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

THE SCO GROUP, INC.,)
)
Plaintiff/Counterclaim-Defendant,)
)
vs.) Case No. 2:03-cv-0294
)
INTERNATIONAL BUSINESS MACHINES)
CORPORATION,)
)
Defendant/Counterclaim-Plaintiff.)
)

Transcript of Miscellaneous Hearing

BEFORE THE HONORABLE DALE A. KIMBALL

December 13, 2005

Mindi Powers, RPR
121305MP

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1 Salt Lake City, Utah, December 13, 2005, 10:30 a.m.

2 * * *

3 THE COURT: We're here this morning in the matter of
4 the SCO Group versus IBM 2:03-cv-294. Plaintiff is
5 represented by Mr. Ted Normand and Mr. Brent Hatch, defended
6 by David Marriott and Mr. Todd Shaughnessy.

7 MR. MARRIOTT: Good morning, Your Honor.

8 THE COURT: Good morning. We're hearing SCO's
9 objection to magistrate's order, Mr. Normand and Mr. Hatch?

10 MR. NORMAND: That's correct.

11 THE COURT: Mr. Normand?

12 MR. NORMAND: Good morning, Your Honor. May it
13 please the Court, my name is Ted Normand. I represent the SCO
14 Group. As you mentioned the SCO Group has filed a limited
15 objection to the Magistrate Court's October 12th order. SCO
16 asks this Court to order IBM to produce the bulk of the
17 nonpublic internal IBM materials that concern IBM's
18 contributions of technologies of Linux operating system and
19 that SCO asked IBM to produce at the outset of this
20 litigation.

21 THE COURT: Now, you folks have the motion to compel
22 in front of Judge Wells. Now, does this affect that?

23 MR. NORMAND: The motion to compel filed with Judge
24 Wells is a motion to compel IBM to respond to SCO's seventh
25 request for documents, which are more specific versions, a

1 very broad request for documents in which we requested the
2 Linux development materials.

3 THE COURT: If I uphold her ruling that you're
4 objecting to, what will that do to your motion to compel?

5 MR. NORMAND: I think the motions are parallel, so
6 that I think if you, if I understood the words you used,
7 uphold our objection, then I think it moots the motion to
8 compel. I think however either court resolves either motion
9 affects the other motion, and we said that in both of the
10 motions.

11 THE COURT: What if I uphold her order?

12 MR. NORMAND: I think if you uphold her order, it's
13 unlikely that she is going to reach a different conclusion as
14 to whether IBM should produce these materials.

15 THE COURT: If I uphold her order does that mean
16 going back to her is basically a motion to ask her to
17 reconsider?

18 MR. NORMAND: As a practical matter, I think that's
19 true. We went through the same exercise, you might recall,
20 Your Honor, in January of this year when the magistrate judge
21 entered an order. IBM moved to reconsider that order and
22 explain to Your Honor that that's what they were doing and you
23 said that's fine, instead of objecting with me, you can file a
24 motion to reconsider with the magistrate court. So as a
25 practical matter, I think your resolution of the issue would

1 affect how the magistrate judge views it.

2 THE COURT: Tell me why I shouldn't uphold her order
3 and tell me what your view of standard of review is.

4 MR. NORMAND: I think the standard of review is to
5 the extent the Court concluded that she has not addressed an
6 issue that the Court agrees should be raised to a level, if
7 she has not addressed the issue -- the question is whether her
8 failure to address the issue was clear error. If you find
9 that she has addressed the issue, I think IBM argues that she
10 has at least implicitly addressed the issue. If you conclude
11 that she has implicitly addressed the issue, the question is
12 whether she resolved it in a way that was abuse of discretion.

13 THE COURT: Go ahead.

14 MR. NORMAND: With the Court's permission I will
15 address the three main points on which the parties have
16 addressed in the briefing. Let me point out at the outset, as
17 Your Honor may know, the October 12th order implements IBM's
18 offer to produce these materials from 20 Linux developers.
19 At the end of the hearing before the magistrate court on
20 October 7th, IBM offered to produce these materials from 20
21 developers and the magistrate court implemented that offer in
22 her October 12th order.

23 What SCO needs is the materials from the files of
24 the remaining Linux developers. And I want to frame our
25 argument with three main points: First, the direct

1 development of materials that SCO seeks; second, the absence
2 of any undue burden on IBM to produce these materials and;
3 third, briefly SCO's diligence in pursuing these materials. I
4 want to focus Your Honor on the question of all of those.

5 SCO admits that the materials are plain and
6 relevant. We seek materials such as programmer notes, design
7 documents, white papers, comments, e-mails and interim
8 versions of source code that IBM's Linux developers have
9 generated internally, and that's part of the reason that the
10 documents are so relevant is that they are internal IBM
11 documents created for the most part before litigation, before
12 anyone had any incentive to say one thing or another.

13 The materials are often included in what is called
14 the developer's sandbox, which is a term typically referring
15 to a computer hard drive that describes the environment in
16 which the developer works on code, comments on code, and sorts
17 e-mails regarding code that the developer has developed.

18 SCO has brought claims, as Your Honor may recall,
19 the breach of contract, copyright violation, and unfair
20 competition among other torts.

21 THE COURT: I do recall that.

22 MR. NORMAND: For each of those claims, SCO seeks to
23 show that IBM has contributed to Linux technologies, that IBM
24 was not entitled to contribute to Linux, and SCO also seeks to
25 show as to damages that the contributions that IBM has made to

1 Linux were important contributions, were important in making
2 Linux enterprise ready and commercially viable.

3 To date SCO has identified to IBM more than 217
4 technologies that SCO submits IBM has improperly contributed
5 to Linux. The technology includes verbatim copies of source
6 code, non-literal copies of source code and implementation of
7 protected methods and concepts.

8 SCO argues that by contributing such technology from
9 Unix System V and from the AIX and Dynix operating systems,
10 IBM has breached contracts with SCO, has violated SCO's
11 copyrights and has engaged in unfair competition.

12 The nonpublic contribution material that SCO seeks
13 is directly relevant to the fight that we expect will play out
14 with IBM over the hundreds of technologies that, in SCO's
15 view, IBM has improperly contributed to Linux, and let me
16 explain that in some more detail.

17 The materials are relevant to SCO's defense as well
18 as IBM -- in which IBM seeks a clean bill of health for all of
19 its Linux activities. To the extent, as Your Honor will
20 recall, other litigations that have been stayed pending the
21 resolution in this litigation of whether IBM is entitled to a
22 clean bill of health for all of its Linux activities, and yet
23 we cannot recover, according to IBM, the materials from its
24 300 Linux developers.

25 For most of the technologies that SCO has

1 identified, IBM, we expect, will dispute that the technology
2 originated from Unix System V or originated from AIX or Dynix,
3 and will also dispute that the technology was important to the
4 growth and development of Linux. SCO expects that the
5 material it seeks today will contain direct evidence refuting
6 those arguments from IBM. Indeed, as I mentioned, IBM has
7 produced the materials from 20 developers that SCO identified
8 in response to the Magistrate Court's October 12 order and SCO
9 has found from those materials documents that will assist
10 SCO's claims.

