IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

COPY

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

BEFORE THE HONORABLE DALE A. KIMBALL

OCTOBER 7, 2005

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

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

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SALT LAKE CITY, UTAH, FRIDAY, OCTOBER 7, 2005

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THE COURT: Good morning, ladies and gentlemen. And needless to say, I'm shorter here than I am in my own courtroom, but we'll make do.

We're here this morning in the matter of the SCO Group, Inc., vs. International Business Machines Corporation. Although I do have the names and know the names of most of you, I would ask that counsel who are at counsel table to, please, identify themselves and all others who may be acting in that capacity.

MR. JAMES: Your Honor, good morning. Mark James from Hatch, James & Dodge. With me is Ted Normand from Boies, Schiller & Flexner, along with Stuart Singer and also Sashi Bach here with us, as well.

THE COURT: Thank you.

Mr. Marriott?

MR. MARRIOTT: Good morning. David Marriott and, of course, Todd Shaughnessy and Peter Ligh and Amy Sorenson and Herman H-O-Y-H. Good morning, Your Honor.

THE COURT: Good morning.

Ladies and gentlemen, I'd like to begin by addressing SCO's renewed motion to compel, which is listed as docket Number 366. In this particular motion, SCO seeks from IBM all documents from its executives and board of directors

that mention or relate in any way to Linux; and, two, witnesses for deposition who can speak to the full scope of the topics SCO has noticed.

In this Court's order from January 18th of 2005, the Court postponed -- I think that should be '04, the Court postponed the decision regarding the production of documents from top level management pending full briefing by the parties.

Unfortunately, there was a docketing error misinterpreting the Court's order deeming SCO's order granted in part and denied in part. Notwithstanding this error, there has been much discovery provided since the first of this year, and Judge Kimball has heard arguments concerning the deposition of Samuel Palmisano, IBM's CEO.

Given the possibility that some discovery provided by IBM may address SCO's concerns in its renewed motion, I would like SCO to review its original motion and file with the Court a new motion removing those items it previously sought which may have been provided by IBM in the intervening time. And I would like SCO to file this new motion by Friday, October 21st. IBM then can file in the opposition, and SCO would reply. And then we will hear that motion along with IBM's motion to compel production of documents on SCO's privileged log later this year. And I would anticipate that that would be set like the second week of December.

This should help clear up the record and prevent any potential wasted resources by hearing issues which may now be moot.

Does anyone have any opposition to handling that particular motion in that way?

MR. NORMAND: Your Honor, Ted Normand for SCO. We don't object, although we obviously would like to have the motion heard as soon as possible.

THE COURT: Well, we will do that as soon as you've had your opportunity to refile it and for IBM to respond.

Mr. Shaughnessy?

MR. SHAUGHNESSY: No objection, Your Honor.

THE COURT: All right. We can do that -- well, let's set that at the conclusion of this hearing. But my desire would be to set it in perhaps the second week of December.

Next, I would like to turn to SCO's expedited motion for leave to take additional depositions, which is found at docket Number 508. I'd like first to hear any objections that IBM may have. Or do you want -- go ahead and argue it first since it's your motion, and then they'll respond.

MR. SINGER: Your Honor, I don't know if the Court is set on approaching it that way. If it was left to us, we would prefer to argue the Linux related motion which we think

broadly relates to issues including depositions.

THE COURT: We can do that. If you want to, then we'll start with that motion and allow you to argue it, and then we'll go on to the other one.

MR. SINGER: Thank you.

THE COURT: That's fine.

MR. SINGER: In connection with that motion, we've prepared several charts. With the Court's permission, I would provide copies to the Court.

Your Honor, and I am Stuart Singer on behalf of the SCO Group. I appreciate the opportunity to address the Court this morning on this issue.

The motion here goes to the very heart of documents that are relevant to this case. Our motion concerns the failure of IBM to produce documents related to its Linux contributions that have not been produced despite agreements to do so and despite two orders of this Court that we believe covers this.

