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A P P E A R A N C E S

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1 SALT LAKE CITY, UTAH, THURSDAY, APRIL 21, 2005

2 \* \* \* \* \*

3 THE COURT: We're here this afternoon in the matter  
4 of The SCO Group vs. International Business Machines  
5 Corporation, 2:03-CV-294. For plaintiff, Mr. Brent Hatch and  
6 Mr. Sean Eskovitz and Mr. Edward Normand; correct?

7 MR. NORMAND: Correct, Your Honor.

8 THE COURT: For defendant, Mr. David Marriott and  
9 Mr. Todd Shaughnessy.

10 MR. MARRIOTT: Good afternoon, Your Honor.

11 THE COURT: Good afternoon.

12 All right. We have SCO's motion to compel IBM to  
13 produce Mr. Palmisano for deposition; SCO's motion for leave  
14 to file a third amended complaint, which might touch on the  
15 question of defendant wanting or not wanting to narrow the  
16 Ninth Counterclaim; and proposed scheduling orders from  
17 everyone.

18 Now, the first and third of those motions clearly  
19 have no confidentiality problems. The second one, the motion  
20 for leave to file a third amended complaint, there might be  
21 some alleged confidential information there, but you can argue  
22 it in a way that doesn't refer directly to it. You can refer  
23 to it in exhibits and so on. So I'm sure for the happy  
24 conclusion of the spectators, the courtroom will not be  
25 sealed.

1 All right. Let's take up the motion to compel.  
2 Who's going to argue that?

3 MR. ESKOVITZ: I will, Your Honor.

4 THE COURT: And you are?

5 MR. ESKOVITZ: I'm Sean Eskovitz.

6 THE COURT: You are Mr. Eskovitz.

7 MR. ESKOVITZ: And, Your Honor, in connection with  
8 both of the motions that will be argued this afternoon, we  
9 submitted to the Court two separate binders of exhibits that  
10 will come up during the argument.

11 THE COURT: And you've given them to opposing  
12 counsel, no doubt?

13 MR. ESKOVITZ: We have.

14 THE COURT: Thank you.

15 MR. ESKOVITZ: Your Honor, SCO seeks to depose  
16 Sam Palmisano because before he became IBM's chairman and CEO,  
17 he personally spearheaded IBM's multi-billion dollar strategic  
18 decision to shift the focus of its operating system business  
19 from Unix to Linux, and that strategy is at the center of  
20 SCO's claims in this case. Specifically, SCO alleges that in  
21 order to carry out his strategy of quickly upgrading Linux  
22 into an operating system that could compete with Unix, SCO's  
23 product for business users, IBM took the shortcut of  
24 misappropriating SCO's intellectual property in Unix and  
25 contributing Unix' enterprise strength features into Linux.

1                   Now, Mr. Palmisano spearheaded that IBM Linux  
2 strategy when he was the vice-president in charge of IBM's  
3 computer server group in late 1999 and early 2000, years  
4 before he was installed as the company's CEO and chairman.  
5 But IBM has attempted to shield Mr. Paul Palmisano from  
6 deposition based on his current positions.

7                   They've refused to produce Mr. Palmisano on two  
8 grounds. First, they've argued that he has no knowledge  
9 regarding any specific issues that are relevant to this  
10 lawsuit; and they've also argued in the alternative that any  
11 knowledge he has can be obtained by deposing other individuals  
12 within IBM. And those objections are wrong as a matter of  
13 fact and as a matter of law. And as I'll detail in this  
14 argument, Mr. Palmisano clearly has knowledge regarding  
15 specific relevant issues about IBM Linux strategy and with  
16 respect to the legal position that IBM has taken. They  
17 incorrectly base their refusal to produce Mr. Palmisano on an  
18 inapposite body of case law that merely stands for the  
19 proposition that in garden variety lawsuits where a party  
20 should not be permitted to harass or interfere with the other  
21 party's operations simply by attempting to take the deposition  
22 of the highest executive of the company, who may have nothing  
23 to contribute with respect to the matters at issue in the  
24 lawsuit. And that doctrine has no application here.

25                   Mr. Palmisano, as we'll detail, made key senior

1 policy decisions regarding Linux and had direct responsibility  
2 for IBM Linux-related activities that are at issue in this  
3 case, all while he was vice-president at IBM before he took  
4 over his current responsibilities.