11 So the materials SCO seeks is relevant in three main
12 ways: One, the material will contain evidence that will
13 directly support SCO's arguments that technologies in Linux
14 are copied from Unix System V and AIX and from Dynix, two, the
15 materials contain important evidence that directly supports
16 SCO's arguments regarding the importance of IBM's
17 contributions to Linux, IBM's own developers' views of the
18 importance of the contributions to Linux; and, three, for
19 purposes of tracking IBM's implementation of methods and
20 concepts in Linux, the documents will assist in that. And we
21 will address those in some detail one by one.

22 On the first point, evidence that will support SCO's
23 arguments about misappropriated technology, SCO expects the
24 material, as the material from the 20 developers that we
25 received, contained admissions from IBM's Linux programmers

1 that the source of the contributions they have made to Linux
2 are Unix System V, AIX and/or Dynix. That evidence is
3 critical because it is unlikely that IBM will agree or admit
4 that most of the technologies at issue were copied from Unix
5 System V, AIX or Dynix.

6 It is true, as IBM says, that in many instances, SCO
7 will show the fact finder a comparison of the code in Linux
8 with the code in AIX or Dynix, and through that means SCO can
9 prove that the technology in Linux was taken from those other
10 operating systems. But that's not the only way SCO can prove
11 that. SCO also is entitled to support that comparison, which
12 is really a subject of expert testimony. SCO is entitled to
13 support that comparison with evidence showing how the
14 technology in Linux came from those operating systems and the
15 internal IBM documents show how that is true.

16 And as I mentioned, Your Honor, I want to remind the
17 Court, these are internal documents, so what we're finding and
18 what we expect to find is IBM's developers' admissions where
19 they say, I am taking this material from AIX, from Dynix, from
20 Unix System V. I've seen it, and I think it will help the
21 sufficiency in Linux. This is what I propose to do: I
22 propose to develop the source code, the method, the concept
23 from those operating systems, and I will fix the sufficiency
24 in Linux, and those are what we call admissions.

25 It's important to note that both magistrate court

1 must review this court's order, this court, has essentially
2 agreed with the notion that SCO is not limited in proving its
3 claims to a code by code comparison between on the one hand
4 Linux, on the other hand Unix System V. Again, that's an
5 issue for expert discovery. SCO's entitled to show through
6 IBM's own words, own internal documents, how these
7 technologies in Linux were derived and how they were
8 implemented. Those materials like Linux development
9 materials, meaning the interim versions of AIX and Dynix that
10 this Court and the magistrate court ordered IBM to produce,
11 those interim versions of AIX and Dynix are, just like the
12 Linux development materials, are relevant because they may
13 contain information regarding IBM's misuse of the technology.
14 And that is what the magistrate court said in her January 2005
15 order requiring IBM to produce all versions of AIX and Dynix.
16 As we read that order, and as we read this Court's allusion to
17 that order in its order denying motions for summary judgment,
18 the Court reached a consensus that SCO is not limited to a
19 mechanical code by code comparison to prove its claims.

20 The second point that most of the materials are
21 relevant is that it will contain evidence that directly
22 supports SCO's arguments about the important of IBM's
23 contributions of misappropriated technology. I've already
24 touched on this a couple of times. Of course, the parties
25 will fight with experts and other evidence over whether IBM's

1 contributions made Linux enterprise ready, made Linux
2 commercially viable in a way that it hurts SCO's business.

3 We seek to support our arguments on that by
4 representing internal IBM documents in which the developers
5 themselves say, I think this is a deficiency in Linux, I think
6 Linux can be improved if we were to take the following steps,
7 and then in some cases after the steps have been taken, saying
8 this has improved Linux. Linux is now something different by
9 virtue of the contribution that I propose to make, and those
10 are the kind of documents that would be relevant to our claim.

11 The third main point in which these materials would
12 be relevant is that they would allow SCO to track IBM's
13 implementations and methods and concepts. Again, this is
14 another issue that will be the subject of expert testimony,
15 and one way to avoid merely an expert fight from the fact
16 finder, whoever it may be, is to find other evidence that IBM
17 itself was using and admitted it was using methods and
18 concepts that were protected in improving Linux. And if there
19 is one area in which a code by code comparison is
20 insufficient, it would be in terms of identifying the
21 implementation of methods and concepts from Linux. And we
22 have found trails of e-mails from some of these 20 developers
23 and from other discovery in which it's clear that a developer
24 comes up with the idea of using a method or concept or a
25 structure, some kind of module in an operating system, in a

1 way that we say is protected, and takes that technology,
2 develops it, puts it into Linux, and then it gets implemented
3 in Linux. If we have a chain of e-mails, we have a chain of
4 documents showing how that happened, it will assist us in
5 identifying exactly how it was implemented, and Linux then
6 will assist us in doing that in a way that is not solely the
7 subject of expert testimony.

8 IBM has previously tried to convince the court that
9 the only way SCO can prove any of its claims is to demonstrate
10 that Linux's source code and Linux are taken verbatim from
11 Linux's source code and Unix System V. For all of these
12 reasons I have explained, it's just not true.

13 SCO will show in support of its contract claims, in
14 particular, that IBM has breached those contracts by
15 contributing protected methods and concepts of Linux, as I
16 mentioned. And as SCO has told this Court since the beginning
17 of the litigation, the task of tracking and identifying
18 implementation of such methods and concepts is not simply a
19 matter of running code comparisons. This very argument was
20 made in February of 2004 before the magistrate court.

21 And it is precisely because that is true, because of
22 the insufficiency of the code by code comparisons, that the
23 fight between the parties over whether and how IBM implemented
24 protected methods and concepts of Linux will be document
25 intensive, and we seek as many documents as we can on the IBM

1 side to support our arguments.

2 SCO expects that the internal Linux development
3 materials will demonstrate that IBM recognized the need to
4 implement certain methods and concepts and that IBM recognized
5 that it had access to and expertise with respect to such
6 methods and concepts by virtue of Unix System V, AIX and
7 Dynix, which under SCO's contract theory are protected
8 technologies.

9 Now, how much of this is directly relevant material,
10 these internal documents containing what we think will be
11 admissions and have contained admissions, how much of this
12 material has IBM produced to date? That's a subject of some
13 dispute between the parties as to what IBM says in its own
14 brief. By its own estimate, IBM has produced about 16 percent
15 of the approximately 300 Linux developers' files. That means
16 that SCO has not had access to the vast majority of internal
17 IBM documents concerning the contributions to Linux at the
18 very heart of SCO's claim. We actually disagree with the
19 16-percent number. The proper number is probably 16 over 300,
20 whatever percentage that comes out to be, 5 and a half percent
21 or something, but even by IBM's lights, 16 percent of 300
22 developers is a pretty insignificant fraction of the material
23 that we seek, and yet IBM argues that this should be
24 sufficient.

25 That brings me to my second main point, which I

1 won't spend a lot of time on, but which is a burden, and I
2 think I can address this point more briefly than I have, the
3 relevance point. IBM's argument about burden is flawed in
4 this main sense, whatever burden IBM faces in producing these
5 documents is a function of the broad scope of IBM's Linux
6 activities. The very scope of those activities is, of course,
7 part of what prompted SCO's lawsuit and is part of SCO's very
8 claims that IBM has been able to, has decided to, has followed
9 through on devoting such a substantial amount of resources
10 towards developing Linux. Yet now we hear that as a function
11 of the volume of that activity, it's too burdensome for them
12 to produce the documents relating to that. It's a bit of a
13 catch-22 in that arguing burden, IBM turns the facts of its
14 substantial involvement in Linux on its head.

