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4 IN THE UNITED STATES DISTRICT COURT  
5 FOR THE DISTRICT OF UTAH, CENTRAL DIVISION  
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9 \_\_\_\_\_ )  
10 THE SCO GROUP, INC., )  
11 )  
12 )

11 Plaintiff, )  
12 )

13 vs. )

Case 2:03-CV-294  
14 )  
15 )

14 INTERNATIONAL BUSINESS )  
15 MACHINES CORPORATION, )  
16 )

16 Defendant. )  
17 )  
18 )

18 BEFORE THE HONORABLE DALE A. KIMBALL

19 APRIL 21, 2005

20 REPORTER'S TRANSCRIPT OF PROCEEDINGS

21 MOTION HEARING  
22  
23  
24

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

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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.

1           In the Stone v. Morton case, Judge Boyce granted a  
2 protective order preventing plaintiffs from deposing one of  
3 Morton International's vice-president in light of his lack of  
4 knowledge of facts relative to the action because the  
5 plaintiff had not exhausted other methods of discovery.

6           The Evans v. Allstate case, the Court precluded  
7 depositions of Allstate's chairman, president, CEO, as well as  
8 chief financial officer and senior vice-president where,  
9 quote, Allstate has already provided adequate information or  
10 the information can alternatively be obtained from other  
11 sources without apex officers.

12           In Harris v. Computer Associates, the Court  
13 precluded a deposition of an executive computer associate.  
14 And in doing that, the Court observed, quote, when a  
15 vice-president can contribute nothing more than a lower-level  
16 employee, good cause is shown not to take the deposition,  
17 close quote.

18           In Baine v. General Motors, the Court quashed a  
19 deposition of a GM vice-president for failure to show the  
20 information sought could not be obtained from other witnesses,  
21 interrogatories and a 30(b)6 deposition.

22           In Mulvey v. Chrysler, the Court found, quote, an  
23 orderly discovery process is best served by resorting to  
24 interrogatories at this time, without prejudice to a  
25 subsequent deposition, close quote.

1                   And finally, Your Honor, in the Hughes v. General  
2 Motors, the Court denied a motion to take the deposition of  
3 GM's president because it found no good cause in that  
4 situation.

5                   The cases, Your Honor, on which SCO relies are, I  
6 respectfully submit, distinguishable. Mr. Eskovitz mentioned  
7 the Travelers case. It was specifically an antitrust case.  
8 And the Court granted deposition, Your Honor, only after at  
9 least once deferring the deposition until other depositions in  
10 the discovery had been taken.

11                   In summary, Your Honor, respectfully, we believe  
12 Mr. Palmisano's deposition ought not be allowed and certainly  
13 not ought to be allowed now, and if it ever were to be  
14 allowed, it ought to be limited to three hours. Thank you,  
15 Your Honor.

16                   THE COURT: Thank you, Mr. Marriott.

17                   Mr. Eskovitz, you get to reply.

18                   MR. ESKOVITZ: Thank you, Your Honor.

19                   Your Honor, significantly during Mr. Marriott's  
20 argument, we didn't hear any attempt to dispute all of the  
21 materials that were presented to the Court, many of which come  
22 from IBM's own mouth concerning Mr. Palmisano's personal  
23 involvement in spearheading, improving, implementing IBM's  
24 Linux strategy. That's a critical fact that distinguishes  
25 this case from many, in fact, all of the cases that

1 Mr. Marriott and a litany of cases that Mr. Marriott has  
2 discussed in his argument and cited in his brief. And  
3 although Mr. Marriott again repeats the idea that the strategy  
4 is not relevant to any of the issues in this case because it  
5 is not an element to any of the issues, he ignores the fact  
6 that the intent or motive of the company is an element of  
7 SCO's tort claim for unfair competition. And even if it's not  
8 an element, it still is relevant, it's obviously important to  
9 the contract claims, to SCO's damages claims, to punitive  
10 damages under SCO's tort claim.

11 So just to, you know, brush aside this testimony as  
12 irrelevant because it's not an element of a claim, which, in  
13 fact, it is, kind of misses the boat here. So the two really  
14 undisputable facts that I think dictates Mr. Palmisano's  
15 deposition in this case is that he personally spearheaded the  
16 strategy, and the strategy is relevant.

17 And the Travelers case is right on point here  
18 because it talks about the importance of high-level executive  
19 depositions when, in fact, that corporate strategy is at  
20 issue. When the corporation's intent or motive in  
21 implementing a strategy is at issue, what Mr. Palmisano  
22 decided or why Mr. Palmisano decided it is the most probative  
23 evidence of IBM's intent in this case.

24 If Mr. Marriott claims that under our standard,  
25 under our standard, there would be -- every case would lead to

1 a deposition of a high-level executive, and that certainly is  
2 not the case. In fact, I would suggest that under  
3 Mr. Marriott's standard, there would never be an instance in  
4 which a high-level executive could be deposed, not even when  
5 the strategy that they approved is at issue in this case could  
6 that executive be deposed under IBM's standard.

7 To the contrary, the cases in which Mr. Marriott  
8 relies on, and I'll go through on particular ones, if the  
9 Court is interested in them, but they're all distinguishable  
10 on the basis that the executives did not have any relevant  
11 information. They were termination cases where the executives  
12 had nothing to do with the termination or the role of  
13 supervising an employee. They're not the kind of cases where  
14 the corporate strategy or corporate intent or motive with  
15 respect to strategies are at issue.

16 And Mr. Marriott on the one hand says, you know,  
17 we've already deposed a lot of senior executives at IBM, and  
18 on the other hand says, we should go depose more of them. We  
19 have got a limited number of depositions in this case.  
20 Mr. Palmisano is the person who spearheaded and executed this  
21 policy. We've already asked Mr. Wladawsky-Berger and Mr. Frye  
22 a number of questions, and they pointed the finger at  
23 Mr. Palmisano as the person who made the decision, as  
24 Mr. Wladawsky-Berger put in the *New York Times* article, as  
25 Sam's Bet. This is Mr. Palmisano's strategy.

1                   And significantly, and this is a point that IBM  
2 ignores in its papers and ignores in its argument, this is  
3 Mr. Palmisano's bet while he was the vice-president at IBM  
4 before he became IBM's CEO chairman. The fact that IBM has  
5 now elevated him to these positions should not shield him from  
6 discovery on the decisions that he made while he was the  
7 person spearheading their computer server group. And I think  
8 that point IBM has lost in the shuffle is important for the  
9 Court's consideration, as well.

10                   Mr. Marriott made a number of arguments. And if  
11 the Court is interested, I can discuss them in detail, about  
12 the law that is applicable. I think even under IBM --

13                   THE COURT: You don't need to discuss them.

14                   MR. ESKOVITZ: The burden obviously shouldn't  
15 depend on who filed the motion and doesn't depend obviously on  
16 the cause of actions that are at issue. It's the relevance of  
17 the corporate motivation and corporate intent with respect to  
18 strategies to the claims in the case, whatever they are.

19                   And, frankly, Your Honor, I was blown away by  
20 Mr. Marriott's argument that a different standard ought to  
21 apply for the two CEOs in this case because of the size of the  
22 parties involved. I respectfully suggest just as IBM intends  
23 to depose Mr. McBride on issues of damages on SCO's business  
24 model and other issues, just for the same reason  
25 Mr. Palmisano should be subject to deposition, particularly

1 since these were decisions that he made before he became IBM's  
2 CEO and chairman.

3 THE COURT: Thank you.

4 MR. ESKOVITZ: Unless the Court has questions.  
5 Thank you.

6 THE COURT: Thank you.

7 Let's move to the motion for leave to file amended  
8 complaint. Who's going to argue that?

9 MR. NORMAND: I will, Your Honor.

10 THE COURT: Mr. Normand?

11 MR. NORMAND: Yes.

12 Good afternoon, Your Honor. May it please the  
13 Court, I'm Ted Normand.

14 The SCO Group has sought leave to file a third  
15 amended complaint to add a new claim of copyright  
16 infringement. The facts forming the basis for the new claims  
17 are based on documents that we requested before the amendment  
18 deadline in this case that IBM produced after the amendment  
19 deadline. I'd like to describe those basic facts very  
20 quickly, Your Honor.

21 In the late 1990s, SCO's predecessor in interest,  
22 Santa Cruz Operation, owned the source code in Unix System V  
23 Version 4 or SVR-4. IBM gained access to that source code  
24 through a joint development arrangement in Santa Cruz called  
25 Project Monterey. Under Project Monterey a project to create

1 an AIX For Itanium Product that could operate on a new  
2 hardware --

3 THE REPORTER: Could you speak up a little more?  
4 I'm sorry.

5 THE COURT: She's having trouble hearing you.

6 THE REPORTER: Just speak up a little more. You're  
7 dropping your voice, and I'm having trouble hearing you.

8 MR. NORMAND: With that access, Your Honor, to the  
9 SVR-4 source code, IBM copied over 200,000 lines of source  
10 code into different versions of IBM's AIX For Power products.  
11 And the point of our claim is IBM did so without  
12 authorization, and that the documents we've uncovered in the  
13 last six to eight months showed that IBM knew it was copying  
14 without authorization.

15 We've set out a basic chronology of those facts in  
16 tab binders that Your Honor has. And I will try to walk the  
17 line that Your Honor described in terms of describing the  
18 documents that we've submitted in the binder that form the  
19 basis of the new complaint. And I'd like to walk through  
20 those very quickly, Your Honor.

21 THE COURT: Okay.

22 MR. NORMAND: Tab 2, Your Honor, an IBM internal  
23 e-mail shows that IBM knows that if it cancelled Project  
24 Monterey, it would not have the rights to the SVR-4 code that  
25 it put into its product.



1                   Tab 3, Your Honor, IBM internal e-mail shows that  
2 IBM knows that it could use the SVR-4 code only on the AIX For  
3 Itanium products, not on the AIX For Power products into which  
4 IBM copied code.

5                   Tabs 4 and 5 need to be read together, Your Honor.  
6 IBM internal e-mail pointing out that compilers are not  
7 included in the PRPQ. PRPQ is an acronym for "Program Request  
8 For Pricing Quote." It's a reference to the draft AIX For  
9 Itanium product that IBM was creating through Project  
10 Monterey.

11                   Internal IBM e-mail in response to that e-mail. In  
12 response to the assertion that the compiler would not be  
13 included in a PRPQ.

14                   I think the compiler must be available in  
15 some form, or SCO won't buy it.

16                   Tab 6, internal IBM e-mail. IBM is concerned that  
17 if they don't call the PRPQ a generally availability product,  
18 they won't have the rights to use the SVR-4 code.

19                   MR. MARRIOTT: Your Honor, I apologize for  
20 interrupting. My concern is just that we've moved to quoting  
21 from the documents, which as they themselves indicate marked  
22 confidential under the protective order.

23                   THE COURT: Well, you can read -- why don't you  
24 characterize it rather than quote it.

25                   MR. NORMAND: Yes, Your Honor. I was making an

1 effort to paraphrase the documents.

2 Tab 7, Your Honor, IBM internal e-mail drawing a  
3 distinction between the internal position that IBM has reached  
4 with respect to Project Monterey and the external position  
5 that IBM should take to the world on whether Project Monterey  
6 is continuing.

7 These documents and others like them, Your Honor,  
8 form the basis for our proposed amendment. In response, IBM  
9 has not even attempted to oppose the merits of the claim.  
10 Instead, IBM has raised several procedural road blocks why we  
11 should not be able to bring the amendments, and I think  
12 they're wrong in each count.