THE COURT: Mr. Singer, let me stop you real quickly and supplement the record by indicating this so that you know. I have read the submissions of both SCO and IBM. I have read the affidavit of Mr. Shaughnessy. I have read the transcript of the original of the orders -- or the hearing that resulted in the orders, and I have read each of the orders themselves.

MR. SINGER: Thank you, Your Honor. I will bear that in mind in my argument.

We made this motion because what we had seen from IBM did not equate to what clearly must have been present for a project of this scope in producing contributions to Linux. And we filed a motion, which the Court is aware, and I won't go over specifics, some of which have been marked confidential by IBM, but there were a number of items which it was clear you would expect to have in there that were not, source code files, in fact, had appeared to have been removed from the CMVC database that related to Linux database, of course, previously ordered produced. One of the issues in the case concerns the JFS, file system technology, which we believe has been inappropriately provided to Linux, and there were documents relating to that.

There are also the fact that documents which used to be on a public website no longer are there because that website has been closed down, and other issues which have been identified in the bullet points from Pages 8, 9, 10 of our additional motion.

The response to that motion from IBM including specifically the declaration of Daniel Frei, who was the senior executive in charge of Linus Technology Center, made clear that these areas of concern were just the tip of the iceberg and that IBM has essentially produced very little at

all in compliance with what we believe there was agreement to do so and this Court's repeated orders to do so. And that we're dealing here with the failure to produce any of the nonpublic or certainly all of the nonpublic Linux related information concerning programmer notes, concerning drafts of code that they submitted, concerning work plans, all the type of information that is generated up to the point where contribution is then publicly made to the Linux community.

IBM does not deny this. In fact, they state that in Frei's declaration that they have not gathered that, reviewed it or produced it, and that it might amount to hundreds of thousands of documents. They say instead that that was not called for, despite it clearly being in the center of this case. The case is about whether the contributions of Linux technology of IBM violates those proprietary rights. And then they say it would be too burdensome to provide it. With the Court's approval, I would like to address those two issues.

First one. The documents were requested going back to June 2003 in at least three of the initial requests in the first request for production. Request Number 11 called for all the contributions themselves which were made not limited to source code, binary code, to open source development lab, Linus, any other entity.

And then there was request 35 and 42. 35 called

for all documents concerning, and concerning is broadly defined, any contribution to Linux. 42 was all documents concerning Linux contributions to development, specifically to 2.4 and 2.5 versions of the Linux Kernel. These weren't just for code, these were for documents concerning their contributions.

IBM initially objected. And then in the course of the meet and confer process, which was carried out in writing, IBM moved back off of its initial objections and indicated that it would make substantial production with respect to areas 35 and 42.

In a letter dated from IBM's counsel on September 15th, 2003, IBM indicated that with request Number 11 that IBM has undertaken to collect documents from various members of the Linus Technology Center, the LTC, who are responsible for work relating to open source contributions to Linux. And in addition, they are collecting materials from the Open Source Steering Committee, the group within IBM responsible for approving and reviewing open source projects, and that:

> We intend to produce nonprivileged documents identified in these files that relate to IBM open source contributions to Linux.

In response Number 35, they again say:

> We are undertaking to produce from the files

of Linus Technology Center and the OSSC personnel nonprivileged documents that relate to IBM's open source contributions to Linux.

They didn't say they were just going to produce the code contributions. They didn't say that what they were arguing about was whether or not they should have to look at the whole company and to open source beyond Linux, but they said for Linux, we were looking at the Linus Technology Center and that they would produce the documents that related to their open source contributions.

Your Honor, this was reiterated in subsequent correspondence in October of 2003 where IBM indicated that this work was ongoing. With respect to request Number 11, they said:

> We have attempted to conduct a reasonable search for documents that relate to IBM's open source contributions. The vast majority are made through the LTC. Some were through this OSSC. And they stated, our searches have included individuals in both of these groups as well as other potential sources of documents relating to IBM's contributions to Linux.

IBM went on to say that:

> We are not limiting our searches to any particular geographic area. Indeed, they have

already included individuals residing in Beaverton, Oregon, which is the headquarters for Linus Technology Center; Austin, Texas, and a variety of other IBM locations.