15 IBM's argument is that because IBM is so involved in
16 its contributions to Linux because it has 300 developers
17 involved in those contributions, it should only have to
18 produce 16 percent at most of the evidence from those
19 developers, and we think that's wrong. Under the federal
20 rules and within its discretion, this Court can reject that
21 argument. That is, the Court can consider the relative amount
22 of discovery a party has produced. In IBM's own lights, it
23 has produced only a very small fraction of this material.

24 And this is particularly true, Your Honor, when you
25 consider how IBM has been able to devote such resources to its

1 Linux activities. In other context, IBM has repeatedly told
2 this Court that IBM is a company of 100,000 employees, and
3 that is how IBM has been able to devote hundreds of its
4 employees to make a contribution to Linux. One example is
5 when IBM opposed SCO's efforts to depose IBM's CEO. IBM
6 argued that as the CEO of a company with 100,000 employees,
7 you should not be subjected to a full seven-hour deposition.
8 Yet now we hear that notwithstanding the 100,000 employees,
9 notwithstanding that number of employees as part of what has
10 enabled IBM to have a substantial involvement in making
11 contributions to Linux, IBM ought to be treated as a company
12 with 5,000 employees, so that it only has to produce the
13 materials from 20 of its developers instead of all 300 who are
14 involved.

15 One final point on burden, Your Honor, showing why
16 in SCO's view the Court should take IBM's arguments with a
17 grain of salt. IBM repeatedly opposed SCO's efforts to obtain
18 the interim versions of AIX and Dynix on the grounds that it
19 would be unduly burdensome to produce those materials. Yet
20 now in its briefing, IBM acknowledges that there is a central
21 repository where IBM stores AIX and Dynix source code, and
22 that the existence of that central repository makes the
23 production of the Linux development material a different task
24 than the development of the AIX and Dynix development
25 material.

1 I think that conception undercuts the reliability by
2 their burden argument. And as we pointed out in our brief, I
3 won't deal on it here, IBM submitted a declaration in support
4 of its burden argument, but the declarant testified in his
5 deposition that the estimates of burden in the declaration
6 were really counsel's and not his, and the declarant was the
7 director of the Linux technologies center, Daniel Frye, and as
8 we read his testimony, what he said was, I am not personally
9 responsible for this estimate. I'm not sure how long it will
10 take. I'm not sure what the burden will be.

11 Now, of course, it's not unusual for counsel to be
12 the ones making the burden argument, but we think here that a
13 fast one has been pulled. We're not sure who is responsible
14 for coming up with the arguments as to the extent of this
15 burden.

16 Let me briefly address a couple more points, Your
17 Honor. The third main point is that SCO has diligently
18 pursued the production of these materials. IBM's main
19 argument on this point is not that SCO has actually waived its
20 right to bring this motion, but that if SCO really thought
21 this evidence were important, according to IBM, that SCO could
22 file a motion to compel the production of material a long time
23 ago. That assertion is incorrect and we think it's
24 inconsistent with other arguments that IBM makes.

25 The first indication SCO had that IBM would refuse

1 to produce the Linux development materials was when IBM moved
2 to reconsider the Magistrate Court's January 2005 order, and
3 IBM does not dispute that since that time SCO has diligently
4 pursued this discovery, and let me walk through the relevant
5 chronology in a little detail.

6 SCO first requested these materials in June of 2003,
7 and I don't think IBM disputes that. In October 2003, counsel
8 for IBM wrote SCO a letter in which IBM said they were
9 beginning to compile materials from the Linux technologies.

10 In November of 2003, SCO filed a motion to compel IBM to
11 produce several categories of documents. Among the categories
12 mentioned in that motion were the Linux development materials.
13 SCO said, consistent with the allegations against IBM, it
14 should be required to identify and produce all of its
15 contributions and development work in Linux. And IBM
16 acknowledged that argument in its opposition brief in the late
17 fall of 2003.

18 In February of 2004, the parties argued SCO's motion
19 to compel as well as the motion to compel that IBM had filed,
20 and the Linux development material was not a focus of that
21 argument. However, there were other areas of discovery that
22 had been briefed for purposes of the argument that were not
23 discussed at length in the area. So it's not unusual that the
24 parties didn't focus on the Linux development materials.

25 In March 2004, the magistrate court issued a

1 discovery order, and SCO interpreted that order to require IBM
2 to produce Linux development material. The magistrate court
3 has since disagreed with that interpretation and has since
4 disagreed with our interpretation of the letter that IBM's
5 counsel wrote in November of 2003, and we don't take issue
6 with that, but what IBM is arguing about is SCO's state of
7 mind. They're attributing to us a state of mind that must not
8 be -- this is relevant or else we would have done X, Y and Z.
9 Well, the magistrate court made no findings that SCO didn't
10 reasonably believe that IBM had said start to compile these
11 materials, and the magistrate court made no finding that SCO
12 didn't actually believe that the March 2004 order ordered IBM
13 to produce these materials.

14 And by IBM's own lights, the March 2004 order set up
15 a discovery protocol whereby SCO would not have admitted to
16 file a motion to compel or production of such materials until
17 SCO had met certain threshold burdens on its own. And indeed
18 IBM argues that the protocol is still in place, so it's a
19 little unclear if IBM even thinks we could have filed a motion
20 to compel until the issue of the amount of AIX and Dynix
21 source code had been resolved.

22 Following the March 2004 order, the parties had
23 essentially a nine-month fight, almost a yearlong fight, over
24 whether IBM was obligated to produce the AIX and Dynix source
25 code. IBM's own theory is that until that issue was resolved,

1 that is the protocol set up a system whereby SCO would have to
2 produce the evidence of misappropriated technology, SCO argued
3 that we couldn't do that until we get the AIX and Dynix source
4 code. Until that issue was resolved, the question of whether
5 SCO could move IBM to produce the Linux development material
6 was beside the point. That issue was ultimately resolved in
7 April of 2005 when the magistrate court resolved IBM's motion
8 to reconsider the January 2005 order.

9 SCO waited until August 1st, 2005 to see what IBM
10 produced in response to the Magistrate Court's April 2005
11 order, and when we saw that IBM hadn't produced the
12 development materials we, you know, put into place the
13 mechanisms that have led us here today. So I think that SCO
14 has acted diligently in pursuing the materials.

15 And, again, I mentioned the April 2004 order, the
16 magistrate court specifically found against us as to our
17 interpretation of the April 2005 order, but that doesn't mean
18 that we didn't believe the April 2005 order said what we
19 thought it said. The magistrate court made no finding about
20 our state of mind and whether our interpretation of that order
21 was reasonable. So for IBM to say that you must not have
22 thought the stuff was relevant because we didn't move to
23 compel IBM to produce it until the last four or five months I
24 think is incorrect.

25 And then one last point, Your Honor. The Court

1 would not need to change the deadline for the end of fact
2 discovery if the Court ordered IBM to produce these materials.
3 SCO expects that the materials will serve primarily --

4 THE COURT: Your contention is that the deadlines
5 could remain.

6 MR. NORMAND: The deadlines for the end of fact
7 discovery, which is I think mid March 2006. And let me
8 explain why that is so. We expect that materials will serve
9 primarily to provide SCO with the internal IBM evidence to
10 help prove that IBM has contributed technology to Linux from
11 Unix System V and AIX and Dynix, to prove that IBM knew it was
12 doing that and to show that the IBM contributions to Linux is
13 important as I've explained.