13 First, there is no undue burden to IBM. As the  
14 Supreme Court has noted, Rule 15 is designed to facilitate the  
15 amendment of pleadings except where prejudice to the opposing  
16 party would result.

17 There is no prejudice here. Indeed, IBM's main  
18 argument in its opposition brief was that the addition of  
19 SCO's claim would interfere with what IBM called its  
20 entitlement to a prompt resolution of the litigation. The  
21 magistrate's court discovery orders from January and from  
22 yesterday I think have mooted that part of IBM 's undue  
23 prejudice argument. And this Court, of course, denied summary  
24 judgment motions and ruled that no summary judgment will be  
25 filed until after the close of fact discovery.

1 IBM's other argument for its claim of undue burden  
2 was that SCO's proposed claim required additional discovery.  
3 As an initial matter, Your Honor, the adverse party's burden  
4 of undertaking discovery does not constitute undue burden for  
5 purposes of Rule 15. And that is particularly true here where  
6 SCO will not need to take substantial new discovery on its  
7 claim where given the new period for fact discovery in this  
8 matter, which we think should be extended even further in  
9 light of the magistrate's court's order from yesterday, IBM  
10 would have more time to take discovery in SCO's new copyright  
11 claim than it would have had before the amendment deadline.  
12 And where given the new period for fact discovery, SCO's  
13 pursuit of the new claim will not prolong discovery. In each  
14 of those respects, there's no undue burden to IBM.

15 In addition, Your Honor, the subject matter of  
16 Project Monterey specifically is already involved in the case,  
17 has been for sometime and has been with respect to at least  
18 three separate claims. First, Project Monterey is involved in  
19 this case by virtue of SCO's own contract and copyright. SCO  
20 will show that IBM not only misappropriated source code in AIX  
21 that IBM licensed, but that it misappropriated source code  
22 that it had not licensed and contributed such source code to  
23 Linux. IBM ignores this point in its briefing.

24 The second way that Project Monterey is already  
25 part of the case, Your Honor, is our claim for unfair

1 competition, which Mr. Eskovitz mentioned. In that claim, we  
2 allege that IBM was engaged in a course of conduct that was  
3 intentionally and foreseeable calculated to undermine and/or  
4 destroy the economic value of Unix by misappropriation of  
5 source code, including specifically in Project Monterey. And  
6 that's at Tab 8 of the binder, Your Honor.

7 By way of example and in response to IBM's  
8 interrogatories, and this is at Tab 9, Your Honor, SCO has  
9 stated IBM made and continued to make investments in the  
10 development of Linux and secretly advanced and promoted in the  
11 development of Linux without disclosing such activities to SCO  
12 including under Project Monterey.

13 SCO also stated that IBM's conduct forming the  
14 basis of a claim of unfair competition included using  
15 products, methods and know-how jointly developed by SCO and  
16 IBM in Project Monterey. And we noted in that interrogatory  
17 response, Your Honor, that SCO needs to take discovery of IBM  
18 where activity of this sort is typically done behind closed  
19 doors. And the documents we walked through, Your Honor, show  
20 that.

21 In addition, Your Honor, Project Monterey is  
22 already involved in this lawsuit by virtue of IBM's Ninth  
23 Counterclaim, which is very (unintelligible).

24 THE COURT: Which is what?

25 MR. NORMAND: Very broad, Your Honor.

1                   And we quote that in the tabloids. Ninth  
2 Counterclaim states:

3                   IBM is entitled to a declaratory judgment that IBM  
4 does not infringe, induce the infringement of or contribute to  
5 the infringement of any SCO copyright through the  
6 reproduction, improvement and distribution of AIX and Dynix,  
7 and that some or all of SCO's purported copyrights in Unix are  
8 invalid and unenforceable.

9                   IBM lists SVR-4 code as one of the copyrights for  
10 which IBM seeks a declaration of non-infringement. In short,  
11 IBM asks the Court to declare that IBM has not infringed any  
12 SCO copyrighting in developing AIX. And in SCO's proposed new  
13 copyright claim, we seek to prove such infringement.

14                   In fact, IBM has acknowledged that Project Monterey  
15 is already subject matter specifically in the lawsuit. For  
16 one thing, in response to our document requests, IBM produced  
17 the Project Monterey documents. In addition, Your Honor, and  
18 by way of example, in response to one of our interrogatories,  
19 IBM identified 19 Project Monterey witnesses who may have  
20 knowledge concerning certain issues in this lawsuit and  
21 identified Project Monterey as those persons subject to area  
22 of knowledge.

23                   SCO has also noticed and deposed two witnesses  
24 almost exclusively regarding the subject matter of Project  
25 Monterey and IBM's interpretation of the joint development

1 agreement that was the basis for the relationship between IBM  
2 and Santa Cruz under Project Monterey.

3 Finally, of how, Your Honor, IBM has acknowledged  
4 that Project Monterey is already in this lawsuit is the very  
5 first deposition that was taken in this case. And we quote  
6 part of the transcript of that deposition at Tab 12. The  
7 deposition concerned Project Monterey. Toward the end of the  
8 deposition, counsel for IBM specifically asked the witness  
9 whether the witness knew that IBM did, in fact, release a  
10 product, a Monterey product, worldwide to customers. In other  
11 words, Your Honor, at the very time, the very first deposition  
12 in this case, IBM was asking witnesses questions to set up  
13 IBM's assertion that its release of the Monterey product was a  
14 worldwide product giving IBM authorization to copy the SVR-4  
15 code.

16 And I can tell you at the time, Your Honor, we  
17 didn't appreciate the important question. In retrospect, you  
18 see what a defensive question it was, that IBM knew Project  
19 Monterey was an issue in the case and was trying to collect  
20 evidence to defend its pretextual release of the Monterey  
21 product in 2001. At the time of the deposition, we had asked  
22 for the Project Monterey documents before the discovery --  
23 before the amendment deadline, Your Honor, and yet, we didn't  
24 get the documents until after the amendment deadline. All of  
25 the foregoing, Your Honor, shows that SCO's copyright claim

1 would not unduly prejudice IBM.

2           Very briefly, Your Honor, the question of good  
3 faith, which is a factor in the Rule 15. The facts forming  
4 the basis of SCO's claim are based on the documents that we've  
5 uncovered in the last to six eight months. IBM's main  
6 argument is that if our motion were granted, we would no doubt  
7 immediately following the granting of the motion would request  
8 for additional discovery. That was IBM's sole argument for  
9 claiming that our motion was made in bad faith. Of course,  
10 the magistrate court orders have mooted that argument. I  
11 won't dwell on the point, but I will point out in our opening  
12 brief, we pointed out by the time this motion was argued,  
13 either Your Honor or the magistrate court would have decided  
14 whether fact discovery would be extended. So the suggestion  
15 that we filed our motion to trump the Court's decision of  
16 whether to extend the discovery schedule is an inaccurate one.

17           I think it's clear, Your Honor, that we don't  
18 propose the amendment in bad faith and that the amendment  
19 would not unduly prejudice IBM. IBM further argues that SCO  
20 has delayed in proposing the amendment and that the amendment  
21 would be futile. We think both of those arguments are  
22 incorrect, taking the argument as to the delay first. IBM  
23 first argues that Rule 16 applies because deadline for  
24 amendment has passed. As Your Honor mentioned, there is a  
25 relationship between the issue of the scheduling order and our

1 motion to amend, I'd be happy to address that issue.

2 I will move now to the issue of the scheduling  
3 order or briefing. I can say we think there are good reasons  
4 and independent reasons why IBM's Rule 16 argument does not  
5 make sense. First, we've proposed a new amendment deadline.  
6 We think a new amendment deadline makes sense for at least two  
7 reasons. One, the appointment of the deadline is to allow the  
8 parties to conform the evidence to their claims. Two, the  
9 question of whether a prejudice results from a deadline not at  
10 issue here.

11 IBM will have more time under the new discovery  
12 schedule to take discovery on our new claim than it would have  
13 had under the old schedule. Under the schedule we proposed,  
14 even the Court -- the magistrate court's order yesterday,  
15 there will be six, seven, eight months of fact discovery even  
16 after the proposed amendment deadline. Under the previous  
17 order, I think it was five-and-a-half or six months of  
18 discovery that would follow the amendment deadline. As a  
19 practical matter, Your Honor, we think we will succeed for  
20 that matter.

21 As a logical matter, we also think Rule 16 doesn't  
22 apply for the following reason. If there is no undue delay by  
23 SCO under Rule 15 because SCO's amendment is based on the  
24 documents that SCO obtained in discovery, then Rule 16 cannot  
25 bar the amendment. That is because it is undisputed that IBM



1 produced the documents after the amendment deadline, but that  
2 we requested the documents before the amendment deadline. So  
3 if there is no undue delay under Rule 15, there's no place for  
4 Rule 16. It doesn't apply. We asked for the documents  
5 before. We got them afterwards. We also asked for the  
6 documents two or three months into the case, Your Honor, in  
7 June of 2003.

8 So the relevant analysis of Rule 15, which I'll  
9 turn to now, Your Honor I'm sure is familiar with the refrain  
10 from liberal granting of motions to amend, reflect the basic  
11 policy that pleadings should enable the claims to be heard on  
12 the merits.

13 THE COURT: I have heard that before.

14 MR. NORMAND: I suspected it.

15 The rule for undue delay is the following, Your  
16 Honor. Where the parties seeking amendment knows or should  
17 have known of the facts upon which the proposed amendment is  
18 based but failed to include them in the original complaint,  
19 the motion to amend is subject to denial.

20 Our claim is based on facts in the documents that  
21 we saw for the first time since the last amendment deadline.  
22 Those documents show, as I described, Your Honor, that IBM  
23 copied more than 200,000 lines of the SVR-4 code into IBM's  
24 AIX For Power product without authorization. And that during  
25 the project, IBM knew that its limited release of the AIX For

1 Itanium product did not authorize IBM to copy the code as it  
2 had done. As soon as we reviewed those documents and  
3 undertook an investigation, we brought a proposed claim, and  
4 IBM doesn't argue that we weren't diligent in acting after we  
5 received the production that they produced after the amendment  
6 deadline.

7           Given these basic facts, our amendment is not  
8 unduly delayed. It's not delayed at all. The function of  
9 Rule 15, which provides generally the amendment of pleadings,  
10 is to enable a party to assert matters that were overlooked or  
11 were unknown at the time he interposed the original complaint  
12 or answer. The Court admitted there is no delay if the  
13 plaintiff uncovered the facts supporting the amendment during  
14 discovery.

15           And we cited in our brief two cases that we think  
16 are good examples in particular of that. The Journal  
17 Publishing case from the Southern District of New York, a  
18 three-and-a-half year lapse between the original complaint and  
19 the amended complaint were justified where the plaintiffs  
20 proposed amended complaint was based at least in part on  
21 documents that came to light during discovery.

22           The Koch case, District of Kansas, there is no  
23 undue delay to seek leave to amend if plaintiffs acquire  
24 knowledge of the facts behind the new claim only through  
25 recent discovery.

1           As we see it, Your Honor, IBM would have this Court  
2 apply a standard whereby as soon as the plaintiff in  
3 litigation had any conceivable basis for bringing a claim, it  
4 would be obligated to assert that claim rather than await the  
5 production of documents that the plaintiff has requested and  
6 expect to bear on the issue. Again, we take it that that is  
7 the point of the amendment deadline. That is not standard and  
8 one that IBM opposes that the Court should impose. And,  
9 indeed, the very point of Rule 15 is to impose a different  
10 standard. Under the precedent, the plaintiff should be  
11 entitled to a critical mass of evidence of high probative  
12 value supporting the claim. And that's a quote from the  
13 case -- one of the tabs to the binder.