5 THE COURT: If I let you depose him, how long do  
6 you want to take?

7 MR. ESKOVITZ: That was exactly my next point, Your  
8 Honor, which is we would comply with the Court's restrictions.  
9 It would be a seven-hour deposition one day. The deposition  
10 could be done with a maximum of convenience. Our offices are  
11 actually in Armonk, New York, which IBM is headquartered and  
12 Mr. Palmisano has his office. He literally needs to cross the  
13 street or we'll cross the street to depose him. And we can  
14 schedule his deposition with him with advance notice to  
15 accommodate his schedule. So it really is a minimum burden.

16 THE COURT: You're just happy neighbors there; is  
17 that right?

18 MR. ESKOVITZ: That's right, Your Honor. It's a  
19 small town. We all get along.

20 I forgot to mention, under all the applicable case  
21 law, Mr. Palmisano's personal knowledge of IBM's intent and  
22 motive with respect to the Linux strategy requires that he  
23 give deposition testimony. As an initial matter, it is well  
24 settled that -- and this is documented in Exhibit A that was  
25 submitted to the Court in connection with this motion.

1 THE COURT: You don't trust our water here?

2 MR. ESKOVITZ: I don't want to spill it, Your  
3 Honor. I'm prone to that.

4 THE COURT: Go ahead. I'm sorry.

5 MR. ESKOVITZ: It well goes without saying that an  
6 order barring litigants to take a deposition is an  
7 extraordinary form of relief. And the parties seeking such an  
8 order under the case law that we cited in Exhibit A  
9 establishes that the parties seeking to quash a deposition  
10 notice bears the burden of showing that the proposed deponent  
11 has nothing to contribute.

12 And that is particularly true with respect to the  
13 case law cited in Exhibit B, when the deposition that is  
14 sought relates to the issues of a company's motivation and  
15 intent with respect to implementing a relevant corporate plan  
16 or strategy. The courts recognize that when it comes to the  
17 matter of corporate motivation, the high-level executive who  
18 proved the strategy or implemented the strategy is the person  
19 with the most probative information to give on a deposition.

20 And constructive on that point is the Travelers  
21 Rental vs. Ford Motor Company case, which we cited in our case  
22 and also in Exhibit B. And the Court recognizes in that case,  
23 District of Massachusetts case, that:

24 Those with greater authority may have  
25 the last word on why, in this case the Ford

1 Company, formulated and/or administered the  
2 plan in the manner in which the lower level  
3 executives describe it as being formulated  
4 and/or administered. And as the ultimate  
5 authority, their views as to why may be of  
6 far greater probative value on the issues of  
7 intent and motive than the views of the lower  
8 level executives.

9 IBM has told us that they have hundreds of  
10 individuals working on their Linux strategy. And we have, in  
11 fact, deposed some of those. But those individuals are not in  
12 a position to tell us why Mr. Palmisano approved the strategy  
13 that he approved. And that is unique knowledge that  
14 Mr. Palmisano has that no lower level executive is going to be  
15 able to give us in a deposition. And it is precisely the  
16 situation where courts permit high-ranking executives to be  
17 deposed. And certainly, as a matter of law, high-ranking  
18 corporate executives are not immune from deposition.

19 It's precisely -- this is precisely the kind of  
20 case in which such depositions are appropriate because, as I  
21 said, first, Mr. Palmisano was personally involved in  
22 formulating and approving the Linux strategy; and, second,  
23 that strategy is relevant to numerous issues in this case.  
24 And I'll take those two points in turn.

25 First, there can really be no dispute that while he



1 was an IBM vice-president Mr. Palmisano was personally  
2 involved in and indeed spearheaded IBM's strategy to embrace  
3 Linux and guided IBM's Linux-related efforts.

4 In Exhibit C that we've handed up to the Court,  
5 there's a *New York Times* article from March 2000 that featured  
6 Mr. Palmisano explaining his role in connection with what it  
7 described as IBM's ambitious Linux strategy. The article  
8 describes Mr. Palmisano as the leader of that ambitious  
9 strategy, the IBM senior executive who pushed both  
10 emphatically for the Linux initiative. It quotes  
11 Mr. Palmisano's hand-picked Czar from the technology side of  
12 the Linux operation as referring to IBM's Linux strategy as  
13 Sam's bet. And the article quotes Mr. Palmisano --

14 THE COURT: Sam's bet?

15 MR. ESKOVITZ: Sam's bet. It was Mr. Palmisano's  
16 bet on Linux on behalf of IBM.

17 And the article quotes Mr. Palmisano as describing  
18 that Linux strategy, and this is important to the King Czar  
19 case, as driving the Linux momentum at the front because, in  
20 his view, moving quickly was imperative for IBM.