We learn now from Mr. Frei's declaration that, in fact, they have not searched and gathered from these locations, the Linus Technology Center, the documents that would relate to Linux contributions. They say that these efforts are ongoing.

Given these assurances, it is understandable that the intentional motions to compel related to aspects of discovery which IBM said they would not provide. There was the issue in which the Court is aware of whether public contributions that are already out there needed to be provided, and there was an issue that was focussed on what is in the files and individuals outside the Linus Technology Center including senior executives, like Mr. Palmisano and Mr. Wladawasky-Berger. And the Court after briefing held a hearing on that in February of 2004, and it rendered an order on March 3rd, 2004, on SCO's motion to compel.

In that motion -- or in that order, there are two relevant paragraphs. Paragraph Roman Number II.2 dealt with the issue of Linux contributions themselves. There the Court indicated that the ones which were public SCO should use its best efforts to obtain through public sources. The

contributions that were nonpublic IBM is ordered to provide.

But then the Court went on to deal with the issues of documents beyond the code contributions themselves, and that is in Paragraph 3 of the Court's order. And there are three occasions in IBM's opposition to the current motion, Your Honor, where they quote this order. In none of those three occasions do they ever mention Paragraph 3. Paragraph 3 begins by confirming in what we believe sweeping terms that IBM has to produce documents to the heart of the case coming out of the Linux project. The Court said:

> IBM is to provide documents and materials generated by and in possession of employees that have been and that are currently involved in the Linux project.

THE COURT: Mr. Singer, don't you see Paragraph 3 as an expansion of what is ordered in Paragraph 2?

MR. SINGER: Well, we think it goes beyond Paragraph 2, certainly, and that it goes beyond that to the extent that Paragraph 2 is the Linux contributions themselves that are going out to the public. And then Paragraph 3 is dealing with documents that IBM has that are broader than that that relate to that process of contribution.

We think there's no legitimate basis on which in the Linus Technology Center, which is the heart of the Linux project, an employee can do a rough draft of code and that

doesn't fall within 3. Or that if you have a work plan or a programming note, not privy to the public, but generated there in the course of that contribution, a document that might be exchanged between developers that say, let's use the Dynix technology in making this contribution. All of that would be documents generated by people in the Linux project and in the possession of employees. And we think it follows from what the Court says here that:

> The Court finds these materials are relevant because they may contain information regarding the use or alleged misuse of source code by IBM in its contributions to Linux.

Now, the fight at that time was focussed on the senior executives, people outside the Linus Technology Center. And the Court made clear that the scope mentioned includes senior executives, includes Mr. Palmisano and Wladawasky-Berger in another document that had been specifically been dealt with. But those are terms not of limitation on a principle obligation, but an example of what is included within the scope of production. And certainly if the executive materials are relevant because they may contain information regarding the alleged misuse of source code, the very documents being used every day in the Linus Technology Center to create the contributions, their notes, their rough drafts, their work plans definitely fall within this scope.

So we think it's clear that those materials both, quote, related to the Linux contributions so IBM had committed by agreement to produce them, and also that they were the subject of Paragraph II.3 of the Court's order.

Now, what did IBM do in response to that? They assured the Court that full production had been made. If IBM was uncertain as to the scope of that obligation, they had the ability to ask for clarification. They had the ability to provide qualifications in the declaration that they filed requiring compliance. We believe this Court asked for such declarations precisely to avoid this type of issue coming up later on.

THE COURT: Do you acknowledge that SCO has the same obligation if it is unsure as to the meaning of an order?

MR. SINGER: Yes. We think that a party has an obligation to comply in good faith and if you are uncertain, it has a duty to seek clarification from the Court to disclose limitations on what they are producing.

And that IBM did not do so in this case. That even if there was an argument, which we don't think there is, and somehow the Court, if they read this thought, well, we only have to produce documents from the files of our senior executives, not the very people at the heart of the project in the Linus Technology Center, they could have asked the Court to clarify Paragraph 3. They didn't do so. They could have

stated in their declaration of compliance in Paragraph 5, we produced the senior executive documents, but we take the position that somehow that doesn't extend to the documents in the Linus Technology Center that relate to these contributions. They did neither.