14           And we think, Your Honor, that IBM's own cases make  
15 that point. And we discussed these cases and distinguished  
16 them in detail in our reply brief. I'll mention a few of  
17 them. In particular, from the 10th Circuit, in the Paris  
18 case, 10th Circuit 1995, the plaintiff's proposed amendments  
19 were not based on new evidence. In the Pallottino case, 10th  
20 Circuit, 1994, the proposed amendment was not based on new  
21 evidence. In the Frank case, 10th Circuit, 1993, plaintiff's  
22 counsel conceded that the failure to amend was strategic  
23 decision. In the Woolsey case, 10th Circuit, 1991,  
24 plaintiff's counsel acknowledged that no new evidence that was  
25 unavailable at the time of the original filing had come to

1 plaintiff's attention. Those cases make the point that focus  
2 on undue delay is on the plaintiff in litigation and  
3 plaintiff's efforts to find the documentation to support the  
4 new claim.

5 IBM's response to these points is to argue that the  
6 question of undue delay requires the Court to impute to the  
7 SCO Group the limited knowledge that certain employees of  
8 SCO's predecessor Santa Cruz might have regarding the same  
9 general subject matter, that is, Project Monterey and products  
10 being created.

11 Now, IBM does not argue, nor present any evidence  
12 that Santa Cruz or the SCO Group had concluded it actually had  
13 a copyright infringement arising out of Project Monterey. And  
14 IBM does not argue, nor present any evidence that anyone from  
15 Santa Cruz or the SCO Group knew anything about IBM's internal  
16 views of its pretextual release as reflected in the documents  
17 that were produced. What the evidence does show is that those  
18 key facts were hidden from view until discovery in this case.

19 And one of the internal IBM documents that I cited  
20 earlier illustrates the point, and we'll quote, Your Honor, at  
21 Tab 7, but it is the document, internal IBM e-mail that  
22 expressly draws the distinction between the internal position  
23 that IBM has taken on Project Monterey is not worth pursuing.  
24 And in the e-mail the author said, we need to take an external  
25 position, and the external position is that Project Monterey

1 goes on. We're still working on the AIX For Itanium product.  
2 That is the kind of information that the world and that we  
3 were aware of, the external position.

4 The excerpt from the first deposition taken in this  
5 case, and I also mentioned earlier, further illustrates the  
6 point. While IBM was asking witnesses questions to defend its  
7 worldwide release, IBM had documents in its possession  
8 reflecting the fact that IBM itself did not regard the  
9 Monterey product release as one that would authorize IBM to  
10 copy the SVR-4 system.

11 Although SCO had served numerous document requests,  
12 IBM would not produce the documents in response to those  
13 requests until after the amendment deadline. IBM relies on  
14 several documents with respect to Santa Cruz' supposed  
15 knowledge. We believe those documents are not compelling, and  
16 they fall into two basic categories. One, documents that SCO  
17 did not see and Santa Cruz did not see and had no reason to  
18 see, such as private consulting for its software announcements  
19 and memoranda for IBM licensees and manuals that IBM's  
20 technical support organization published for IBM licensees.  
21 Santa Cruz was not an IBM licensee.

22 The second category of documents show what products  
23 certain people envisioned would be created in Project  
24 Monterey. These are not documents that reflect any actual  
25 knowledge on the part of anyone at Santa Cruz about any claim

1 for copyright infringement. These facts are no grounds for  
2 the Court to conclude there has been any undue delay on the  
3 part of the SCO Group.

4 And it's worth pointing out, Your Honor, because I  
5 will briefly get to the point, IBM can and does raise such  
6 arguments in support of the statute of limitations argument on  
7 futility. These are accrual arguments that are subject to  
8 different standards. And we put cases in the binder that show  
9 the courts analyze the question of undue delay distinctly from  
10 the question of whether the limitations period. I won't dwell  
11 on that point, Your Honor, but I do think there are important  
12 policy differences between Rule 15 and the application of the  
13 statute of limitations. I quoted Wright, et al, earlier, the  
14 function of Rule 15, to enable a party to assert matters that  
15 were overlooked or unknown, the purpose of policy underlying  
16 all statutes of limitations. And this is from a Utah Supreme  
17 Court case in the last few months, Your Honor. To promote  
18 justice by preventing surprises through the revival of claims  
19 that have been allowed to slumber until evidence has been  
20 lost, memories have faded, and witnesses have disappeared.

21 None of those things is true here.

22 In addition, Your Honor, there's essentially a  
23 policy for statute of limitations conflicts with the policy  
24 under Rule 15, which is to promote claims to be brought even  
25 if they were overlooked. That's not the case here, but right

1 from the middle to point out the policy.

2 IBM's next claim under Rule 15 is that our claim  
3 would be futile. And we think that's wrong, as well. As an  
4 initial matter, an amendment is futile only if the proposed  
5 amendment could not have withstood a motion to dismiss.  
6 That's the general standard. I'm sure the Court has heard  
7 that one, as well.

8 SCO alleges that only through copyright to the  
9 SVR-4 code that IBM copied in excess of 200,000 lines of that  
10 code into the AIX For Power product. IBM did it without  
11 authorization, that those are the elements of copyright  
12 infringement. IBM does not dispute the merits of those  
13 allegations, but they made several procedural arguments.

14 IBM first invokes a statute of limitations  
15 provision in the joint development area for JDA. That  
16 provision states:

17 Any legal or other action relating to a breach of  
18 disagreement must commence no later than two years from the  
19 date of the breach.

20 And the Court cited that in the state of New York.  
21 Now, IBM does not dispute that the Court must strictly  
22 construe a contractual provision modifying a statute of  
23 limitations, which it does. In fact, under a reasonable  
24 instruction, let alone a strict instruction, IBM's  
25 interpretation of Section 22.3 does not make sense. It cannot

1 encompass (unintelligible).

2 THE REPORTER: Excuse me. Cannot encompass?

3 MR. NORMAND: SCO's copyright claim.

4 The reading that IBM offers fails to reconcile  
5 other provisions in the JDA and creates an unreasonable  
6 result. First, IBM actually ignores parts of the provision  
7 interpreting Section 22.3. That is, IBM does not even argue  
8 that the accrual portion of Section 22.3 applies to SCO's  
9 claim.

10 You'll note that the portion of the provision, Your  
11 Honor, saying that the claim under Section 22.3 must be  
12 commenced no later than two years from the date of the breach.  
13 IBM ignores that part of the rule because it creates an  
14 unreasonable result. IBM argues that the rule of the accrual  
15 should be the rule of accrual for the copyright act. And we  
16 think the reason that IBM does that is because when you read  
17 the provision as a whole, it would mean that under IBM's  
18 interpretation, Section 22.3 would eliminate both the rule for  
19 when a copyright claim accrues as well as the rule that the  
20 plaintiff can bring a copyright claim on the defendant's  
21 continuing infringement. That is not a reasonable reading.

22 If the scope of Section 22.3 were as broad as IBM  
23 argues, the copyright claim would have to be commenced within  
24 two years of the breach of the contract. Under that reading,  
25 if during Product Monterey IBM copied SCO's code but then



1 waited two years to release the part containing the code,  
2 SCO's claim would have been time-barred. We think that's an  
3 unreasonable result. IBM relied only on the first part of the  
4 language of Section 22.3 because it knows the section read as  
5 a whole, it creates an unreasonable result.

6 The fact that Section 22.3 clearly does provide for  
7 a discovery rule of accrual -- excuse me -- that Section 22.3  
8 does not provide for a discovery rule of accrual is a reason  
9 to reject items of interpretation, not to parse the language  
10 as IBM has.

11 In addition, Your Honor, IBM's interpretation fails  
12 to reconcile other provisions of the JDA. You'll see at  
13 Tab 19, Your Honor --

14 THE COURT: 20.1.

15 MR. NORMAND: 20.1. The entire liability of each  
16 party for any cause whatsoever regardless of the form of  
17 action, whether in contract or tort.

18 Section 20.1 shows the parties knew how to include  
19 in broad fashion any claims under the agreement, which is  
20 effectively the interpretation IBM gives of Section 22.3.  
21 It's not reasonable to give different conditions the same  
22 meaning.

23 In addition, Your Honor, we think these arguments  
24 made clear that Section 22.3 can reasonably be interpreted as  
25 SCO's (unintelligible). We think that the provision is clear

1 in our favor. At an absolute minimum, the provision is  
2 ambiguous. And because it's ambiguous, the Court cannot  
3 resolve the party's intent and, therefore, cannot preclude  
4 SCO's amendment at this stage of the proceedings.

5 Given that Section 22.3 does not apply, Your Honor,  
6 we enter into the world of accrual of copyright claim and  
7 statute of limitations of copyright claim. There shouldn't be  
8 any dispute on this point. Under the copyright act, every  
9 court that has addressed the issue has concluded that the  
10 copyright claim in which claims based on infringement that has  
11 occurred in the previous four years under the statute of  
12 limitations. I think it's actually three years, Your Honor.

13 IBM argues that there's some dispute in the case  
14 law as to the doctrine of continuing infringement. That's  
15 wrong. There's a dispute as to whether a copyright claim of  
16 who brings a claim 10 years after the copyright claim has  
17 accrued can recover damages for the entire 10-year period.  
18 There is no dispute under the case law that plaintiff who  
19 brings a copyright claim can recover the damages for the  
20 infringement that has occurred the previous three years.  
21 Where the copyright claim accrual and limitations period  
22 applies, there is no question that our amendment is not shield  
23 from.

24 IBM argues that venue is improper in this court.  
25 Given that Section 22.3 does not apply, that argument fails.

1                    Finally, Your Honor, I think it is worth noting IBM  
2 dismisses too quickly a case showing very clearly that the  
3 District Court always has the discretion to determine that the  
4 interest of judicial economy regarding pending litigation can  
5 override the forum selection. In the Steward case from the  
6 District of Minnesota, 2001, the Court declined to transfer  
7 the litigation to the locale specified in the forum selection  
8 clause because the Court preferred to have both cases  
9 adjudicated simultaneously before the Court that is intimately  
10 familiar with the issues in the case. We think that is the  
11 case here, Your Honor.

12                    The discovery that SCO must pursue to defend  
13 against IBM's Ninth Counterclaim, for example, includes the  
14 precise Project Monterey activities underlined in SCO's  
15 proposed amendment. The fact that in this case the documents  
16 regarding Project Monterey have already been produced and are  
17 being reviewed, and presumably there will be a supplemental  
18 production, the parties have already taken other discovery  
19 regarding Project Monterey, such as the three depositions I  
20 referred to. The subject matter and many specifics of Project  
21 Monterey have already been part of the lawsuit and been made  
22 part of the lawsuit. And whether or not SCO's new claims in  
23 the case, SCO will present the facts of IBM's conduct in  
24 copying Project Monterey. Your Honor, in the interest of  
25 judicial economy clearly shows that SCO's new claim should not

1 be split from this litigation.