21 And as I explained, and I'll get into more, the  
22 fact that IBM's motive here was to upgrade Linux as quickly as  
23 it possibly could in order to begin to recoup the billions of  
24 dollars that they invested into that strategy, it's critical  
25 to proof of our contract claim as well as defenses to the

1 copyright claims in this case and for other independent  
2 reasons.

3 At Exhibits D and E of the book that Your Honor has  
4 are IBM's own descriptions of Mr. Palmisano's contributions.  
5 And they credit him in Exhibit D with leading IBM's adoption  
6 of the Linux operating environment; and in Exhibit E, as  
7 spearheading when he was head of IBM's server and enterprise  
8 storage businesses, a major initiative to embrace Linux across  
9 IBM's server line.

10 And, indeed, shortly after IBM adopted  
11 Mr. Palmisano's Linux strategy in January of 2000,  
12 Mr. Palmisano, this is in Exhibit F, publicly announced that  
13 IBM would take the lead in the industry by making IBM  
14 technologies available to the Linux and open source  
15 communities.

16 And as I alluded to earlier, we have taken the  
17 deposition of other IBM executives with respect to the Linux  
18 strategy, and particularly Mr. Wladawsky-Berger, who I  
19 described earlier and the *New York Times* described as IBM's  
20 technical Linux Czar. And Mr. Wladawsky-Berger testified in  
21 his deposition, and these are excerpted in Exhibit F, that he  
22 reported and made his recommendations directly to  
23 Mr. Palmisano; that Mr. Palmisano made the decision that IBM  
24 should embrace Linux; and that Mr. Palmisano believed that  
25 IBM's Linux strategy was a high priority, important effort for

1 IBM.

2 So I don't think there's really much dispute here  
3 that Mr. Palmisano was directly involved and, as the *New York*  
4 *Times* described, spearheaded, and as IBM itself describes,  
5 spearheaded the strategy. So the question is, what relevance  
6 does the strategy have to SCO's claims?

7 And as I alluded to earlier, there are several  
8 independent bases on which the strategy is relevant. The  
9 first one I described already, which is that the corporate  
10 motive and intent of IBM in throwing its weight and billions  
11 of dollars that have been publicly reported behind Linux is  
12 the reason why IBM took the shortcuts that SCO claims it did  
13 and misappropriated SCO's code in order to upgrade Linux as  
14 quickly as it could to make it enterprise-hardened, is the  
15 word that has been described in the industry, to make it a  
16 viable competitor with Unix as quickly as possible. To turn  
17 it from a hobbyist's interest into something that -- operating  
18 system that would appeal to sophisticated businesses.

19 Second, and maybe even more directly, SCO has tort  
20 claims including a claim for unfair competition in its  
21 complaint, and it's in Exhibit G. We cite some case law for  
22 the Court, these are in the our briefs, as well, that it is an  
23 element of SCO's unfair competition claim to show IBM's bad  
24 faith or IBM's corporate intent, its motive. And that's  
25 obviously also relevant to SCO's claim for punitive claims

1 under its tort claims.

2 With respect to the unfair competition claim, SCO  
3 specifically alleges that IBM has engaged in a course of  
4 conduct that is intentionally and foreseeably calculated to  
5 undermine and/or destroy the economic value of Unix and to  
6 seize the value of Unix for its own benefit and for the  
7 benefit of its Linux distribution partners. Obviously, the  
8 evidence that Mr. Palmisano can give as to why IBM and why he  
9 on behalf of IBM proof of Linux strategy is evidence that goes  
10 to IBM's intent with respect to the tort claims of punitive  
11 damages claims.

12 And finally and independently with respect to  
13 damages, the evidence of IBM's corporate intent or motive is  
14 relevant to the benefit that IBM receives by being able to  
15 shortcut the development process and being able to rely on  
16 misappropriated Unix code in developing Linux.

17 It bears noting in connection with the relevance  
18 point that Mr. Palmisano's Linux documents have already been  
19 the subject of two separate court orders from Judge Wells  
20 compelling their production. And those orders recognize the  
21 relevance of the high-level documents and Linux -- and IBM's  
22 Linux strategy to the claims in this case.