THE COURT: Then let me indicate to you that I'm going to want you to address what appears to be SCO's failure to clarify or ask for clarification on issues related to the Linux contributions. In my review of the transcript of the initial hearing, I read it closely and find no mention made by Mr. McBride of any of the new requests you are now saying are covered by the order. So be prepared to address that.

MR. SINGER: Yes. If I'm -- I mean, our position with respect to our current motion is we're not saying that in the February hearing or in the hearing on AIX and Dynix contributions that the issue was these Linux materials. Our position is, we believe that IBM had said they would produce this.

THE COURT: But the order does not address that, and it does not address it because it was not raised at the time of the hearing.

MR. SINGER: I understand, Your Honor. Our position is it was not raised with the Court at the time of the hearing expressly because of the assurance in the letters which we have shown you that are resolving document Request 35

and 42 and others saying that IBM will search the files of the Linus Technology Center, and IBM will produce documents that, quote, relate to its Linux contributions.

THE COURT: Well, that's why I go back to what the responsibility of each side is, to seek court clarification when something is unclear.

MR. SINGER: If we believe that IBM -- or let me put it this way, Your Honor. If we thought IBM was not producing documents at the heart of the case despite saying, we produced documents that relate to Linux contributions, that certainly would have been expressly raised. We believe it is very hard for IBM to take the position that they're taking here, that despite the language of these orders, despite an order we'll get to in a moment that deals with the production of the programmer notes, the history, the revisions in AIX, in Dynix, that the Court could possibly admit that even more central documents relating directly to the Linux contributions themselves did not have to be produced.

In this assurance on April 2004, IBM simply said that they undertook a reasonable search for and has produced all nonprivileged, responsive documents including those from the files of Mr. Palmisano and Mr. Wladawasky-Berger, which is, of course, the subject of the other motion which has now been deferred at this time, but this includes all the section of 2.3 of the order.

After this, the discovery fight focused on the issue of AIX and Dynix code because that, IBM said, they were not going to produce the revision control information for, CMVC database, RCS database. They weren't going to respond specifically to interrogatory Number 5, all for specific identification of contributions made in programmers who made those with respect to AIX to Dynix and to Linux.

As the Court is well aware, there was extensive briefing on this issue, and there was argument, following which in January of this year, the Court entered its order which said that because of the contract theory, the broad scope of discovery, IBM needs to produce that information. The Court ordered it produced. The Court ordered that programming information, related documents from files of 3,000 IBM programmers who contributed to AIX and Dynix be produced.

IBM filed a motion for reconsideration from that. And they said that is too burdensome. And the Court's response to that said, well, for the present time, it will defer, not remove that obligation from the 3,000 employees who made the most contributions to the AIX and Dynix, but to defer that, and only as a first step require compliance for 100 individuals who made the most contributions.

In the course of discussions leading to that motion for reconsideration, statements by IBM to us indicated that they were not interpreting that to include as well Linux

information had not previously been produced. And so in our opposition to IBM's motion for reconsideration, that was expressly addressed to the Court at that time.

And it's indicated that in many instances, there's been a development process which runs from IBM or Sequent programmers immersed in SCO's proprietary UNIX code between the selection of AIX and Dynix material for Linux and the actual contributions to Linux. SCO requires access to that development history including both code and related documentation for exactly the same reason this Court has held that:

> SCO needed access to the material evidencing the developers and development process of Dynix and AIX themselves.

IBM did not respond directly to this other than to say, we're not obligated to produce information that's public. We're just obligated to produce information that's nonpublic, and this should not be ordered.

The nonpublic information that they were withholding they never stated in that response includes all the materials relating to that development process.

The Court did not limit in any way IBM's obligation. The Court in its order dated April 19, 2005 -- I should say the Court did not limit these obligations relating to Linux. The Court, as I've mentioned and as the Court is

aware limited the obligations for the time being on the number of AIX and Dynix files that it needed to review.