2 In short, Your Honor, SCO proposes a good faith  
3 meritorious claim on the basis of facts that SCO uncovered  
4 only recently in discovery in this matter and that SCO could  
5 not have recovered without that discovery or before the  
6 deadline for the amendment of the pleadings. We proposed a  
7 claim that concerns the very same subject matter that is  
8 already at issue in the case including by virtue of IBM's  
9 counterclaims. We propose a claim with approximately six to  
10 eight months of fact discovery remaining, depending on how  
11 Your Honor rules on the issue of scheduling orders.

12 Under the circumstances, Your Honor, we submit the  
13 Court should permit SCO to bring its copyright claim.

14 THE COURT: Thank you, Mr. Normand.

15 Mr. Marriott?

16 MR. MARRIOTT: Your Honor, there are a number of  
17 reasons why the Court should deny SCO's application to amend.  
18 I'd like to focus on just two of them without diminishing the  
19 importance of those other reasons which I think are adequately  
20 addressed in our briefs.

21 THE COURT: All right.

22 MR. MARRIOTT: Before I come to those, Your Honor,  
23 two quick points. We believe that SCO's predecessor in  
24 interest, Santa Cruz Operation, Inc., granted to IBM and that  
25 IBM has a license to use Unix System V Release 4 code, SVR-4

1 code, in its AIX For Power product. SCO devoted some portion  
2 of its presentation to its view of the merits of whether IBM  
3 has that license. The Court cannot resolve that question on  
4 this motion. I don't intend to try Your Honor's patience with  
5 inquiring into the merits, except to say we believe that the  
6 evidence will show that we have that license.

7 Second, Your Honor, as another preliminary matter,  
8 let me just say just a word about the standards that apply to  
9 this motion. There are three. The first, Your Honor, rose  
10 out of this Court's order of June 10, 2004. The deadline, as  
11 Mr. Normand indicates, for amending the pleadings has passed.  
12 It passed more than a year ago. As a result, this motion is  
13 untimely, unless SCO can satisfy first the requirement of this  
14 Court's order of June 10. In the order dated June 10, Your  
15 Honor said that the scheduling order will not be modified  
16 again except upon a showing of extremely compelling  
17 circumstances. Absent a showing of extremely compelling  
18 circumstances, the motion should be denied.

19 Second standard, Your Honor, that relates to this  
20 claim is Rule 16(b). Rule 16(b) provides that an amendment  
21 shall not be permitted after the deadline for amending the  
22 pleadings has passed, except upon a showing of good cause.  
23 And as Your Honor knows, the central inquiry there is whether  
24 the parties seeking to amend after the deadline has acted in  
25 due diligence.

1           The third standard, Your Honor, is the standard  
2 that Mr. Normand focuses on primarily. That is Rule 15 and  
3 Rule 15(a), the rule the Court need not reach. But if it  
4 chooses to reach Rule 15, Rule 15 would not permit an  
5 amendment where there has been undue delay where there would  
6 be prejudice to the party opposing the amendment, which bad  
7 faith with an ulterior motive where the proposed amendment is  
8 futile or should have been and must be brought in another  
9 court.

10           First point, Your Honor, which I would like to make  
11 is that SCO has known about the proposed claim, that is to  
12 say, its claim that IBM has included Unix System V Version 4  
13 code and IBM AIX For Power product for many years, and it has  
14 done nothing about it. If SCO, Your Honor, knew or should  
15 have known that IBM included -- that IBM included in AIX For  
16 Power SVR-4 code and it knew that before the deadline for  
17 amending the pleadings passed, then this motion fails. If it  
18 knew before the deadline passed for amending the pleadings  
19 that IBM included that code, Unix System V Release 4 code in  
20 its AIX Power Product, then it can't establish good cause, it  
21 can't satisfy the requirements of Rule 15, it certainly can't  
22 establish compelling circumstances, let alone extremely  
23 compelling circumstances.

24           SCO contends, Your Honor, that it did not know and  
25 had no reason to know that IBM included SVR-4 code in its AIX

1 For Power product because in SCO's words, IBM's conduct was,  
2 quote, an egregious clandestine violation, close quote. And  
3 IBM, quote, took affirmative steps, close quote, to prevent  
4 SCO from discovering this alleged clandestine conduct.

5 Those allegations are false. And with the Court's  
6 permission, I intend to show that SCO's internal documents,  
7 Your Honor, documents in its possession for many years and in  
8 possession of its predecessor interest, show it to be false.  
9 I will show also, Your Honor, that the public record makes  
10 perfectly clear that SCO and the world knew and understood  
11 that IBM had included SVR-4 code in its AIX For Power product.  
12 The showing I intend to make, Your Honor, again is not based  
13 on the Monterey licensing agreement, so we think it will  
14 totally support our position. This showing is based upon  
15 their documents and the public record.

16 If I may approach.

17 THE COURT: Yes.

18 MR. MARRIOTT: Your Honor, beginning at Page 2, we  
19 lay out at least eight indications in the public record and in  
20 SCO's own documents, documents found in its files, that IBM  
21 included SVR-4 code in its AIX For Power product. One,  
22 indication one, the purpose of Project Monterey, Your Honor,  
23 was to create a family of operating systems, including the AIX  
24 For Power product. It was not, as the SCO brief suggests, a  
25 simple afterthought. And I refer the Court to the last bullet

1 on the page, a SCO presentation at a SCO partner conference in  
2 the year 2000.

3 Project Monterey in the presentation said, quote:

4 To establish high-volume, enterprise class  
5 Unix platform through...Single scalable Unix  
6 product line family for IA-32, IA-64 and IBM  
7 Power microprocessors.

8 In a joint IBM/SCO presentation, Your Honor, it  
9 states IBM and SCO -- quote:

10 IBM and SCO join forces to deliver the most  
11 advanced family of Unix products in the world  
12 including AIX, PPC.

13 That's Power PC product.

14 At Page 2 of our book, Your Honor, the second  
15 indication found in SCO's documents that it knew or should  
16 have known Project Monterey's combined features from both AIX  
17 and UnixWare. If you look, for example, at the last quote on  
18 Page 3, Your Honor, May 2, 2001, print-out of the web page for  
19 the AIX 5L product, which website was jointly sponsored by IBM  
20 and SCO, that is to say, the Santa Cruz Operation, Inc., so  
21 its predecessor. This is a document produced by SCO to us in  
22 this litigation. AIX is, quote, for both Intel Itanium- and  
23 IBM Power-based systems, close quote. AIX 5L is taking IBM's  
24 AIX Unix operation system and combining it with the best  
25 technologies from SCO's UnixWare operating system.



1                   The third indication, Your Honor, is found at  
2 Page 4 of the book. SCO provided IBM with UnixWare/SVR-4 code  
3 for inclusion into IBM's AIX For PowerPC Product. A SCO  
4 e-mail dated 10-23-98 states, quote:

5                   UnixWare for AI32 and AIX PPC continue to be  
6 developed and controlled by SCO and IBM  
7 respectfully. The only difference here is each of  
8 us now has access to technology from both UnixWare  
9 and AIX which can be added to the existing product  
10 lines to increase compatibility and improve the  
11 family story.

12                   Next bullet, SCO e-mail dated 9-7-99. Quote:

13                   SCO is providing UnixWare technology to IBM  
14 for inclusion in AIX. Thus users should think of AIX,  
15 paren, on PowerPC, close paren, SCO's UnixWare on IA32  
16 and Monterey on IA64 as becoming the same operating  
17 system over the next two years.

18                   Indication four, Your Honor, Page 5 of our book.

19                   IBM communicated to SCO regarding the inclusion of  
20 UnixWare/SVR4 code in AIX For Power.

21                   And IBM-SCO Family Unix Technical Proposal, dated  
22 9-2-98, produced by SCO in the case states that technology  
23 from UnixWare 7 would be incorporated in both AIX or IA-64 and  
24 AIX For Power.

25                   And IBM presentation also produced by SCO states

1 that the Project Monterey strategy includes a plan to  
2 aggressively grow and enhance AIX-Power offering by including,  
3 quote, contributions from SCO's UnixWare and Sequent's  
4 Dynix/ptx.

5 It lists SVR-4 Print Subsystem as among the common  
6 subsystems in the Project Monterey product line, including AIX  
7 For Power.

8 And finally, SCO e-mail dated 8-11-00, distributing  
9 text of a press release prepared by IBM: refers to AIX 5L  
10 running on both Power, the allegedly infringing product,  
11 running on both Power in IA64 and notes, quote, that among the  
12 Unix System 5 technologies to be incorporated in this release  
13 is the SVR-4, the allegedly infringed technology, printing  
14 substance.

15 Fifth indication, Your Honor, in the documents is  
16 that SCO was aware of the specific UnixWare/SVR-4 code that  
17 would be included in AIX For Power. An IBM-SCO family Unix  
18 technology proposal, again produced by SCO in the litigation,  
19 lists specific technology from UnixWare 7, the allegedly  
20 infringed product in part, to be incorporated into both AIX  
21 for IA64 and AIX For Power. Included are, quote, proc  
22 filesystem and SVR-4 Printing subsystem/printcap files, the  
23 allegedly infringed product listed in the proposed amended  
24 complaint.

25 A joint SCO/IBM document comparing AIX For Power

1 and AIX for IA64:

2 Notes that the SVR-4 print subsystem is common  
3 between the two products

4 A SCO-IBM agreement overview, dated 11-4-98 lists,  
5 quote, common features/technology, close quote, between  
6 UnixWare 7, Monterey IA64, and AIX For PowerPC, including,  
7 again, SVR-4 print subsystem, one of the allegedly infringed  
8 products.

9 The sixth indication. SCO and IBM marketed AIX For  
10 Power -- SCO and IBM marketed AIX For Power as a product that  
11 would include UnixWare/SVR-4 technology.

12 A SCO presentation to its Data Center Acceleration  
13 Program, dated 11-4-98.

14 SCO supplying IBM. SCO, present sentence,  
15 supplying IBM with UnixWare 7 APIs and technologies for AIX.  
16 It describes AIX on PowerPC as, quote, AIX with UnixWare,  
17 close quote.

18 SCO presentation at SCO partner conference 2000.  
19 Refers to technology exchanges between AIX, UnixWare and  
20 Dynix. And notes that the Project Monterey strategy includes  
21 the plan to, quote, aggressively grow and enhance AIX-Power  
22 offering, close quotes, by including, quote, enhancements from  
23 SCO's UnixWare and IBM NUMA-Q Dynix/ptx.

24 Seventh, and nearly final indication for today,  
25 Your Honor, IBM specifically announced the inclusion of

1 Unix/SVR-4 technologies in AIX 5L For Power.

2 In March 2001, a document entitled, Printing for  
3 Fun and Profit under AIX 5L, it's noted that the addition of  
4 the SVR-4 print subsystem, the allegedly infringing product --  
5 alleged infringed product, rather, is in this release of AIX,  
6 it devotes more than 150 pages for the SVR-4 print subsystem.

7 IBM 4-17-01 software announcement for AIX 5L For  
8 Power, includes a section titled, SVR-4 Printing Subsystem.

9 A 2001 AIX 5L for Power Version 5.1 release notes  
10 includes a section of instructions on how to use SVR-4  
11 printing subsystem.

12 The eighth indication, Your Honor, is that  
13 contemporaneous industry reports noted the inclusion of  
14 UnixWare/SVR-4 code in AIX For Power.

15 And August 8, 2000 -- this is Page 9 in the book.  
16 August 8, 2000, "The Register" refers to AIX 5L as an  
17 operating system that runs on both the IA64 and Power  
18 architectures and that included contributions from, quote, SCO  
19 UnixWare and Unix System V standard technologies, quote close.