23 Specifically in March 2003, the Court ordered IBM  
24 to produce all the documents and materials generated by and in  
25 the possession of employees that have been and that are

1 currently involved in the Linux project. And the Judge  
2 specifically provided that IBM was to produce materials and  
3 documents relating to IBM's Linux strategy from Mr. Palmisano  
4 and other high-level executives. However, among other  
5 deficiencies in IBM's production, they have not produced a  
6 single e-mail or other correspondence discussing Linux from  
7 Mr. Palmisano's files.

8 We renewed our motion to compel. Counsel for IBM  
9 represented to the Court that it would look again for relevant  
10 documents, even though it had already been ordered to do so in  
11 March of 2003, and Judge Wells ordered IBM to produce  
12 affidavits from the high-level executives concerning the  
13 efforts with respect to document production. After that  
14 order, IBM produced additional documents from  
15 Mr. Wladawsky-Berger file, but still has not produced any  
16 correspondence or e-mails relating to Linux from  
17 Mr. Palmisano's own files. They did not produce any  
18 explanation as to why they have not produced any of those  
19 documents. And in response to the Court's order, they simply  
20 produced a very source affidavit from Mr. Palmisano that says  
21 he gave his lawyers unrestricted access to his files. But  
22 again, no explanation as to why these e-mails had not been  
23 produced.

24 So to date, despite these two prior court orders on  
25 this issue, IBM has not provided any explanation for this

1       shortcoming in its document production from Mr. Palmisano.  
2       Mr. Wladawsky-Berger, and the Court has the testimony,  
3       testified that he communicated by e-mail to Mr. Palmisano.  
4       And in Exhibit H that the Court has, IBM produced at least one  
5       such document, but not from Mr. Palmisano's file. So we have  
6       at least an indication, a confirmation of Mr. Wassenberger's  
7       testimony from IBM's production that, in fact, Mr. Palmisano  
8       communicated about the Linux strategy in writing --

9                 THE COURT: You mean Exhibit I?

10                MR. ESKOVITZ: I believe I'm going to get to  
11       Exhibit I -- I'm sorry. You're right. Sorry, Your Honor.  
12       Exhibit I is the IBM-produced document. And Exhibit J is  
13       another e-mail that we found on the Internet from  
14       Mr. Palmisano relating to the Linux strategy. Neither of  
15       these documents were produced from IBM's -- from  
16       Mr. Palmisano's files. We still have not received from  
17       Mr. Palmisano's files any such Linux-related correspondence.

18                We have a third motion to compel such documents,  
19       which are currently pending before the Court. But what's  
20       important for these purposes is that for the very same reasons  
21       that the Court has seen fit to order IBM now twice to produce  
22       these Linux documents, because it's the same reason why  
23       Mr. Palmisano's testimony is relevant to this case, he was a  
24       key decisionmaker. And frankly, Your Honor, given the  
25       difficulty that we've had getting documents and getting

1 straight answers about why these shortcomings persist with  
2 respect to the production, we should be permitted to explore  
3 the adequacy of Mr. Palmisano's document production, as well.

4           As I alluded to earlier, IBM's argument essentially  
5 relies on an inapposite body of case law in which parties  
6 resisting high-level depositions establish that the potential  
7 deponent either had no personal knowledge of the events at  
8 issue frequently in the cases of discrimination cases or  
9 unfair termination cases where there were no corporate  
10 strategies that were at issue, or at least identify the  
11 particular witnesses who could provide the testimony that was  
12 being offered. For example, where a plaintiff is looking for  
13 financial information, and the defendant says, you can get  
14 that from our accountants or from our CFO. You don't need the  
15 CEO for this.

16           Again, Mr. Palmisano is the only person who can  
17 explain his reasons, his motives for adopting the policy that  
18 he adopted. And unlike many of the cases in which IBM relies  
19 on, they have not provided any affidavits from Mr. Palmisano  
20 disclaiming relevant knowledge, and they haven't identified  
21 who these witnesses would be. They've said there's hundreds  
22 of people who are involved with the Linux strategy.

23           And finally, I should note that IBM had served  
24 notice on SCO for our CEO. We intend to produce him. And I  
25 don't see any real reason for, you know, IBM's CEO being

1 treated any differently.

2 So Mr. Palmisano is an important witness in the  
3 case. He's got relevant testimony to give. The case law  
4 establishes that that relevant testimony requires him to sit  
5 for a deposition. There's no basis for IBM certainly to  
6 resist that deposition, and they certainly haven't met their  
7 burden of showing good cause that Mr. Palmisano has nothing to  
8 contribute. Thank you.