14 To the extent the evidence would help SCO to
15 identify how these methods and concepts have been implemented
16 into Linux, SCO can update its interrogatories accordingly
17 during the January to March discovery period, and during that
18 period, IBM is entitled to take discovery regarding the
19 misappropriated code. There would be no prejudice to IBM.

20 To the extent the evidence identifies two or three
21 additional Linux developers who SCO might seek to depose, the
22 Court could easily permit SCO to take such a deposition before
23 the end of discovery. And this two or three is probably the
24 maximum number.

25 Your Honor, as you may know, we have a limit of 50

1 depositions. SCO certainly feels compelled to take the vast
2 majority of those depositions, to finish them within the next
3 four or five weeks. We wouldn't say, that by reviewing this
4 material, there would be seven more developers we could
5 depose. We don't expect that we could get an extension of the
6 limited 50 depositions, so we are talking about a small number
7 of depositions of additional developers that could occur in
8 January, February and March.

9 And one last point on this deadline, as the Court
10 may be aware, we're filing a submission on December 22nd. The
11 discovery we're seeking could result in amendments to that
12 submission, but not substantial amendments. The submission
13 identifies the code that IBM has misappropriated. We actually
14 don't expect these materials to help us identify code that IBM
15 has misappropriated. We expect the materials to help us
16 further prove that the material we've identified that has been
17 misappropriated was misappropriated, that IBM knew it had been
18 misappropriated, but we do not expect that upon receipt of
19 this discovery if it were produced, we would amend the
20 December 22nd submission in any substantial way. The only
21 potential amendment that could result, one which IBM could
22 address during the January, February or March discovery period
23 that has been set aside for IBM to do just this, the only
24 potential amendment is to update the interrogatories to
25 further specify how methods and concepts have been implemented

1 in Linux, and that is a task that the materials we seek are
2 particularly relevant in helping us to finish. Thank you,
3 Your Honor.

4 THE COURT: Thank you. Remind me when the hearing
5 on motion to compel is in front of Judge Wells.

6 MR. NORMAND: Is it October 20th or -- I mean
7 December 21st?

8 MR. SHAUGHNESSY: I think it's next Tuesday.

9 MR. NORMAND: Next week, Your Honor.

10 MR. MARRIOTT: It's on the 20th, Your Honor.

11 THE COURT: 20th? So it's a week from today?

12 MR. NORMAND: Yes.

13 THE COURT: Thank you.

14 MR. NORMAND: Thank you.

15 THE COURT: Mr. Marriott?

16 MR. MARRIOTT: Thank you, Your Honor. Just to be
17 clear in response to Your Honor's question, the hearing that's
18 set for argument next Tuesday is not the motion that's related
19 to this one. Two arguments are set on different motions, not
20 one that bears relationship to the appeal before Your Honor
21 today.

22 THE COURT: Not the motion to compel.

23 MR. MARRIOTT: A motion to compel, but a different
24 motion to compel and the one in which SCO seeks the same
25 relief from Judge Wells that it seeks from Your Honor by way

1 of this motion. That motion has not yet, to my knowledge,
2 been set for argument.

3 THE COURT: Do you agree with that, Mr. Normand?

4 MR. NORMAND: I think that's right.

5 MR. MARRIOTT: Thank you, Your Honor.

6 MR. NORMAND: And one further thought, Your Honor, I
7 think the parties have asked the magistrate court, I think
8 we've asked her to schedule, if she could, the argument on
9 that motion before December 22nd, and I don't think we've
10 heard back from her on that.

11 THE COURT: All right.

12 MR. MARRIOTT: To my knowledge that's not true.

13 THE COURT: Which isn't true?

14 MR. MARRIOTT: That we have asked the magistrate
15 judge to set arguments for SCO's motion.

16 THE COURT: So you disagree with Mr. Normand that
17 you've asked for that?

18 MR. MARRIOTT: Correct, I disagree.

19 MR. NORMAND: Well, I certainly wouldn't have had
20 that conversation with Mr. Marriott, and if I'm incorrect, I
21 apologize, but I would have had a conversation with Mr.
22 Shaughnessy.

23 MR. SHAUGHNESSY: Yeah, my recollection is that at
24 most that would have been something that would have been
25 included in the motion papers, but there has been no separate

1 communication from the magistrate judge setting that
2 particular motion hearing that I'm aware of.

3 THE COURT: All right. Go ahead.

4 MR. MARRIOTT: Thank you, Your Honor. I have three
5 points -- two main points, Your Honor, and then I'd like to
6 respond, if I may, to some of the assertions made by SCO in
7 its reply papers and in its argument today. Before I do that
8 though, I'd like to come, if I might, to a matter which is
9 raised by a question of Your Honor to Mr. Normand and which is
10 absent from discussion in SCO's papers and that's the
11 discussion of the burden that SCO bears on this motion, an
12 issue I think critical to the resolution of the appeal.

13 To prevail, as Mr. Normand I believe suggests, for
14 the first time hearing this argument on this appeal, SCO must
15 establish that Magistrate Judge Wells acted contrary to law
16 and that she committed clear error. And that the Tenth
17 Circuit cases -- Your Honor, what that means, as a practical
18 matter, as I know Your Honor is aware, is that this Court
19 should not interfere with Magistrate Judge Wells'
20 determination unless Your Honor comes to a decision based on
21 what the Tenth Circuit describes as the entire set of
22 evidence, and if Your Honor does so based upon a definite and
23 a firm conviction of mistake. The standard is not that Your
24 Honor might have done it differently, not that Your Honor
25 thinks there might be an error or suspects it. The question

1 is whether Your Honor has a conviction that a mistake was
2 made, and not just a conviction, Your Honor, but a definite
3 and a firm conviction under the cases of the Tenth Circuit.

4 With that backdrop, Your Honor, let me come, if I
5 may, to the first of the points I'd like to make.

6 THE COURT: But if I understood part of his
7 argument, it was that she, at least with respect to some of
8 these matters, she really didn't consider them or rule on
9 them, and with those, there might be a different standard.

10 MR. MARRIOTT: That is certainly SCO's contention,
11 Your Honor. In fact, my first point is that Magistrate Judge
12 Wells considered SCO's request. And as a result, the standard
13 here, Your Honor, is whether or not she committed clear error
14 or whether or not she acted contrary to law and we, of course,
15 respectfully submit that she did not.

16 THE COURT: And you disagree with his suggestion
17 that she might not have considered this or at least part of
18 this?

19 MR. MARRIOTT: I disagree with that, Your Honor.
20 The crux of SCO's contention on this appeal is, as this
21 dialogue suggests, that Magistrate Judge Wells failed to
22 address SCO's argument that IBM should be required to produce
23 all documents related to the development of the claims, and
24 that simply, as I believe, the record demonstrates incorrect.
25 SCO filed a motion to compel, Your Honor, before Magistrate

1 Judge Wells and it filed that motion on December 2nd, 2005,
2 and in the motion it asked Magistrate Judge Wells to require
3 IBM to produce all documents related to the development of
4 Linux, and in support of that motion SCO made two arguments.
5 The first argument was that IBM had violated orders of the
6 court in not producing this information because according to
7 SCO, Magistrate Judge Wells had already ordered IBM several
8 times to produce the information.