However, with respect to Linux, the Court's order had no limitation and, we think, made it as clear as it could be that IBM was required to produce all the nonpublic Linux contribution information that it had not previously produced. The Court, this is not our emphasis in underscoring where it says, "all nonpublic Linux contribution information," that's the Court's emphasis.

Now, we believe that the face of these two orders and IBM's earlier agreement to produce this information that IBM has willfully failed to comply. How can IBM take the position that an internal work plan as to how they're going to make a certain contribution is not a document that, quote, relates to that contribution? How can IBM fairly take the position that a document such as that when it's generated in the Linus Technology Center is not within the scope of documents that are generated by employees in the Linux project? How is that not part of nonpublic Linux contribution information? This is not limited just to the contributions, but the information. It goes to the very core, we submit, Your Honor, of the documents in this case.

But even beyond the plain language of the Court's order, we don't believe that the position that IBM apparently is taking can make any sense and be understood as having a

rooting in this. First of all, IBM has taken the position that all or virtually all of their contributions to Linux are publicly made. That being the case, if the Court's order were construed as just dealing with contributions themselves, they're virtually a nullity because if contributions themselves are public, that we agree, the publicly accessible information we get publicly. If the Court's orders mean anything, they mean that the nonpublic information that surrounds the public contributions are to be produced.

Furthermore, IBM has to know that the Court in its reasoning and its order saying that AIX and Dynix development history is relevant and needs to be produced could not possibly intend to exclude Linux development history, documents relating to the Linux contributions which are even more at the core and the center of the case that concerns whether those contributions were made in violation of our proprietary rights.

THE COURT: But, Mr. Singer, I again ask you if in the discussions with IBM you are not receiving these, then why didn't SCO accept the obligation which you appear to accept to ask for clarification?

MR. SINGER: Well, Your Honor, as IBM says in its opposition papers, they produced some of the documents. They produced they say tens of thousands of documents that are responsive to this. We don't know how they selected those.

We don't know why they produced tens of thousands of documents if they believed they had no obligation or why if they produced that many they didn't produce all of them. So we are receiving along the way certain information.

We did raise these issues with IBM, we submit, when we pushed them on item Number 35 back in 2003, and they say, we are producing these. We are going through the Linus Technology Center. We are producing the files that relate to these contributions.

We did push them again when in connection with this motion for reconsideration, and in this spring they made the argument that they were not required to detail their Linux contributions. We said, we want to make clear that the Court's order included the Linux contributions. And they refused to do that. We then raised that with the Court, as I've just indicated, in our memorandum dated February 28th, 2005. And we believe that any uncertainty in IBM's mind was then clarified by the Court's order that said, all nonpublic information was to be produced. So we believe we have reacted to that.

What they have done meanwhile is they never told us they never did what they said they would do and search the files of Linus Technology Center and produce related information. They have presented declarations that said that they produced everything when they now say they haven't even

searched for that material.

IBM is the party that knows what's in their files. We can draw some inferences from what they are producing to us, but we don't know that full scope. IBM at all times knows exactly what is in their files, and they know exactly what they have produced and what they have not produced.

Furthermore, Your Honor, there is another statement by IBM that bears on this. In their responsive brief which they submitted to this Court on this very motion, IBM stated that they should not be required to do this because it would be difficult if not impossible to separate out the contributions from the development history information.

And if the Court accepts that, I ask, well, what basis, then, has IBM even been able to confirm to the Court that it's complied with the order to produce nonpublic contribution information if they haven't at least gathered the development information and reviewed that, which they said they haven't done? They have been making judgments, apparently, that none of this information is under these court orders, when, according to Mr. Frei's declaration, they haven't gone about gathering it from the field, reviewing it and making any determinations. You could have documents in the hands of Linus Technology Center employees that specifically say, we are looking to incorporate here technology from Dynix, a derivative product of UNIX System V,

in the Linux because it will work better, or admissions of that type. And IBM not only would haven't produced it, but based on the Frei declaration, they would not have even conducted the necessary and thorough search to provide it.