9 THE COURT: Thank you, Mr. Eskovitz.

10 Mr. Marriott?

11 MR. MARRIOTT: Good afternoon, Your Honor.

12 THE COURT: Good afternoon.

13 MR. MARRIOTT: As much as we disagree with SCO with  
14 respect to their claims, Your Honor, we recognize that IBM  
15 must provide, and, indeed, we have provided, some measure of  
16 discovery with respect to their claims. We have, in fact,  
17 provided substantial discovery. IBM has produced millions of  
18 pages of paper. It's produced hundreds of millions of lines  
19 of source code. And it's made available for deposition very  
20 high-level executives, including the head of IBM software  
21 business, Steve Mills; Irving Wladawsky-Berger, the person SCO  
22 describes to people as IBM's Linux Czar; and the head of IBM's  
23 Linux technology center, Dan Frye.

24 Now, we recognize that a person is not protected  
25 from deposition merely by virtue of being a CEO or chairman of



1 a Fortune 100 Company. But the circumstances in this case, we  
2 respectfully submit, are such that it does not make sense that  
3 Mr. Palmisano be deposed, certainly not at this juncture of  
4 the case. In our judgment, a CEO of a Fortune 100 Company  
5 like Mr. Palmisano should not be deposed, except where the  
6 information they haven't provided is directly relevant in a  
7 case, where they have in this case as described, has unique  
8 personal knowledge and the information sought is not available  
9 from others, such as the other 300,000-plus persons who are  
10 employed at IBM.

11 THE COURT: SCO says unlike the unusual cases where  
12 the CEO is protected from deposition, here this particular CEO  
13 had some direct involvement with the set of problems that form  
14 the basis of this case.

15 MR. MARRIOTT: Well, Your Honor, I appreciate  
16 that's the contention that SCO makes. It's SCO's formulation,  
17 however, that there is virtually no circumstance under which a  
18 CEO would not be subject to deposition because under the SCO  
19 view of the world, any person, any CEO who has any personal  
20 knowledge of those things over which that person is in charge.  
21 And there's no question, and I'll come to it momentarily,  
22 Mr. Palmisano has some knowledge with respect to Linux. We  
23 all, indeed, now have some knowledge with respect to Linux.  
24 But there's nothing that is unique, Your Honor, about  
25 Mr. Palmisano's knowledge with respect to Linux.

1                   Whether or not Mr. Palmisano should be deposed is,  
2 of course, a matter committed to Your Honor's discretion. And  
3 I would like just in a few minutes offer two reasons why we  
4 believe the Court should exercise its discretion not now to  
5 require Mr. Palmisano's deposition. First, Your Honor, is  
6 that there is persuasive authority, notwithstanding  
7 Mr. Eskovitz' contention of the contrary that the deposition  
8 of an apex employee, that is, the CEO or chairman of a company  
9 like IBM, should not be deposed except where that person has  
10 unique personal knowledge.

11                   THE COURT: I do know what apex means.

12                   MR. MARRIOTT: Pardon?

13                   THE COURT: I know what apex means.

14                   MR. MARRIOTT: I wasn't doubting you did, Your  
15 Honor.

16                   In the words of the Baine case, which we cite at  
17 Pages 6 and 8 of our brief, quote, the legal authority is  
18 fairly unequivocal, close quote, on this point. Moore's  
19 Federal Practice says, Your Honor, federal courts, quote:

20                   Often are reluctant to permit apex  
21 depositions of the highest level corporate  
22 officers or managers or who are unlikely to  
23 have personal knowledge of the facts sought  
24 by the opposing party, close quotes.

25                   And in the Cardenas case, which we cite on Pages 3

1 and 4 of our brief, the courts says, the courts, quote:

2 Frequently restrict efforts to depose  
3 senior executives where the party seeking a  
4 deposition can obtain the same information with  
5 less intrusive means or where the party has not  
6 established the executive has some unique  
7 knowledge pertinent to the issues in the case.

8 And, Your Honor, SCO has made a number of arguments  
9 to suggest that that is not a unique personal knowledge, the  
10 controlling standard. In fact, in its papers at Page 8 in its  
11 opening brief, SCO suggests that it is well-settled that a  
12 company's CEO is subject to deposition where his knowledge is,  
13 quote, even arguably relevant, close quote.