9 SCO's argument in the alternative was that
10 irrespective of Magistrate Judge Wells' orders, she should
11 require IBM to produce all documents related to the
12 development of Linux. In response to SCO's motion, which had
13 two prongs, IBM filed a brief in opposition. In our
14 opposition papers, Your Honor, we laid out for the court,
15 Magistrate Judge Wells, that we did not understand her orders
16 to require IBM to have produced the information SCO seeks.
17 And second, we laid out, in even greater detail and greater
18 length, our response to the argument raised by SCO that we
19 should be required in any event to produce all documents
20 related to the development of Linux.

21 And I refer Your Honor to pages 10 through 16 of our
22 opposition papers below, which are devoted to the sole
23 question presented by this appeal, which is whether, as SCO
24 contends, Magistrate Judge Wells overlooked the argument set
25 out in SCO's opening brief and in IBM's opposition papers.

1 SCO filed a reply and that argument was heard. The transcript
2 of that argument, Your Honor, spans 70 pages. At the outset
3 of the argument Magistrate Judge Wells said, for the record,
4 at page 6 of the transcript, that she had considered the
5 parties' submissions, including the briefs submitted by SCO
6 and IBM about whether, irrespective of the court's orders, IBM
7 should be required to produce all information related to the
8 development of Linux.

9 Following Magistrate Judge Wells' indication that
10 she reviewed the submissions of the parties, counsel for SCO
11 argued that IBM should be required to produce the materials at
12 issue on this appeal for two reasons, one, because they were
13 supposedly required by prior orders of the court and, two,
14 because SCO contended they were in any event required. And I
15 refer Your Honor to page 25 of the transcript below. In
16 opposition IBM argued that it had not violated orders of the
17 court, and that in any event, we should not be required to
18 produce the information SCO seeks on this appeal.

19 And with respect to the latter point, I refer Your
20 Honor to pages 48 through 50 of the transcript below, that in
21 reply SCO argued again that IBM should be required in any
22 event to produce the information at issue. SCO refers to this
23 portion of the transcript in its papers and that appears at
24 page 55 by SCO's own description.

25 Following arguments from counsel, Magistrate Judge

1 Wells then said, again for the record, at page 57 of the
2 transcript, that she had considered the parties' arguments.
3 Prominent among those arguments was whether, one, IBM violated
4 the Court's orders and, two, whether independent of the
5 Court's orders, IBM should be required to produce documents
6 from all Linux developers relating to development of Linux.

7 Following that statement, Magistrate Judge Wells
8 ruled from the bench and from the bench she said in substance
9 two things. One, IBM did not misinterpret the Court's orders,
10 and the Court had not previously ordered IBM to produce, as
11 SCO contended, all documents related to the development of
12 Linux. Second, Magistrate Judge Wells denied the motion. She
13 denied SCO's request that IBM be required to produce all
14 documents related to the development of Linux, and I refer
15 Your Honor particularly to page 3 of Magistrate Judge Wells'
16 order.

17 Moreover, Your Honor, at the close of the hearing,
18 Magistrate Judge Wells said, does anyone have any other issues
19 they would like to raise with the Court, in response to which
20 SCO's counsel said at page 70, no. Following the hearing, at
21 the direction of Magistrate Judge Wells, IBM prepared for the
22 Court's signature a form of order, which IBM's counsel
23 discussed with counsel for SCO. The parties disagreed as to
24 one element of that order, an issue not relevant to the
25 present appeal. That issue was then elevated to Magistrate

1 Judge Wells. We held a teleconference, in which Mr.
2 Shaughnessy and Mr. Normand participated, to resolve the
3 disagreement about that issue. Magistrate Judge Wells
4 resolved that issue, again not relevant here, in IBM's favor.
5 But at no point during the meet and confer following the
6 hearing and at no point during the teleconference with
7 Magistrate Judge Wells did SCO ever say that they had an issue
8 with Magistrate Judge Wells' order because she had failed to
9 consider the second of their arguments in connection with
10 their motion to compel.

11 The suggestion here that Magistrate Judge Wells was
12 somehow required to parse the papers of the parties and in her
13 ruling from the bench itemize every single argument refuted
14 is, respectfully, not supported in the case law. I would
15 respectfully submit, Your Honor, that one cannot read the
16 orders of Magistrate Judge Wells below in context and reach
17 any other conclusion than that she fully understood SCO's
18 argument, she said twice on the record that she had considered
19 them, and she's ruled on them immediately after hearing from
20 counsel from SCO and counsel for IBM, and at no point did SCO
21 suggest that somehow an argument of apparently enormous
22 importance was missed by Magistrate Judge Wells, and
23 respectfully, Your Honor, I would submit that just didn't
24 happen.

25 The second point which I'd like to make is that not

1 only did Magistrate Judge Wells consider the issue presented
2 by this appeal, but she properly resolved it. She didn't
3 abuse her discretion. She didn't act contrary to law, and she
4 didn't commit clear error. Magistrate Judge Wells ruled that
5 there should be reasonable limits in effect placed on
6 discovery, and she implemented those limits and she did it
7 properly here. That decision stands, Your Honor, we submit,
8 for at least four independent reasons: One, the information
9 at issue there and now here is not relevant, was not relevant
10 and in any event not necessary, two, requiring IBM to produce
11 that information would pose an undue burden on IBM; three, the
12 request comes too late in the day; and, four, contrary to what
13 Mr. Normand suggests here today, it is simply not conceivable,
14 Your Honor, that the Court could require that Magistrate Judge
15 Wells or Your Honor today could require IBM to produce the
16 information that SCO seeks without requiring an adjustment of
17 the Court's schedule.

18 Now, I don't intend in any great depth, Your Honor,
19 to discuss each of those four I think independent bases for
20 Magistrate Judge Wells' decision. They are set out in our
21 papers and I'm happy to address any questions Your Honor may
22 have about them. Let me say briefly this with respect to
23 them: As Your Honor has now heard, I'm sure more than you
24 wish, Linux is an operating system that is an open operating
25 system. It has been and is being developed in the public

1 view. There are millions, an equivalent of millions of pages
2 of paper available to SCO and to anybody else who wants to
3 look at it on the Internet, and in our papers, Your Honor, we
4 cite the Court to the Web sites in which you could find for
5 yourself, if you so desire, more information than you'd ever
6 like about the development of Linux.

7 In addition to that which is publicly available,
8 Your Honor, we have produced from the files of IBM, contrary
9 to what SCO suggests, a very substantial number of documents
10 relating to the development of Linux. In the three -- nearly
11 three years since this lawsuit has been pending, IBM has
12 produced documents from 236 custodians. By comparison, SCO
13 has produced documents from approximately 66 custodians.
14 Contrary to what Mr. Normand said here this morning, IBM has
15 not limited its production to the documents related to the
16 development of Linux to the files of the 20 Linux developers.
17 IBM has produced documents from the files of the company, from
18 the files of individuals relating to the development of Linux,
19 the number of individuals to whom have been produced Linux
20 development documents, Your Honor, is approximately 80. It is
21 not limited, as SCO suggests in its papers here, to 20.

