested documents by Friday, November 5, 2004.

Sincerely,


Edward Normand

² An example is a declaration from Martin Pfeffer, who (as IBM knows) has submitted a declaration that directly contradicts the contract-interpretation argument that IBM made in its motion for summary judgment on SCO’s contract claims.