14 And that simply is not the test. None of the cases  
15 cited by SCO suggest that is the test. Indeed, some of the  
16 cases cited by SCO, such as the Six West case, which is cited  
17 on Page 9 of its brief, makes it quite clear that a unique set  
18 of personal knowledge is what the test is.

19 SCO suggests in Footnote 3 and Mr. Eskovitz said  
20 again here this afternoon that the doctrine of limiting these  
21 depositions to those persons who have unique personal  
22 knowledge is somehow inapplicable in cases of this kind. And  
23 it applies to cases that Mr. Eskovitz describes as garden  
24 variety cases, Your Honor.

25 In SCO's brief, it says the doctrine is limited to

1 personal injury, employment, and contract cases. This is,  
2 Your Honor, in an important respect a contract case. And the  
3 only case on which SCO relies for the proposition that the  
4 doctrine set out, for example, in the Cardenas case is somehow  
5 limited to cases of this kind is the Bridgestone/Firestone  
6 case. In Bridgestone/Firestone, the Court there observed  
7 nothing other than that a rigid rule is applicable in cases --  
8 in cases of whether apex depositions should be taken. In that  
9 case, Your Honor, the Bridgestone/Firestone case, the Court  
10 allowed deposition to proceed, but only after substantial  
11 discovery, most depositions had been completed, and only after  
12 the plaintiff filed a list of specific questions about  
13 which -- subjects about which it would question the witnesses  
14 in court, in where we would submit there is a greater showing  
15 of knowledge, of unique knowledge on the part of the CEO.

16 THE COURT: Greater than here, you mean?

17 MR. MARRIOTT: Greater than here, Your Honor.

18 SCO suggests that IBM bear a heavy burden, which is  
19 rarely ever met, to avoid deposition of this content. The  
20 cases cited by the parties, Your Honor, as I understand,  
21 regarding this were a little more than the proposition that  
22 the party seeking a particular form of relief bears the burden  
23 to establish a basis for that relief. Parties seeking to  
24 compel a deposition bears the burden to establish a basis for  
25 compelling a deposition. Parties seeking a protective order

1 bears the burden of establishing a basis for a protective  
2 order.

3 In this case, SCO seeks to compel the deposition of  
4 Mr. Palmisano. And in our judgment, as we read the cases,  
5 SCO, therefore, then bears the burden. In the Cardenas case,  
6 which we cite, the plaintiff there, like SCO here, moved to  
7 compel the deposition of executives. In that case, it was  
8 three executives of Prudential. And applying the unique  
9 personal knowledge test, the magistrate judge in that case  
10 denied the motion on the grounds that the plaintiff had failed  
11 to show that the executives, quote, possessed any information  
12 that could not be obtained from lower level employees or other  
13 sources, much less their knowledge of plaintiff's allegations  
14 was unique. The District Court then upheld the Court's  
15 decision in Cardenas.

16 Most of the cases, Your Honor, on which SCO relies  
17 for the proposition that IBM here bears a heavy burden are not  
18 even apex deposition cases. After stating the general  
19 proposition that parties seeking a form of relief bears a  
20 burden to establish the relief, a number of those cases  
21 actually preclude depositions.

22 For example, SCO relies upon Simmons v. Willis for  
23 the proposition that courts, quote, rarely will grant a  
24 protective order that totally prohibits a deposition, close  
25 quotes.

1 Not only was the Simmons case not an apex  
2 deposition case, Your Honor, it is a case in which the Court  
3 ordered that the deposition sought not to take place. The  
4 courts also granted protective orders in a number of the other  
5 cases that SCO cites, such as Frideros, Medlin, Motsinger,  
6 Snowden and Cotracom.

7 Your Honor, the second point that I wish to make,  
8 and then I will sit down, is that Mr. Palmisano here does not  
9 have any unique personal knowledge and it hasn't been shown to  
10 that effect. Mr. Palmisano didn't draft, he didn't execute,  
11 he didn't negotiate the agreements that IBM is alleged to have  
12 breached. The agreements were executed in the office in order  
13 of 20 years ago by individuals who don't even report to  
14 Mr. Palmisano.