22 The idea, Your Honor, and Mr. Normand suggests at
23 the last hearing in an effort to put this dispute behind us,
24 in an effort to reach a compromise, IBM offered to produce
25 documents from an additional 20 developers to be selected by

1 SCO, so that we would avoid disputes about whether we properly
2 selected the people, whether we were trying, as Mr. Normand
3 suggests, to pull a fast one.

4 SCO identified the 20 developers. We produced
5 documents from those developers. That exercise, Your Honor,
6 took 60 days, and it didn't take 60 days at a leisurely pace.
7 Those were an intense 60 days with a lot of people involved,
8 reviewing a lot of documents to determine whether they were
9 responsive or privileged to prepare those for production, and
10 yet what SCO asks for today, they ask Your Honor to require us
11 to produce and to find more -- importantly, Magistrate Judge
12 Wells acted contrary to law in ruling as she did -- documents
13 from hundreds of additional Linux developers. If you just
14 take the metric, Your Honor, of what it took to produce
15 documents from the files of the 20, which was 60 days, on
16 weekends, on a very late night review basis, we would be doing
17 the production, the discovery that they request for over a
18 year. The suggestion that there is not somehow undue burden
19 associated with that is I think simply incorrect.

20 The evidence of record is what matters to the
21 determination of this appeal, Your Honor, and though SCO
22 suggests that the Court should look beyond the evidence that
23 was presented to Magistrate Judge Wells. The deposition of
24 Mr. Frye, which they cite in their reply papers, which in any
25 event it doesn't support their contention, is beyond the scope

1 of the record. The evidence of the record at the time
2 Magistrate Judge Wells ruled indicated by Mr. Frye's sworn
3 testimony, they've had a chance to depose him for over two
4 days, that the production of these materials would impose a
5 substantial undue burden on IBM. There's not any question
6 that the IBM lawyers were involved with Mr. Frye in the
7 preparation of his declaration. He's not a lawyer. Mr. Frye
8 isn't actually doing the preparation of materials to be
9 produced. He's not doing the review, so obviously there was
10 some interchange between counsel and Mr. Frye as to the
11 contents of his declaration. And if you read SCO's excerpts
12 from that declaration as they appear in their reply brief, I
13 would suggest they don't in any way support the notion
14 suggested by SCO here today, that Mr. Frye's declaration was
15 somehow an attempt to pull a fast one.

16 Mr. Frye testified that the effort would require, as
17 is obviously the case, and common sense would suggest, a
18 production from the files of hundreds of people. If a
19 production is done right and the people are visited with and
20 they are interviewed and it is determined whether they have
21 documents and they pass them along and they are carefully
22 reviewed for privilege and for responsiveness, that is a
23 substantial exercise, and it is not one that, we respectfully
24 submit, that could be accomplished here, except by imposing
25 undue burden on IBM, and we think Magistrate Judge Wells got

1 it just right when she limited the issue we have here, the
2 discovery of question.

3 We're not talking, Your Honor, about a world in
4 which there is all the discovery or no discovery. Magistrate
5 Judge Wells in the exercise of her discretion drew a line.
6 Magistrate Judge Wells appreciated that there were enormous
7 volumes of information available publicly on Linux. She
8 understood the scope of IBM's production of Linux because we
9 made it, I think, clear. She understood that IBM had produced
10 on the order of magnitude that we're talking about here and
11 she drew lines, I think reasonably, to provide SCO with what
12 it needs without imposing on IBM undue burden.

13 Furthermore, Your Honor, contrary to what SCO
14 suggests here today, we do contend that SCO delayed for
15 bringing this motion to Magistrate Judge Wells' attention. If
16 you believe SCO, Mr. Normand reiterated it here this morning,
17 SCO has been seeking the documents at issue since the summer
18 of 2003, since the beginning of this case. Magistrate Judge
19 Wells rejected, and Mr. Normand does not dispute, Magistrate
20 Judge Wells rejected in her October 12 order the idea that
21 SCO's earlier motion to compel sought the information that is
22 at issue on this appeal.

23 What that means is, Your Honor, SCO didn't bring a
24 motion to compel the production of the materials it now says
25 are at the core of the case, without which it claims it can't

1 fairly proceed until approximately two and a half years after
2 the case began, months before the close of fact discovery, and
3 about ten days before the final deadline for the disclosure of
4 the allegedly misused materials.

5 And let me pause for just a second on that issue.
6 As Mr. Normand says today, if the materials at issue are as
7 important as they are, then how can it be, Your Honor, they
8 are not going to be used to supplement the alleged misuse of
9 material. That tells you a lot about the supposed importance
10 of these materials. They're not going to be used he says
11 today, except in perhaps in a substantial way to amend the
12 disclosures that are required to be made on December 20th as
13 to what's at issue in the case. If all Mr. Normand wishes to
14 know is something particular from IBM about the code already
15 identified as allegedly misused, there are other ways by which
16 SCO can find that information, and indeed they have propounded
17 a 30(b)(6) notice on IBM to discover information such as the
18 supposed significance of the information IBM is contributing,
19 the very thing that Mr. Normand suggests now today. They were
20 required the production of at least a million -- we don't know
21 exactly how many documents are at issue here, Your Honor, but
22 I think it's quite clear based on our experience it's going to
23 be a million pages of paper, and to require that and the
24 effort that would be involved to get it done, there are other
25 ways to get the same information, it respectfully makes no

1 sense.

2 So the motion was delayed unduly because there is
3 absolutely no reason that SCO couldn't have brought this
4 motion before. And Mr. Normand talks a lot today about SCO's
5 subjective state of mind. I don't have any idea, Your Honor,
6 what's in SCO's mind. What I can tell you is they claim they
7 propounded requests in 2003. Magistrate Judge Wells makes it
8 perfectly clear in her October 12, '05 order that no prior
9 motion to compel had requested that information. If that's
10 true, the first they requested it was September 2nd of this
11 year, effectively on the eve of the close of fact discovery.
12 That ought to tell you something how supposedly important the
13 information is and that ought to tell you something about
14 whether the motion was unduly delayed.

15 The idea that they somehow just figured this out in
16 connection with the motion briefing on IBM's motion to
17 reconsider with respect to Magistrate Judge Wells' ruling on
18 AIX is not supported by the record here as we explained to
19 Magistrate Judge Wells, Your Honor, below when this motion was
20 argued in front of her. IBM has throughout the litigation, as
21 has SCO, produced logs which disclose the identity of the
22 individuals from whom IBM has produced documents. SCO
23 propounded interrogatories early in the case asking who made
24 contributions, who were the people who were involved. They've
25 had the lists of people involved in making contributions for a

1 very long time. At the same time they've had the logs that
2 show from whose files documents were produced. One cannot
3 possibly have those two documents in hand, if they've read
4 them, and not have had it perfectly clear that IBM has not
5 done, as we have not done, a production from the files of
6 everybody in the Linux technology center who might have
7 information relating to the development of Linux.

8 Again, the contributions are publicly available and
9 to the extent they aren't, we have produced those. IBM has
10 produced a substantial volume of information relating to the
11 development of Linux. And, again, as I said, by our count our
12 production of information related to the development of Linux
13 is somewhere in the order of a million and a half pages of
14 paper.