The other point IBM makes, Your Honor, is they argue that the Linux information would be too burdensome at this point to produce. And it was in that connection that Mr. Frei's declaration is submitted. We believe the short answer to that is IBM said they would do that search of Linus Technology Center in September of 2003 and produce all documents related to the Linux contributions. So that is something they said they would do over approximately two years ago but they have not done.

And further, we think that a statement by IBM of the burden of reviewing files of 300 approximate number of developers is not something which can be viewed as inordinate and burdensome under any case. It is hard to understand that they would be defending this case in the first place without having gathered and reviewed the information that directly relates to how the Linux contributions were prepared and made. Yet, they have not done so.

THE COURT: You required them to defend against this case by filing suit against them.

MR. SINGER: That's right. Our point is that these documents, Your Honor, go right to the heart of that suit.

For them to say they have never gathered and reviewed the documents that show how Linux development has occurred, the rough drafts, the internal work plans, programming notes, that all of that you would think would be the first thing that IBM would look to along with the contributions themselves.

IBM can gather information from 300 individuals very easily. They can start by sending an e-mail to those 300 individuals which says, send us the development information, all the documents that, in fact, do relate to their Linux contributions.

We assume that IBM has taken the necessary and appropriate steps to preserve that information upon the commencement of this suit. We submit that that information should be produced in a manner they should work with us that requires the least adjustment, if any, to the discovery schedule in place. For example, we have a number of depositions of programmers coming up, and they should give us an advance of those programmers' depositions the files indicating what it is those programmers were working on.

Instead, we have a situation where they're saying, you take blindly these depositions of the programmers. You can ask them what work they did in a deposition, but you shouldn't get the benefit of the files of their desk top or their server which would indicate what work they did in preparing the contribution.

Clearly that material is very relevant and is at the heart of this case. And even if it were not the subject of these earlier orders and the earlier agreement by IBM, it should be produced.

IBM said that 300 people are spread throughout 10 countries. They don't indicate how many of those, in fact, work at the headquarters in Beaverton or in Austin, Texas. But no matter how many places there are, in this day and age, e-mail goes out, and documents come back in from whatever locations that IBM has engaged in.

When we asked Dan Frei in his deposition had he turned over everything, his response in his deposition whether he complied with the document request, the file request, he said, I turned over everything. Clearly that's not the case in so far that he has in his possession documents that relate to the contributions made to Linux.

Your Honor, one further argument. To the extent that IBM is taking the position that this was not, in fact, called for by Request 35 and Request 42 among others, that is inconsistent with their recently received responses to our Seventh request for production. IBM once it became clear this summer that they have not produced a lot of information because we weren't seeing it regarding Linux development, some examples of which are in our motion, we sent out a Seventh request for production. We tried to deal with it with as

great specificity as we could as opposed to general categories of documents relating to Linux contributions, documents relating to 2.4, 2.7 development, we sent out a Seventh request of production that had scores of specific requests. All documents concerning contributions to specific Linux projects, development work, listing specific projects, development work on the contributions to the 2.7 Kernel. Documents relating to the development trees. These are just a few examples.

In response to those requests and many other similar requests, IBM stated that these were duplicative of SCO's earlier document requests, including request Number 11 and 35. And we submit that suggests, you know very well that SCO 35 which asked for all documents concerning Linux contribution included the very thing that they have not produced despite their agreement to produce all documents relating to Linux.

They should have produced this a long time ago, Your Honor. We submit that they have an order to produce it forthwith. And we submit further if the Court agrees with us respectfully that their action has not been appropriate in this regard, and the Court should consider sanctions, as well.

THE COURT: Thank you, Mr. Singer.

MR. SINGER: Your Honor, this was not in the book. It's a smaller photocopy of this particular chart. It is

available.

MR. MARRIOTT: Good morning, Your Honor. David Marriott for IBM.

THE COURT: Good morning.

MR. MARRIOTT: If I may, I'll just take this down.

THE COURT: Sure.