15 Mr. Palmisano is obviously familiar with IBM's  
16 Linux strategy, but there is no showing here that he has any  
17 personal knowledge about that strategy that is unique and that  
18 is unknown by other individuals within IBM. He's not a  
19 computer programmer, and he certainly has no particular  
20 knowledge of the technology contributions that Mr. Palmisano  
21 alleged to have made to the Linux operating system in  
22 violation of either contract copy reference --

23 THE COURT: Is it relevant that you're going to  
24 depose SCO's CEO?

25 MR. MARRIOTT: I don't think it's relevant, Your

1 Honor. It is true that we intend to depose Mr. McBride. And  
2 with respect to Mr. McBride and Mr. Eskovitz, I think there is  
3 a big difference between Mr. Palmisano and Mr. McBride.  
4 Mr. McBride is a CEO of a company that by my count has  
5 slightly over 100 employees. Mr. Palmisano is a leader of a  
6 company that has more than 300,000 employees. Mr. McBride, as  
7 I would see it, is uniquely positioned to address the  
8 questions at issue in this case including issues in our  
9 counterclaims that go directly to Mr. McBride's public  
10 statements about SCO's alleged evidence.

11 Mr. Palmisano, by contrast, Your Honor, while he  
12 has some knowledge in actually Linux' operating system and  
13 some involvement there, he doesn't have a perspective with  
14 respect to IBM's strategy with respect to Linux, the issue on  
15 which SCO intends to acquire discovery I think in any way  
16 distinguishes on him.

17 In its opening papers, Your Honor, SCO indicated  
18 that it required Mr. Palmisano's deposition with respect to  
19 two causes of action, two sets of causes of action: SCO's  
20 contract claims against IBM; and IBM's claims in a declaration  
21 of non-infringement with respect to IBM's Linux strategy. For  
22 the first time in its reply papers and again here today, SCO  
23 suggests that there are additional claims to which  
24 Mr. Palmisano's testimony would be relevant.

25 But whatever the claims are, Your Honor,

1 specifically the testimony that SCO contends it requires from  
2 Mr. Palmisano relates to IBM's so-called Linux strategy. And  
3 in SCO's words, it wishes to depose Mr. Palmisano regarding,  
4 quote, IBM's strong financial motivation to use shortcuts in  
5 order to promote Linux' commercial appeal.

6           Although, Your Honor, IBM's motivation for  
7 promoting and contributing to Linux is not an element of any  
8 of SCO's claims, and although I submit it is of marginal  
9 relevance to any of the elements of the claims in the case, we  
10 have nevertheless produced thousands of pages of paper  
11 relating to that strategy. There is an enormous body of  
12 information in the public domain with respect to that  
13 strategy, as indicated by SCO's own papers, which go on at  
14 some length about their version of IBM strategy. And IBM has  
15 made available for deposition, Your Honor, three very  
16 high-level executives who have to the extent SCO has  
17 propounded questions about IBM's Linux strategy undertaken to  
18 answer.

19           Putting aside, Your Honor, that strategy is of  
20 marginal relevance, putting aside that there's an enormous  
21 body of information available about it, there is no showing  
22 here that Mr. Palmisano has any unique perspective. And  
23 again, under the scope and view of unique perspective,  
24 everyone has a unique perspective, and everyone would be  
25 subject to deposition. In the line of cases that suggests



1 that some unique perspective is required are just dead wrong,  
2 because in their view, those cases would be wrongly decided.

3           There are an enormous number of people -- there are  
4 a lot of people, not to overstate it, at IBM, Your Honor, who  
5 devote their time and their talents and their energies to  
6 Linux, and there is no reason why SCO ought not be required at  
7 least in the first instance to undertake to obtain the  
8 information they seek from those individuals. They have taken  
9 by my count something like three depositions, the individuals  
10 that I mentioned, all high-level executives, about Linux, and  
11 that's it. There are many others, Your Honor, who they can  
12 learn information about IBM's Linux strategy without troubling  
13 Mr. Palmisano about a deposition.

14           Courts have declined in cases that I would submit  
15 are not any different from this case to permit apex  
16 depositions. I mentioned the Cardenas case. You mentioned a  
17 couple others. In the Consolidated Rail case, the Court  
18 deferred the depositions of a party's chairman, president,  
19 CEO, as well as senior vice-president of operations and  
20 vice-president of labor relations. We produced vice-president  
21 level depositions here, Your Honor. In that case, depositions  
22 were put in multiple lawsuits involving breach of contract  
23 regarding freight charges, quote, until it has been  
24 demonstrated that they have some unique personal knowledge  
25 pertinent to the issues in the case, close quote.