15 As I said, Your Honor, it's not conceivable that the
16 relief they request would not -- would not result in a delay
17 in the resolution of this case, and effectively their reply
18 papers say that, and they encouraged Mr. Normand here today by
19 suggesting, despite saying that they won't, that the most that
20 might be required is an amendment to their disclosures of
21 December 20th. Well, that's a deadline, Your Honor. If
22 they're amending their disclosures on December 20th, they're
23 asking for a change in the schedule. If they're proposing
24 depositions into February and March, they're asking for a
25 change in schedules because the schedule at the moment allows

1 no discovery after January 27, '06 except as it relates to
2 defenses concerning the alleged misuse of material.

3 The last point, Your Honor, and I think it's not an
4 unimportant point, is that SCO's arguments in its reply papers
5 and some of its arguments today simply distort the record of
6 what has occurred here, and I want to run through just some of
7 those because I think in their aggregate they're not of small
8 significance, especially where Your Honor is reviewing this
9 against the record presented to Magistrate Judge Wells.

10 SCO contends at page 6 of its reply brief that IBM
11 has not argued that SCO did not diligently pursue court
12 intervention. As I said, that's wrong. Moreover, we said
13 just that at the point which they say we do not disagree at
14 page 10 of our opposition papers. SCO attacks Magistrate
15 Judge Wells' order, Your Honor, on the grounds that she failed
16 to consider the entire record here, but SCO then in its reply
17 papers seeks to take the Court beyond the record. SCO
18 contends that IBM only produced documents from 20. That is
19 not correct, we have reproduced documents related to the
20 developers of Linux. SCO contends that the criteria that IBM
21 used to select the documents that were produced in these 20
22 were, in the words of its reply at page 7, known only to IBM.

23 Your Honor, as I've indicated, SCO selected the 20
24 individuals from IBM to produce documents, not IBM. The
25 criteria is known only to SCO, not to IBM. Moreover, the

1 parameters of the search were not known only to IBM, they are
2 laid out in Magistrate Judge Wells' order at pages 3 through
3 4. Under the heading there is no good deed goes unpunished.
4 SCO contends, Your Honor, that IBM has conceded the relevance
5 of the information it seeks by offering at the last hearing,
6 by way of compromise, to search the files of an additional 20.
7 We expressly said on the record in making that offer of
8 compromise, Your Honor, that we disputed the relevance.
9 That's at page 56 of the transcript. We offered a compromise
10 to put the issue to rest, not to give rise to another motion
11 requesting additional documents.

12 SCO took the documents, and now we have another
13 motion to compel in front of Judge Wells for the rest, and we
14 have an appeal in front of Your Honor. SCO suggested to
15 Magistrate Judge Wells, Your Honor, that the documents were
16 required because they were critical for taking depositions.
17 That's at page 51 of the transcript below. IBM produced the
18 documents from the 20 and I think in record time. We've
19 provided a date for the deposition of every one of those 20
20 developers, only to have SCO take some of them but turn around
21 and cancel a substantial number of them who remain and
22 presumably never will be deposed, despite the significant
23 efforts to produce documents from a supposedly critical
24 individual.

25 It is suggested here today, Your Honor, that we

1 produce documents from the files of hundreds, and yet at the
2 same time suggested that only several additional depositions
3 are going to be required. So apparently we are going out to
4 sift through the files of hundreds of people so SCO can only
5 take the depositions of several of those individuals. At page
6 8 of its reply, SCO says that Magistrate Judge Wells expressly
7 found that the discovery at issue on this appeal was not
8 before the Court, meaning before Magistrate Judge Wells. So
9 it follows, SCO says, that she didn't rule on SCO's request.

10 Well, Your Honor, Magistrate Judge Wells did say
11 that this discovery at issue here was not before her, but she
12 was talking about in the 2003 and the 2004 time frame. She
13 wasn't talking about not being before her on the 7th of
14 August, I think it was, when the argument occurred -- 7th of
15 September -- well, forget the date, I frankly don't recall --
16 where the argument was on this motion. SCO suggests IBM's
17 trying to have it both ways in these papers. It suggests on
18 the one hand we're saying SCO never asked this information, on
19 the other hand we're saying the information is duplicative of
20 SCO's seventh set of requests. We're not trying to have it
21 both ways.

22 We acknowledge that they say they requested this
23 information from the beginning of the case. The problem is
24 they didn't move to compel that until September 2nd of '05,
25 but what we're saying is, Your Honor, they've never moved to

1 compel that until now. That makes it too late.

2 SCO, Your Honor, says that it respects Magistrate
3 Judge Wells' order. This is at page 2 of their reply papers.
4 They say they respect Magistrate Judge Wells for the purposes
5 of this appeal. Mr. Normand said it again today as it relates
6 to her prior orders. Yet at page 4 of their reply they
7 suggest that IBM, again, hasn't complied with the orders. At
8 page 5 of their opening brief, they say that Magistrate Judge
9 Wells ruled that all Linux documents relevant to this case
10 were relevant to this case in her January order. She made it
11 perfectly clear in her order that's on appeal here that that
12 is not the case.

13 And SCO says at page 3 of its reply, that the relief
14 that it seeks here follows or flows from Magistrate Judge
15 Wells' earlier orders, again, a proposition expressly rejected
16 by Magistrate Judge Wells. Finally, Your Honor, SCO suggests
17 that it was incongruous for Magistrate Judge Wells to order
18 IBM -- to not require IBM to produce documents from all
19 developers of Linux when she required IBM to produce
20 development documents related to AIX and to Dynix.

21 Your Honor, Magistrate Judge Wells never required
22 IBM to produce all documents related to the development of AIX
23 and Dynix. She asked that IBM produce a central repository,
24 which we have done, two central repositories, which we've
25 done, and she ordered IBM to produce documents from

1 approximately 100 of the 3,000 or so developers who were
2 involved in development of AIX. That's approximately 2
3 percent of the developers.

4 We produced documents from a far greater number of
5 developers who were involved with Linux. So if congruity with
6 the rules of production for AIX is the rule, then, Your Honor,
7 we've already produced it.

8 In conclusion, Your Honor, respectfully, there is no
9 basis on this record for interfering with Magistrate Judge
10 Wells' determination. She did not act contrary to law. She
11 did not abuse her discretion and we ask Your Honor to overrule
12 the objection. Thank you.

13 THE COURT: Thank you, Mr. Marriott.

14 Mr. Normand, you get to reply. I think I have the
15 issues pretty well in mind, so you won't take too long, right?

16 MR. NORMAND: That's correct, Your Honor.

17 Standard of review at the bottom, we do think the
18 Magistrate Court made a mistake, so that is the standard of
19 review and that is what we think happened. There is no
20 indication at all in her October 12th order that she addressed
21 these issues, the kinds of issues that are relevant to a
22 motion to compel.

23 And that was one of Mr. Marriott's lead points. IBM
24 has argued that in her order the Magistrate Judge actually
25 resolved the question of whether IBM should now produce Linux

1 development materials. In short, when you read the order,
2 there is no indication that that is true. There's no
3 discussion in that order of the relative relevance of the
4 materials. There is no discussion in the order of any burden.
5 There is no discussion in the order of how it might affect
6 timing. There is no discussion in the order of how to balance
7 the relevance against the effect on the discovery schedule
8 about a balance of relevance against the possibility of
9 burden. There is no indication in the order that she
10 considered or adopted or disagreed with IBM's arguments about
11 the burden.