20 June 2001, report by Andrews Consulting Group  
21 describes AIX 5L as, quote, a single Unix for both PowerPC and  
22 IA64, close quote. And notes that, quote, AIX 5L supports a  
23 number of Unix System V Release 4, SVR-4, commands and  
24 utilities, especially in the printing subsystem, close quote.

25 And finally, September 24, 2001, article, notes

1 that AIX 5L, quote, can be used with both IBM PowerPC  
2 processors and the merging Intel IA64 Itanium chips and that  
3 AIX 5L, the allegedly infringing product, included a SVR-4  
4 compatible printing subsystem, the allegedly infringed  
5 product.

6 What's more, Your Honor, SCO contends that it  
7 should be allowed to amend because it just discovered evidence  
8 of the alleged infringement after it says the deadline passed  
9 for amending the pleadings. And SCO attaches to its opening  
10 brief and it includes in the book that it provided the Court  
11 today six documents, and it references IBM's AIX For Power  
12 code. And Mr. Normand said by my count today no less than  
13 five times, IBM produced these documents for the very first  
14 time after the deadline passed for amended pleadings. That's  
15 false. Three of the six documents, which Mr. Normand refers  
16 to, were produced before the deadline for amending the  
17 pleadings. Three of the six.

18 And when it comes to the scheduling order, Your  
19 Honor, I have a handout which lays out the chronology. It may  
20 make more sense to talk about it there in greater detail. It  
21 shows the dates on which it was produced and a cover letter of  
22 their production. Let me take one example. This is Exhibit 6  
23 of SCO's opening brief, a piece of this allegedly newly  
24 discovered evidence. It deserves special mention.

25 The document was produced, Your Honor, not among

1 millions of pages of paper, as counsel would have the Court  
2 believe. It was produced on a single CD with less than a box  
3 of documents on November 11, 2003, nearly three months before  
4 the deadline for amending the pleadings. SCO's newly  
5 discovered evidence, Your Honor, is not so new.

6 On this record, I would respectfully submit that  
7 there is no basis for SCO's proposed amendment. SCO fails to  
8 establish good cause. It fails to satisfy the requirements of  
9 15(a), and it certainly fails to establish compelling  
10 circumstances, again let alone extremely compelling  
11 circumstances, as this Court's June 10, 2004, order requires.  
12 In fact, Your Honor, SCO cannot establish a good cause. To  
13 quote the Court on deadlines, which is cited in our papers,  
14 the good cause standard primarily considers the diligence of  
15 the party seeking the amendment.

16 This party, which had these documents in its files  
17 for years, has acted with anything, we respectfully submit,  
18 but diligence. The courts, Your Honor, have refused to  
19 find -- putting aside the Court's June 10 order, the courts  
20 have refused to find good cause under circumstances no  
21 different than these. And I direct the Court to Pages 10 and  
22 11 of the book where we cited a number of cases where the  
23 court commonly refused to permit pleadings after the deadline  
24 for amendment of pleadings.

25 In the Sipp case, for example, the 10th Circuit

1 affirmed its denial of a motion to file less than a year after  
2 the original complaint. This motion was filed 19 months after  
3 the original complaint and only two months after the  
4 expiration of deadline of any pleadings. This motion was  
5 filed nine months after the deadline for amending the  
6 pleadings.

7 And the Court can see for itself the results of the  
8 Brown, Schwinn, Doelle and Proctor & Gamble case. Of course,  
9 I know the Court is familiar, I know, with the Proctor &  
10 Gamble case.

11 The Court need not reach Rule 15(a) --

12 THE COURT: I'm a lot more familiar than I ever  
13 wanted to be with Proctor & Gamble.

14 MR. MARRIOTT: The Court need not reach 15(a)  
15 because SCO can't satisfy Rule 16(b), Your Honor. But if the  
16 Court does reach 15(a), the result there is the same. And  
17 Page 13 in our book, we lay out a number of cases in which  
18 courts have declined under Rule 15(a) to allow it in because  
19 it was untimely.

20 In the Frank case, for example, the 10th Circuit  
21 affirmed a denial of a motion to amend when the plaintiff's  
22 motion was filed four months after the Court's deadline for  
23 amending pleadings. And the plaintiff knew or should have  
24 known of the proposed claim long before that date.

25 Now, Your Honor, SCO offered by my count three

1 reasons to explain its delay. First of all, Your Honor, it  
2 seeks to dismiss the documents, to which I've just referred as  
3 ambiguous. In its papers, it says that the AIX 5L reference  
4 might not really be AIX For Power, it might be AIX for IA64  
5 only. It says also that the SVR, that is the System V  
6 technology, might not have been SVR-4, which it contends IBM  
7 doesn't have a license to, but it might just have been SVR-3,  
8 which it acknowledges IBM had a license to.

9 The documents, Your Honor, which I've just reviewed  
10 and which we highlight in some limited way on Page 14 are  
11 abundantly clear that the references here are not to AIX for  
12 IA64 only, but to AIX For Power. And the documents make  
13 abundantly clear that the technology issue is not just SVR-3,  
14 but it's SVR-4. And I won't read them all to Your Honor, but  
15 you can see them on Page 14.

16 Now, SCO contends, Your Honor, that it didn't know  
17 about this evidence. And for that proposition, it relies upon  
18 the declaration that it submits from one of its employees,  
19 Mr. Jay Peterson. And respectfully, Your Honor,  
20 Mr. Peterson's declaration isn't worth much. It is based on  
21 speculation, it is based on improper legal conclusion, and it  
22 lacks foundation. Mr. Peterson is in no position to testify  
23 what people in the Santa Cruz Operation, Inc., many years ago  
24 as a collective group knew or did not know. Mr. Peterson can  
25 speak to what Mr. Peterson knows and what Mr. Peterson doesn't



1 know. And what Mr. Peterson knows and doesn't know, frankly,  
2 is of little consequence in the face of the evidence here that  
3 both the Santa Cruz Operation, Inc., and SCO knew that AIX For  
4 Power included SVR-4 code. Mr. Peterson's professed ignorance  
5 cannot be reconciled with the documentary evidence before the  
6 Court.

7 Now, finally, Your Honor, SCO suggests that in its  
8 papers, that it can't be charged here with the responsibility  
9 and the knowledge of its alleged predecessor in interest in  
10 the Santa Cruz Operation, Inc. It can't have it both ways,  
11 Your Honor. From the beginning of this litigation, the SCO  
12 grouping has pretended that there is no distinction between it  
13 and the Santa Cruz Operation, its predecessor in interest.

14 And I direct, Your Honor, for example to Page 15 of  
15 the book. In SCO's initial complaint, it alleged that it  
16 performed the activities undertaken by the Santa Cruz  
17 Operation, Inc. It blurred the distinction, it said, quote:

18 From and after September 1995, SCO  
19 dedicated significant amounts of funding  
20 and a large number of Unix software engineers,  
21 many of whom were original AT&T Unix software  
22 engineers, to upgrading UnixWare for high-performance  
23 computing on Intel processors, close quotes.

24 It says:

25 In furtherance of Project Monterey, SCO

1           expended substantial amounts of money and  
2           dedicated a significant portion of SCO's  
3           development team to completion of the project.

4           Your Honor, in 1995, the SCO Group didn't exist.  
5           In 1995, its predecessor Caldera Systems, Inc., didn't exist.  
6           Santa Cruz Operation, Inc., and the SCO Group are not, not  
7           withstanding its prior contentions, the same company. They  
8           are nevertheless predecessors in interest, Your Honor. And  
9           the law is abundantly clear, we laid the cases out at  
10          Page 16 in the book, that a party is charged with the  
11          knowledge what its predecessor in interest knew or should have  
12          known.

13           Even if, Your Honor, even if they didn't know what  
14          the documents included, even if you credited Mr. Peterson's  
15          declaration, even if they were allowed selectively to identify  
16          themselves with the Santa Cruz Operation, Inc., the proposed  
17          amendment here is untimely and shouldn't be allowed. A  
18          proposed claim is untimely if the moving party should have  
19          known about the claim.

20           And you can see the cases that support that  
21          proposition in 17. Frank v. US West, 10th Circuit, said,  
22          quote:

23           It is well-settled in this circuit that  
24          the untimeliness alone is a sufficient reason to  
25          deny leave to amend, especially when the party

1 filing the motion has no adequate explanation  
2 for the delay.

3 Las Vegas Ice, Your Honor, reaches the similar  
4 result.

5 The law is clear here, that the SCO Group had a  
6 duty to investigate. Those cases are laid out at Page 18.  
7 SCO's own cases, Your Honor, indicate, as laid out in Page 19,  
8 that, in fact, it had a duty to investigate.

9 A party who fails to comply with its duty to  
10 investigate is charged with knowledge of the facts  
11 constituting the infringement, as indicated in the cases laid  
12 out at Page 20.

13 The most basic of public investigations, the most  
14 basic of internal investigations would have shown, indeed, I  
15 submit did show that IBM included SVR-4 code in its AIX For  
16 Power product years ago. They knew it, Your Honor, and this  
17 claim is untimely both under Rule 15, Rule 16 and certainly  
18 this Court's order of June 10th.

19 The second point, Your Honor, the last point which  
20 I intend to make, is that the proposed claim here is not a  
21 claim which may properly be brought in this court.  
22 Section 22.3 of the JDA, and I refer you to Page 21 of the  
23 book, provides, quote:

24 Any legal or other action related to a  
25 breach of disagreement must be commenced no

1 later than two years from the date of the  
2 breach in a court cited in the state of New York.

3 It is undisputed that this proposed claim is a  
4 legal or other action. It is equally undisputed,  
5 notwithstanding -- it is equally clear, Your Honor, that the  
6 proposed claim here is related to a breach of disagreement.

7 I refer you to the next slide, Page 22 of the book,  
8 wherein SCO in the proposed amended complaint and in its  
9 opening brief on this motion acknowledge that the proposed  
10 claim is a claim relating to a breach of the agreement. SCO's  
11 proposed third complaint says, quote:

12 IBM converted SCO's copyrighted code for  
13 IBM's own use in violation of the specific  
14 restrictions of the parties' Joint Development  
15 Agreement.

16 SCO's opening brief states that IBM, quote, ignored  
17 the JDA's restrictions in violation -- I apologize, Your  
18 Honor. It states that IBM ignored the JDA's restrictions on  
19 its use of SCO's SVR-4 code and released an Itanium product  
20 that did not satisfy the conditions of a product release.

21 You know, SCO obviously didn't bring the claim in  
22 New York. That is reason enough under this provision for this  
23 claim not to be included in this case. It offers in its  
24 papers, Your Honor, two arguments as to why that shouldn't be  
25 the case and said barely a word about it today.

1           The first argument Mr. Normand mentioned today  
2 is -- the only argument that Mr. Normand mentions today is  
3 that Section 22.3, which we just read, is inapplicable. They  
4 took the opposite position, Your Honor, in their opening  
5 brief, the opposite position. In their opening brief, they  
6 acknowledge that that section applied here. They brought it  
7 up in their opening brief.

8           The law is clear, Your Honor, that a court  
9 generally refuses to consider arguments raised for the first  
10 time in a reply brief, which this argument of inapplicability  
11 is; and in any event, it is a reversal of position, which the  
12 courts also decline to consider. And the authorities for that  
13 proposition are set out at Slide 23.