12 Not to put too fine a point on it, Your Honor, but
13 the plain language of the October 12th order speaks for itself
14 and, as a practical matter, I'm sure the Magistrate Court,
15 herself, has a view as to whether she resolved it and that may
16 be the quickest route to resolving the issue. But from our
17 perspective for purposes of this objection, this Court has a
18 record of the law and on the record below which is the October
19 12th order, there is no indication that she considered the
20 variety of factors that I think both of us agree -- Mr.
21 Marriott and I would agree are relevant in our motion to
22 compel.

23 But there is some suggestion that we should have
24 immediately at the end of the hearing or in the days following
25 a hearing when we negotiated with counsel that we should have

1 taken some formal step to essentially file a motion to
2 reconsider with the Magistrate Court if she had not resolved
3 this issue, and I didn't think we're entitled to do that and
4 IBM's own conduct in connection with the January 2005 order
5 shows that the parties had an option as to whether to move to
6 reconsider or file an objection with this Court. As a
7 practical matter, and as we have told both courts, we filed a
8 motion to compel with the Magistrate Court roughly the same
9 time as this objection, so it's not as if this issue is not
10 before the Magistrate Court.

11 And when we were discussing the particular phrasing
12 of the October 12th order, I did raise with counsel for IBM
13 that we thought she had not resolved an issue and he
14 disagreed. He said I think she did resolve the issue. Both
15 parties took the position they're taking now, but it was not
16 at all obvious and I don't think we're obligated to SCO at
17 that time, in discussing the phrasing of what she had ruled
18 during the October 7th hearing, that we were obligated to make
19 these arguments.

20 Very quickly on the other points. Relevance, IBM
21 says that they have produced these files from -- let me get
22 the numbers right -- 80 developers. In their brief they said
23 they had produced it from 55 developers. I don't know if the
24 numbers are significant. The point is if IBM is willing to
25 say now that they did produce these materials from 60 other

1 developers other than the 20, then how can it be that IBM
2 argues at the same time that these materials are not relevant.
3 Would they produce them to us, the relevant material from 60
4 other developers? If they produced from 80, then it must be
5 that the 20 was just a further concession on IBM's part that
6 these are relevant.

7 What was the significance of the concession? We
8 finally got to identify the developers. We have no idea how
9 IBM decided which of the 60 other developers among the 300 to
10 chose from, even if they did do that. We're not conceding
11 that they have produced from the 80. I don't think we can
12 reach a consensus as to that number, but if they produced
13 these materials from the files of any developers other than
14 the 20 that we identified following the October 12th order, I
15 think that's a concession that those materials are relevant.

16 With respect to the burden argument, as I said,
17 there is no indication in the Magistrate Court's October 12th
18 order that she considered these burden arguments. There's no
19 affidavit in front of this Court as to burden. Those are all
20 the first points.

21 I think it is just as important, Your Honor, that we
22 raised this issue when we first got an indication from IBM
23 that they are not going to produce these materials. The
24 parties have fought like mad throughout 2004 over the scope of
25 several categories of broad documents, and that was the focus

1 of the parties' arguments.

2 SCO took the view at that time that those were
3 resolved and other discovery could be pursued. The first
4 indication we got from IBM that they were not going to produce
5 this material in whole was January of 2005. Since that time,
6 we've pursued the issue. We've raised the issue before the
7 current discovery schedule was set in place. We've sought
8 what I think is a pretty small accommodation. We sought to
9 amend in some part, the December 22nd submission, we don't
10 expect it to be a very significant amendment at all, and we
11 sought leave to take a few depositions. What we wanted to do
12 is get the documents and examine them internally. We don't
13 want to change discovery schedules, we don't think it's
14 necessary, but to the extent it were necessary, I think it
15 follows from the fact that we've been pursuing discovery for
16 some time, and the delay in producing discovery shouldn't now
17 preclude us from getting the materials and forcing us to run
18 up against these discovery deadlines.

19 Finally, Your Honor, I know you'd like me to keep
20 this brief on the argument about whether it's too late in the
21 day and whether the schedule needs to be changed. IBM says
22 that they don't know our state of mind, but in their briefs
23 they said they did. In their briefs they said that we must
24 not think or we must not have thought that this was relevant
25 because we didn't pursue it. We think we did pursue it. IBM

1 further says this must just be delay. This is
2 incomprehensible to us. We said to both courts at the same
3 time, we're filing these motions, we're trying to meet the
4 discovery deadlines. We understand that the resolution of the
5 issue on one court will resolve the resolution of the other
6 court. We did that for efficiency. We did that because we
7 saw we were running up against the discovery deadline, and
8 when IBM attributes to us a state of mind of trying to delay,
9 when they on the other hand concede that they've already
10 produced these materials as relevant from 80 developers and 60
11 whom we didn't even identify, that's an incongruous argument.
12 We're not seeking to delay and it's true that IBM doesn't know
13 our state of mind, and to the extent they say they did, they
14 were incorrect about it.

15 Last point, Your Honor, on cancelation of these
16 depositions, the purpose of discovery is, I think everyone
17 could agree, fact discovery. Document discovery is to help
18 determine whom to depose. We never said to the Magistrate
19 Court or IBM that we will depose all of these 20 developers.
20 We asked for the files of 20 that we identified because from
21 what we could figure from the public documents they seemed
22 relevant. There are many nonpublic documents that IBM
23 concedes exist. Indeed their production from the 20
24 developers are labeled confidential. They're not materials
25 that other -- that the Linux community has seen. They're not

1 materials we could have gotten. They're from these
2 developers' sandboxes. They're confidential materials. Those
3 are not public documents.

4 And to the extent we reviewed those nonpublic
5 documents and decided that we couldn't afford to depose many
6 of the deponents, I think that's a proper use of discovery and
7 both parties have had this issue of where they're running
8 right up to the deadline of depositions deciding whether they
9 can take them at that time or a later time and canceled them.
10 IBM has canceled on the eve of two 30(b)(6) depositions. I
11 think that's not improper. I think it's to be expected. I
12 think our review of the files from the 20 developers was
13 appropriate discovery. Thank you, Your Honor.

14 THE COURT: Thank you, Mr. Normand. Thank you all.
15 I'll take this objection under advisement and get a ruling out
16 shortly. Thank you very much. Court will be in recess.

17 (The matter was concluded.)
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C E R T I F I C A T E

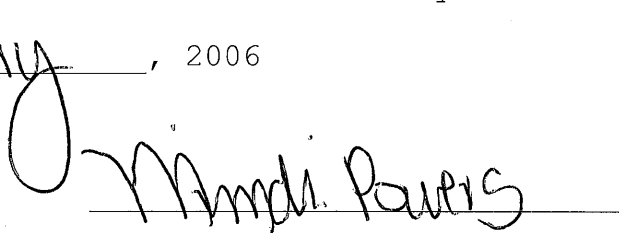
STATE OF UTAH

COUNTY OF UTAH

I, Mindi Powers, Registered Professional Reporter for the State of Utah, do hereby certify that the foregoing transcript of proceedings was taken before me at the time and place set forth herein and were taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

IN WITNESS WHEREOF, I have hereunto set my name
this 5th day of January, 2006


Mindi Powers, RPR