14           Pickering v. USX Corp., refusing to rule on  
15 arguments raised for the first time in reply memorandum.

16           Weaver v. University of Cincinnati, stating that  
17 the Court would address only the merits of defendants'  
18 original contention where defendants shifted their argument in  
19 their reply brief.

20           Even if, Your Honor, they hadn't conceded the  
21 applicability in their prior papers of Section 22.3, even if  
22 that were true, and it's not, that section plainly applies  
23 here, Your Honor, a contract must be construed to give meaning  
24 to all the terms. That Section 22.3 is an important term of  
25 the contract. Cases to that effect are laid out at Tab 24.

1 Courts have construed, Your Honor, language  
2 comparable to the related-to language here to include  
3 non-contract claims, such as SCO's proposed copyright claim.

4 At Page 25, you'll see, for example, the Turtur  
5 decision, Your Honor, Second Circuit, holding that, quote,  
6 rising out of or related to, close quote, language to apply to  
7 a tort as well as a contract claim.

8 In the Ward case, the Court found that the, quote,  
9 scope of a relating-to language is broad and intended to cover  
10 a much wider scope of disputes, not just those arising under  
11 the agreement itself.

12 Courts, Your Honor, have even interpreted more  
13 restrictive language, like "arising under" as opposed to  
14 "related to" to encompass claims of the kind here used in the  
15 forum selection clause. And those cases are laid out in  
16 Page 26.

17 In Monsanto, Your Honor, the Court held, the  
18 Federal Circuit, held that if patent claims were subjected to  
19 forum selection clause applicable to, quote, all disputes  
20 arising under the contract.

21 Second, Your Honor, SCO contends that IBM ought not  
22 be allowed to enforce this amending provision here because IBM  
23 has waived its rights to the provision. Two arguments they  
24 make. First one is the argument was waived because IBM failed  
25 to assert the defense in its responsive pleadings. That's

1 wrong for three reasons.

2 First, Your Honor, SCO didn't raise the argument in  
3 its opening brief. It's improper for the reasons that I've  
4 already stated. Second, we haven't submitted a responsive  
5 pleading. The complaint hasn't been allowed in the case yet.  
6 Third, Your Honor, we have submitted in the case in connection  
7 with their other three complaints four responsive pleadings.  
8 In every one of those pleadings, notwithstanding their  
9 contentions to the contrary, and this is laid out, Your Honor,  
10 at Page 28 of our book, notwithstanding what their brief says,  
11 in every one of our responsive pleadings, we have asserted a  
12 defense of improper venue.

13 The second and last argument they make with respect  
14 to waiver, Your Honor, is that the claim is waived somehow by  
15 virtue of IBM's assertion of its Ninth Counterclaim. Your  
16 Honor, Section 22.1 of the Joint Development Agreement -- and  
17 that's wrong, by the way, Section 22.1 of the Joint  
18 Development Agreement, which is set out at Page 29 of the  
19 book, expressly provides:

20 No waiver of any portion of this agreement  
21 shall be effective unless it is set forth in a  
22 writing which refers to the provisions so affected  
23 and is signed by an authorized representative of  
24 each party.

25 There is no such writing.

1                   Second, to establish waiver, they've got to show a  
2 voluntary and intentional abandonment of a known right. Cases  
3 to that effect are set out at 30. There has been no knowing  
4 and intentional abandonment of a known right. And the case  
5 law, Your Honor, indicates that the mere assertion of a  
6 counterclaim, as we show at Page 31, is an insufficient basis  
7 for final waiver.

8                   Finally, they suggest that the Ninth Counterclaim  
9 somehow encompasses the proposed claim. That isn't right,  
10 Your Honor. The Ninth Counterclaim was intended to be narrow  
11 in scope. The Ninth Counterclaim could not have been as broad  
12 as they contend because, A, the Court wouldn't have subject  
13 matter jurisdiction over it, IBM couldn't have brought a Ninth  
14 Counterclaim seeking a declaration of non-infringement with  
15 respect to the conduct at issue in their proposed complaint  
16 because we hadn't been sued for that, one; and they had never  
17 threatened to sue us for that, two. We lacked a reasonable  
18 apprehension suit. There would have been no subject matter  
19 jurisdiction with respect to a claim of that kind. And in any  
20 event, the claim that they contemplate having somehow been  
21 swept up in Ninth Counterclaim is a claim that must be  
22 brought, if at all, in New York by virtue of the agreement  
23 that IBM entered into with its partner in Monterey, the Santa  
24 Cruz Operation, Inc.

25                   In summary, Your Honor, the motion should be



1 denied. It should be denied because they've known about this  
2 claim from the very beginning of the case, and it should be  
3 denied because there is a forum selection clause here which  
4 requires this claim to be asserted in New York, not in the  
5 state of Utah.

6 THE COURT: If I let them amend as they want to do,  
7 would it affect your motion to narrow the Ninth Counterclaim?

8 MR. MARRIOTT: Would it affect the motion? Your  
9 Honor --

10 THE COURT: In other words, would you still want me  
11 to grant that motion?

12 MR. MARRIOTT: Your Honor, the motion with respect  
13 to the Ninth Counterclaim is intended simply to reflect IBM's  
14 intent to filing a motion.

15 THE COURT: All right. So I'll call it a motion to  
16 clarify.

17 MR. MARRIOTT: Call it a motion to clarify. The  
18 motion frankly is of little consequence. It doesn't make much  
19 difference. SCO doesn't really care, Your Honor, about that  
20 motion except for purposes of being able to argue in this  
21 connection that somehow the claim is waived.

22 THE COURT: But my question to you is, if I let  
23 them amend, do you care about your motion?

24 MR. MARRIOTT: I don't care about the motion, Your  
25 Honor.

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THE COURT: Okay. Thank you.

MR. MARRIOTT: Thank you.

THE COURT: Reply, Mr. Normand?

I assume you'll be brief and efficient.

MR. NORMAND: Thank you, Your Honor. I'll make an effort to be brief and efficient. Mr. Marriott has raised some new issues, some new documents and some arguments that I'm hearing for the first time.

Just to clear the field, to begin with, Your Honor, the question of when documents were produced, I think we're going to have a factual dispute with IBM about that. I do not purport to have personal knowledge about when documents were produced, but it is my understanding that the documents had been produced after the amendment deadline. If we're incorrect, we're incorrect. It stands that several of the documents at least, as Mr. Marriott concedes, were produced after the deadline. And this goes to the point of plaintiff's entitlement to collect a core critical mass of highly privilege documents. There is no question that some of the very important documents were produced after the deadline. And we have not purported to present to the Court with all of the documents.

As an overarching matter, Your Honor, there is no argument of undue prejudice from IBM. And under the Supreme Court precedent and under a lot of other precedents, that's

1 the primary overriding factor. There is no undue prejudice.

2 IBM makes a series of arguments about Rule 16. We  
3 think those arguments misconstrue the case law and are  
4 overstated. Let me note from the onset, Your Honor, that, as  
5 I noted in my opening argument, there is no place for Rule 16  
6 here. There may not be a place for Rule 16 because there may  
7 be a new amendment deadline.

8 Even if there is not a new amendment deadline, the  
9 question, then, is Rule 16, because there is no question that  
10 many of the documents, at least, even pending this dispute  
11 with IBM over the timing of production of documents, there's  
12 no question that some of the documents were produced after the  
13 deadline. If there's been no undue delay and Rule 15 is prior  
14 to the deadline, Rule 16 has been placed. In any event, the  
15 questions under Rule 16 as we cite in the briefs is whether  
16 the plaintiff uncovered previously unknown facts during the  
17 discovery that would support an additional cause of action.  
18 The question is whether the supporting facts did not surface  
19 when the last amendment deadline had passed.

20 Now, with regard to another matter, IBM spends a  
21 lot of time going through the documents, the documents that we  
22 had not seen before, internal documents from Santa Cruz. We  
23 think that misses the point entirely. There is evidence that  
24 people at Santa Cruz might have known that as part of the  
25 Project Monterey the parties intended to allow copying to

1 happen. IBM, first of all, argues that there was an  
2 authorization, but they don't point to the Court or to us any  
3 basis for that supposed authorization.

4 Santa Cruz understood that the product was to be  
5 developed. Santa Cruz understood that there would be sharing  
6 of the code as part of the project, but there is no allegation  
7 and no proof that anyone at Santa Cruz or SCO actually knew  
8 they had a claim. More importantly, IBM's arguments ignore  
9 the key evidence that we've uncovered. It is highly relevant  
10 that IBM itself thought and its product release did not  
11 authorize itself to use the code. And I'd like to walk the  
12 Court through that in a little bit more detail.

13 SCO must prove that IBM's copying was unauthorized.  
14 Part of that proof is the question of the operation of the  
15 JDA. Very relevant evidence as to the operation of the JDA is  
16 how IBM thought the JDA operated. Accordingly, very relevant  
17 evidence to our claim is IBM's view that it was not authorized  
18 under the JDA to undertake the copying it did. There is just  
19 no question that that evidence is relevant. IBM's argument  
20 produces the claim that the evidence is irrelevant, that it  
21 added nothing, that we could have brought a copyright claim  
22 without knowing that IBM thought that the release was  
23 pretextual. I don't think that's true to the extent that an  
24 argument is an accrual argument. And I'll address that in a  
25 moment, Your Honor.

1 IBM tends to confront the three reasons that we've  
2 offered for why we think it is appropriate. Some of the  
3 reasons are ones that IBM has frankly mischaracterized. They  
4 first discussed the documents and say that we dismissed the  
5 documents. As I said, that misses the point that as many of  
6 the documents that are released, they did not either attempt  
7 or give any basis for thinking they have copyright claims.  
8 And none of the documents suggest that anyone at Santa Cruz  
9 knew that IBM itself regards itself as having lack of  
10 authorization of the copying of the code. That is a critical  
11 aspect of the claim we propose to bring. It is an aspect that  
12 we could not have discovered possibly until we reviewed the  
13 documents in this litigation.

14 Argument -- IBM then argues the issue of whether we  
15 should be imputed to have what little knowledge Santa Cruz  
16 might have had about the subject matter of the claim. We  
17 think IBM misses the point there, as well, Your Honor. IBM  
18 cites no case for its proposition and for purposes of Rule 15  
19 that plaintiff should have knowledge of its predecessor  
20 imputed to it. These are the cases that IBM cites, cases in  
21 which the defense of laches had already barred the  
22 predecessor's claims when the predecessor purported to assign  
23 the claims to the successor. Those cases make sense. If  
24 laches were to preclude the predecessor's lawsuit, he should  
25 not be permitted to escape his untimeliness by selling or

1 giving his patent or other intellectual property rights to a  
2 successor to then try to file a timely lawsuit.

3           SCO does not seek to gain any rights that Santa  
4 Cruz did not have. The only issue here is whether SCO can  
5 bring a new claim as an amendment in this proceeding. IBM  
6 cites no cases to support its oral argument that knowledge of  
7 Santa Cruz, however limited, should be imputed to us.

8           IBM illustrates what I think is its failure to  
9 confront our main argument where it says the most basic of  
10 public and internal investigations would have revealed the  
11 basis for our proposed claim. That is not true. It's not  
12 remotely true. We would not have known even with the most  
13 intense investigation that IBM itself viewed itself as  
14 unauthorized to publish and to copy code as it did. That's  
15 critical evidence, Your Honor.

16           IBM argues that we acknowledged in our opening  
17 brief the JDA applied. That's not true, Your Honor. Here's  
18 the statement we made in our opening brief.

19           SCO recognizes that the parties' JDA for  
20 Project Monterey contains a forum selection  
21 clause for New York courts.

22           We acknowledge that the JDA contained a forum  
23 selection clause. We weren't obligated to raise every  
24 argument, Your Honor, in which 22.3 would not apply.

25           We're also at the height of formality here, Your

1 Honor. IBM filed an ex-parte motion for leave to file a  
2 surreply after they concluded that when we raised the issue of  
3 waiver in the applicability provision in our reply brief, they  
4 argue that we raised that for the first time. They got  
5 permission to file a surreply. They filed a 16-page surreply,  
6 and we're here arguing the points before Your Honor. I think  
7 it's an incorrect argument, and in any event, a technical one  
8 that shouldn't preclude the consideration of merits.

9 As to the interpretation, Your Honor, of  
10 Section 22.3 of the JDA, IBM ignores again our main argument,  
11 which is by their own lights, the provision doesn't make any  
12 sense. They leave the accrual portion of the provision out  
13 because it would give the provision an unreasonable reading.  
14 They cite several cases that they say support their arguments,  
15 that in light of analogous provisions a forum selection clause  
16 should apply.

17 We think those cases make our point. In contrast  
18 to those cases, Section 22.3 does not encompass all claims  
19 relating to or arising under the agreement or concerting the  
20 parties' rights and duties under the agreement. That is not  
21 the scope of this provision. That's the scope of 20.1. It's  
22 a reason not to give the reading of 22.3 that IBM does.

23 IBM argues that there's been no waiver of the  
24 provision. We think that's wrong, Your Honor, for one basic  
25 reason, which is the scope of the Ninth Counterclaim. I

1 quoted the Ninth Counterclaim before, and it is extremely  
2 broad. It asks for a declaration of non-infringement. It  
3 does so in plain language. It was a counterclaim that  
4 exceeded the scope, as Mr. Marriott concedes, as praise as  
5 written that he exceeds the scope of our claims. That makes  
6 it not a compulsory counterclaim, as Mr. Marriott again  
7 explicitly concedes, but a permissible counterclaim. Parties  
8 pursue litigation from one forum constitutes the waiver of  
9 that party's ability to enforce the forum selection clause to  
10 another forum.

11 The Ninth Counterclaim is permissive. None of  
12 SCO's claims required any fact finder to determine whether  
13 IBM's development of AIX violated any SCO copyrights. We  
14 think the precedent makes clear that the defendant waives any  
15 venue objections when it objects to new issues in the case.  
16 10th Circuit held long ago in Thompson, 1962, that the filing  
17 of a counterclaim can constitute the waiver of a forum  
18 selection clause.

19 IBM cites a more recent 10th Circuit case,  
20 Campbell, I believe it's Campbell, in which the Court  
21 concludes that if the counterclaim was compulsory, it would  
22 not be a waiver. But the rule as it stands and as we can  
23 prove from a variety of precedents is that the defendant  
24 voluntarily submits himself to the forum through filing a  
25 permissible counterclaim. We think the plain language of the



1 Ninth Counterclaim makes it clear that it's permissive.

2 I'll address in a moment, Your Honor, the question  
3 of whether IBM's re-interpretation of its Ninth Counterclaim  
4 makes any sense. I want to address IBM's brief argument on  
5 the non-waiver provision in the JDA. We cited the case in our  
6 briefs that show where the party's conduct constitutes a  
7 waiver generally of venue objection, even if there is a  
8 no-waiver condition in the contract, that is not a right to  
9 the waiver, constitute a waiver, both of the no-waiver  
10 provision and of the venue objection generally in federal  
11 court.

12 The cases IBM cites don't support its argument. In  
13 the Roboserve case, the Seventh Circuit case, the Court  
14 acknowledged only that the waiver of authority in Illinois  
15 holds that, Waiver Only in Writing provisions can be waived by  
16 words and deeds of the parties. And I think IBM's Ninth  
17 Counterclaim constitutes a deed by which IBM intends to inject  
18 new issues into the case.

19 IBM argues that its Ninth Counterclaim shouldn't be  
20 read as written. IBM says its Ninth Counterclaim is not  
21 intended to encompass SCO's claims. And it's filed a motion  
22 styled, A Motion For Entry of Order Limiting the Scope of the  
23 Ninth Counterclaim. The motion is fully briefed. I take it,  
24 Your Honor, it will be heard another time.

25 But in sum, in our opposition to that motion, we

1 point out that among other things, IBM filed that motion only  
2 having seen after the October 2004 hearing before the  
3 magistrate court the evidence of its violation of SCO's  
4 copyrights and the evidence that it knew it was not authorized  
5 to use SCO's code.

6 IBM doesn't seek leave to amend the counterclaim  
7 but seeks leave to ask the Court to enter an unprecedented  
8 order that would retroactively limit the scope of  
9 (unintelligible). It's unprecedented. IBM cites  
10 unprecedented to support a motion. And the motion directly  
11 contradicts IBM's argument to this Court in September of 2004,  
12 as Your Honor may recall, with respect to our motion to  
13 dismiss IBM's Tenth Counterclaim as a permissive one. IBM  
14 argued at that point that what you should control is the plain  
15 language of the scope of our copyright claim. In our view,  
16 our copyright claim was more narrow than IBM interpreted it to  
17 be. And we argued that the plain language didn't support  
18 IBM's agreement. And IBM argued that the plain language had  
19 to control. And the Court adopted, as we understand the  
20 Court's order, that rule, that the plain language of the  
21 counterclaim would control and the plain language of SCO's  
22 allegations would control. I don't see why a different rule  
23 would apply in this instance.

24 In short, Your Honor, IBM's argument ignores the  
25 crucial fact that there is no undue prejudice. IBM's argument

1 deduces the claim without any citation or precedent or  
2 authority remotely analogous, that Santa Cruz' limited  
3 knowledge should be imputed to us. And we think those  
4 arguments are wrong.

5 And as a last point, Your Honor, the question of  
6 the extent of Santa Cruz' knowledge is a statute of  
7 limitations accrual question. It is not a question that is  
8 relevant to the policies of Rule 15. At the very least, Your  
9 Honor, the question of when a claim (unintelligible) is a fact  
10 question, and we cited cases in our brief showing that it is a  
11 fact question, not only requiring discovery, but is one that  
12 cannot be resolved in summary judgment. An intense fact  
13 question. And to the extent that the document, the new  
14 document that IBM submitted suggests that Santa Cruz had a  
15 certain level of knowledge of copying, which is different from  
16 the question of any knowledge of IBM's knowingly unauthorized  
17 copying, that IBM acknowledged the copying was unauthorized,  
18 that is a fact question. And the fact that Mr. Marriott has  
19 brought in new documents, ones that we have not seen before,  
20 only highlights what that question is. It is no basis for  
21 (unintelligible). Thank you, Your Honor.

22 THE COURT: Thank you.

23 MR. MARRIOTT: May I have just a moment, Your  
24 Honor? I can segway easily, if you like, into the scheduling  
25 discussion.

1 THE COURT: But you want -- well, the scheduling  
2 discussion is not going to be very lengthy.

3 MR. MARRIOTT: Perhaps not.

4 THE COURT: You want to say something? You want to  
5 reply to his reply?

6 MR. MARRIOTT: I would if I could.

7 THE COURT: How long?

8 MR. MARRIOTT: Three minutes.

9 THE COURT: Then he still gets the last word. It's  
10 his motion.

11 MR. MARRIOTT: That's fine with me.

12 MR. NORMAND: Your Honor, that's fine.

13 THE COURT: I'll give you two minutes.

14 MR. MARRIOTT: Okay. Thank you.

15 First, Mr. Normand suggests that he heard nothing  
16 from IBM with respect to prejudice. As I said at the outset,  
17 Your Honor, we are not making here all of our arguments.  
18 There is no question that it would be prejudice to IBM if this  
19 motion would be allowed. If it would be allowed, it would be  
20 prejudice because the forum selection clause would be read out  
21 of the contract. There would be prejudice because new issues  
22 would be inserted in this case which are otherwise not here.  
23 Like, for example, whether IBM has a license to include Unix  
24 System VR-4 code into this product. That issue is not in this  
25 case. That is the central issue in all likelihood in their

1 proposed claim.

2 The proposed claim, Your Honor, concerns a contract  
3 between IBM, a New York corporation, and the Santa Cruz  
4 Operation, Inc., a California corporation, not the SCO Group,  
5 Inc., a Utah based company.

6 SCO suggests, Your Honor, by way of its inquiry in  
7 SCO's arguments that a party is not on notice for purposes of  
8 inquiry notice unless that party has all of the evidence,  
9 which we indicate the alleged underlying violation. That's  
10 wrong, Your Honor. If that were the rule, there would be no  
11 inquiry notice as a test.

12 Mr. Normand suggests that Rule 15 somehow is  
13 oblivious to whether a party knew or should have known.  
14 That's a fact question he says the Court couldn't possibly  
15 resolve in this posture. Courts resolve that question all the  
16 time in this juncture, Your Honor. If Mr. Normand were right  
17 that that was a fact question and the Court couldn't hear it  
18 and consider it, we would never have these decisions laid out  
19 in our book in which courts have denied amendments because the  
20 party should have known of the alleged misconduct.

21 With respect to the scheduling points, Your Honor,  
22 I guess my question is whether the Court intends to hear any  
23 argument with respect to that. If it does not, I'd like to  
24 show one other exhibit, which I think is of some consequence  
25 to this.

1 THE COURT: Consequence to this motion?

2 MR. MARRIOTT: It is.

3 THE COURT: Or referring to schedule?

4 MR. MARRIOTT: It is the consequence of both.

5 THE COURT: Well, show it. We're going to have a  
6 brief discussion about scheduling.

7 Now, tell me how this is of consequence to this  
8 motion.

9 MR. MARRIOTT: I will, Your Honor. It is of  
10 consequence to this motion because this chronology which lays  
11 out the events concerns both. The reason it relates to  
12 scheduling, Your Honor, because one of the scheduling  
13 questions is whether the Court should enter an order which  
14 includes a new deadline for filing amended pleadings.

15 THE COURT: Yeah, that is one of the questions.

16 MR. MARRIOTT: Pardon?

17 THE COURT: That is one of the questions.

18 MR. MARRIOTT: That is one of the questions. And  
19 that question is also obviously relevant to the motion that  
20 SCO should be allowed to amend its complaint. The documents  
21 that SCO contends is the newly discovered evidence are  
22 indicated here with asterisks, Your Honor. At the tabs,  
23 you'll see the correspondence which indicates when these newly  
24 discovered pieces of the evidence were produced. There is a  
25 factual record, and it is right here. And this is the record

1 that indicates when the documents were produced. Three of the  
2 six, as I say, were produced before the close of fact  
3 discovery.

4 Your Honor, the code in question, IBM AIX For Power  
5 product, was produced to SCO in March of 2004, as indicated on  
6 this document. SCO says in its papers that it was relatively  
7 easy to determine from those -- from that code that IBM  
8 infringed because it says that IBM copied hundreds of  
9 thousands of lines of code, to put that code into its AIX For  
10 Power product. SCO had that discovery, Your Honor, by  
11 March 4th. On April 5th, it filed a motion seeking to amend  
12 the scheduling orders. In that motion to amend, which is laid  
13 out here in the book, Your Honor, it asks for date after date  
14 after date for events in this case. Not a single one of those  
15 dates concerns a date for amending pleadings.

16 The parties appeared before the Court on June 8th,  
17 2004, for a hearing with respect to the scheduling order, at  
18 which point SCO had had the allegedly critical documents, at  
19 which point all of the allegedly critical documents were in  
20 its possession, some for more than six months, the code which  
21 he said was -- well, that it easily determined was in  
22 possession. And nothing was said at that hearing about a  
23 need, Your Honor, to amend the schedule to have a new date for  
24 which to file an amended pleading. That is indicative of  
25 there not being either good cause or extraordinarily good

1 circumstances. Thank you.

2 THE COURT: Thank you.

3 Mr. Normand?

4 MR. NORMAND: Thank you, Your Honor. I won't dwell  
5 on the point. As I said, I don't know personally whether what  
6 IBM has represented about the documents is accurate. To the  
7 extent Your Honor thinks it might be relevant, we ask for the  
8 opportunity to respond to the submission that they made.

9 Mr. Marriott said earlier that, I think he said three of the  
10 six were produced in November of 2003; three of the most  
11 relevant were not. Even as to those that were produced, we  
12 received them only a few months before the original amendment  
13 of pleadings. Thank you, Your Honor.

14 THE COURT: Thank you.

15 All right. Now who's going to talk now about  
16 scheduling? Mr. Marriott?

17 MR. MARRIOTT: Yes, sir.

18 THE COURT: Who over here?

19 MR. NORMAND: Your Honor, I will.

20 THE COURT: All right. Now, I have your proposed  
21 schedules. Talk to me briefly, each of you, about what  
22 difference in your proposed, if any, the magistrate's order  
23 entered yesterday may make and what difference -- what your  
24 proposals would be if I allowed plaintiff to amend or if I  
25 didn't allow plaintiff to amend.



1 MR. NORMAND: Yes, Your Honor. We have a revised  
2 scheduling order. May I approach?

3 THE COURT: Yes. Have you given Mr. Marriott a  
4 copy of it?

5 MR. MARRIOTT: He has, Your Honor.

6 THE COURT: Okay. This is your proposed revision;  
7 right?

8 MR. NORMAND: Yes, Your Honor.

9 THE COURT: And this is after the order yesterday  
10 by Magistrate Wells?

11 MR. NORMAND: Yes, Your Honor. The modifications  
12 to the scheduling order --

13 THE COURT: Would this be affected by my ruling on  
14 the motion to amend?

15 MR. NORMAND: It would not, Your Honor. It  
16 proposes an amendment deadline.

17 THE COURT: Okay.

18 MR. NORMAND: You see near the top of the page,  
19 Your Honor, amendment deadline of June 17, 2005.

20 THE COURT: Okay.

21 MR. NORMAND: The differences between this revised  
22 schedule and the schedule we submitted several weeks before  
23 the magistrate's court order relate to merely timing.

24 THE COURT: Relate to what?

25 MR. NORMAND: Timing. The magistrate court order

1 gave IBM, as we understand it, as of yesterday --

2 THE COURT: Most schedules do relate to timing.

3 MR. NORMAND: Then I'm right.

4 THE COURT: You are right. You are certainly --  
5 I'll take judicial notice of the correctness of your last  
6 statement.

7 Excuse me. Go ahead.

8 MR. NORMAND: Thank you, Your Honor. I have that  
9 going for me.

10 The magistrate court's order gave IBM 90 days from  
11 yesterday to comply with the discovery order the magistrate  
12 court had originally entered in January. Accordingly, we've  
13 changed our schedule in roughly proportional fashion, moved  
14 dates back. Of course, we moved the fact discovery deadline  
15 back 54 days, as indicated in the footnote. And we've moved  
16 most of the other dates back about 90 days. We don't presume  
17 to take a full 90 days that the Court has given. We would  
18 take 70 days. We think that the delay in the production is  
19 relevant to our ability to structure the order as we  
20 originally proposed it.

21 THE COURT: Thank you.

22 Mr. Marriott?

23 MR. MARRIOTT: Your Honor, I believe that  
24 Magistrate Judge Wells' order doesn't change much of our  
25 proposed schedule, except that I would suggest that by

1 adjusting outward the dates two months would accommodate the  
2 Court's order of yesterday.

3 With respect to the other question, adding that  
4 complaint, Your Honor, would from our perspective complicate  
5 the case and require a line of discovery which was otherwise  
6 not contemplated and which is otherwise not necessary and  
7 would require a minimum of nine months additional time.

8 THE COURT: Have you looked at this?

9 MR. MARRIOTT: I was handed that at the beginning  
10 of the hearing, Your Honor. I have not studied that.

11 THE COURT: All right. Thank you.

12 Now, do either of you -- is there -- would you be  
13 able to sleep tonight based on what you've told me about  
14 scheduling? I don't want you to go home and say, oh, gee, I  
15 wish I would have said that when we talked about scheduling.  
16 That happened to me a few times when I was practicing. Why  
17 didn't I say X? So is there something else you want to say  
18 about scheduling?

19 MR. NORMAND: Well, I know if I don't say  
20 something, Mr. Eskovitz will tell me I should have said  
21 something. Two main points --

22 THE COURT: That's reason enough. You don't want  
23 your partners calling you in the middle of the night.

24 MR. NORMAND: Thank you, Your Honor.

25 Mr. Marriott first said he doesn't see how the

1 magistrate's court order changes their proposed schedule.  
2 We'll point out that their proposed schedule from a few weeks  
3 ago presupposed that they would win a motion for  
4 reconsideration.

5 The other point, Your Honor, is the reasons I  
6 outlined my argument on the motion to amend, to the extent to  
7 the nine-month discovery schedule that IBM proposes for fact  
8 discovery, which is what I heard Mr. Marriott say, to the  
9 extent that that is premised on Project Monterey discovery, we  
10 think that has to be incorrect. Project Monterey is in the  
11 suit. We don't, SCO, need to take substantial additional  
12 discovery. And there's a six- to eight-month discovery under  
13 our schedule that we think is plenty to accommodate Project  
14 Monterey. Thank you.

15 THE COURT: Thank you.

16 Mr. Marriott, do you want to sleep well tonight?

17 MR. MARRIOTT: I do, Your Honor. Project Monterey  
18 is not in the case in the sense in which they propose to put  
19 it in the case, the words mentioned in the case to be sure.  
20 The issues presented by their motion is not here, and I think  
21 an additional nine months would be required with respect to  
22 that.

23 I don't think, to respond briefly to what  
24 Mr. Normand said about my comment about Judge Wells' order, I  
25 don't think that doesn't affect the case at all. I think I

1 said it would shift about two months in the proposed dates.

2 The one thing which I'd like to mention with  
3 respect to the proposed schedule is set out in the papers, but  
4 I think it deserves special emphasis. We believe that it is  
5 critical that the Court enter a proposed scheduling order that  
6 includes a provision which requires both parties to disclose  
7 the allegedly misused material, whatever it is, by a date  
8 certain, and that the parties then have an opportunity  
9 subsequent to the disclosure of that allegedly misused  
10 material to take discovery with respect to that material.

11 The Linux Operating System, Unix System V, AIX, and  
12 Dynix, include collectively hundreds of millions of lines of  
13 code, Your Honor. When they identified that which IBM has  
14 alleged to have misused, we're going to need to take discovery  
15 with respect to that identified code. We're going to need to  
16 take discovery with respect to who and when, where, why, how.  
17 We're going to need to take discovery with respect to whether  
18 it's subject to contracts, whether it's subject to copyright  
19 principles. We're going to need to take discovery with  
20 respect to whether it's in public domain, and if so, to what  
21 extent.

22 Your Honor, our proposal is that the Court impose  
23 an interim deadline, by which the parties disclose, I  
24 understand already should have been done, if the parties have  
25 additional information they disclose that and that there be a

1 final deadline. And after that deadline, the target is fixed.  
2 The experts are not permitted to disclose additional  
3 information in their reports or other pretrial submissions.  
4 They're not allowed an opportunity to add additional uses  
5 about that which was supposedly misappropriated. The target  
6 is fixed.

7 That's the only way, Your Honor, if there's allowed  
8 to be a period of brief fact discovery after that we can  
9 properly prepare our defense. The only other alternative,  
10 Your Honor, is to undertake that kind of investigation with  
11 respect to the hundreds of millions of lines of code in issue  
12 in the case under a hypothetical, yet unasserted theories of  
13 liability. That is impossible, and any scheduling order we  
14 respectfully submit should include that kind of provision.

15 Now, they've made various arguments against it,  
16 Your Honor. We've laid out in our papers why none of them are  
17 respectfully are any good. If as they contend we will get  
18 this information in the ordinary course, which is their  
19 argument, then they ought to have no difficulty agreeing to a  
20 schedule in which there is that kind of provision.

21 And respectfully, the reason that they don't  
22 particularly care about that provision is that IBM has  
23 disclosed to them 700,000-plus lines of code, line for line  
24 match up that we contend that they infringed in our copyright  
25 claim. That we don't have. That we want. That we think we

1 need in order for this case to progress. Thank you.

2 THE COURT: Thank you.

3 Mr. Normand?

4 MR. NORMAND: Thank you, Your Honor. The parties  
5 do disagree over the structure of the fact discovery. We have  
6 proposed that the fact discovery in this case proceed as it  
7 does in every other civil case, with mutual discovery. IBM  
8 wants a period of unilateral discovery to begin very shortly.  
9 They want that period to begin on August 11th. That's not  
10 enough time for us to review the code.

11 IBM's unilateral discovery proposal fails for  
12 several other reasons in addition, Your Honor. First, our  
13 schedule conforms that mutual discovery contemplated in the  
14 federal rules and the one that was structured in the previous  
15 schedule orders. And we think it would be odd if that  
16 framework changed as a result of -- as reflected in the  
17 magistrate court's January order, IBM's failure to produce  
18 relevant evidence for over a year.

19 IBM can prepare a defense to SCO's claims during  
20 the period of mutual fact discovery. IBM has served  
21 interrogatories on SCO, and SCO is under an obligation to  
22 respond to those interrogatories. We will do so as soon as we  
23 can. If it arises that IBM is of the view that it has not  
24 received our responses to their interrogatories in enough time  
25 to complete discovery, that is an issue to raise with the

1 Court at that point. The Court is full of arsenal of measures  
2 it can take to allow more time or to preclude us from using  
3 evidence if we haven't produced responses to those  
4 interrogatories in time.

5 IBM's argument suffers we think also from a very  
6 fundamental flaw. No one knows better than IBM what they  
7 contributed to Linux, how it was derived, how it was created.  
8 The notion that IBM is flying blind is absurd.

9 Thank you, Your Honor.

10 THE COURT: Thank you.

11 Anything else?

12 All right. Thank you all. I'll take these motions  
13 under advisement and get a ruling out in due course.

14 Court will be in recess.

15 (Whereupon, the court proceedings were concluded.)

16 \* \* \* \* \*



1 STATE OF UTAH )

2 ) ss.

3 COUNTY OF SALT LAKE )

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

6 That as such reporter, I attended the hearing of  
7 the foregoing matter on April 21, 2005, and thereat reported  
8 in Stenotype all of the testimony and proceedings had, and  
9 caused said notes to be transcribed into typewriting; and the  
10 foregoing pages number from 3 through 96 constitute a full,  
11 true and correct report of the same.

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

14 And hereby set my hand and seal, this \_\_\_\_ day of  
15 \_\_\_\_\_ 2005.

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21 \_\_\_\_\_  
22 KELLY BROWN HICKEN, CSR, RPR, RMR  
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