MR. MARRIOTT: Your Honor, SCO's motion is premised on the proposition that IBM has by way of Mr. Shaugnessy's declaration and its interaction with counsel in this case and the Court effectively misled the Court with respect to the scope of IBM's production pursuant to the Court orders. And I want to be perfectly clear from the outset that that is absolutely false. We have endeavored, Your Honor, throughout the course of this litigation to conduct ourselves according to the highest of standards of professional conduct, and I believe respectfully, Your Honor, that we have. And we've endeavored to comply with Your Honor's orders in so far as we've understood them as best we could and in all respects. And, in fact, Your Honor, in some instances we have, I think it can fairly be said, gone above and beyond what Your Honor has ordered.

Mr. Singer mentioned in the Court's requirement that IBM search for files from 100 developers of AIX and Dynix code. IBM searched for and to the extent it found, Your Honor, produced documents from 150 AIX and Dynix developers.

In fairness, Your Honor, I think that our approach to discovery has gone above and beyond that, I hope in the few minutes that I have to demonstrate that to Your Honor.

At the risk understating the point, Your Honor, SCO's present motion is to us nothing short of astonishing. In a nutshell, Your Honor, it argues that we agreed from the beginning of the case to effectively produce every document in the company relating to Linux, despite the fact that they've never asked for it. They argue that Your Honor ordered us to produce every document in the company relating to Linux, despite the fact that they didn't move for and apparently we'd already agreed to do it. And then they argue, Your Honor, that in effect, we thumbed our nose at the Court's order. We said that we produced everything that we said we would produce, and then, in fact, we did not, despite the fact that later they're apparently saying in Mr. Frei's declaration exactly what we did do.

Your Honor, early in this litigation, SCO made what I think can fairly be characterized as a grandiose public statements about the scope of its case and the breadth and the depth of its evidence. In his February 8 order, Judge Kimball said, quote:

> Viewed against the backdrop of SCO's plethora of public statements concerning IBM's and others infringement SCO's purported copyrights to the UNIX

software, it is astonishing that SCO is not offering any competent evidence to create a disputed fact.

Your Honor, in so far as SCO distorts the record on this motion and faults IBM for not complying, which I believe I can show Your Honor to be revisionist versions of Your Honor's orders, its approach here as I would submit in Judge Kimball's words, nothing less than astonishing.

I would like, if I may, to make three points. The first of those points is contrary to what Mr. Singer says, IBM did not at any point agree to provide, as SCO suggests, every document in the IBM company relating to Linux or even every document relating to IBM's Linux contributions or the development of Linux. SCO propounded, Your Honor, a very small set of discovery request earlier in this case relating to Linux.

And if I may borrow your charts, counsel.

MR. SINGER: Sure.

MR. MARRIOTT: I think, Your Honor, that SCO says it well in its own chart. In document request Number 11, in document request Number 5:

Seek documents relating to contributions to Linux. Contributions to the open source development lab, Linus Torvald, Red Hat.

From the beginning of the case, their requests were focused on Linux contributions. Requests don't ask for

documents relating to the development of Linux, and they don't ask for every document in the company that relates in any way to Linux.

That notwithstanding, Your Honor, when we received these requests we objected to them. And we objected to them because we found that even as they related only to contributions, they were overbroad and unduly burdensome and would require the production of materials not reasonably calculated to lead to admissible evidence. And we set out our objections in our responses and objections to SCO's requests.

And if I may approach, Your Honor, we have a binder which I hope -- may I -- which I hope will be of some assistance to the Court. It's in part oriented toward the other motion that has now been put off, Your Honor, but some of the materials here may be useful, and I'll come to them as they do.

The point is, Your Honor, in response to the SCO requests, IBM propounded objections because the requests in our mind were broad. For example, Your Honor, as we made clear to SCO from the beginning, IBM's contributions, as anyone's contributions, to Linux are public. Linux is a publicly developing operating system. The contributions themselves are by definition in the public domain.

There is one sort of wrinkle, Your Honor, and in one sense in which a contribution which I think isn't a

contribution might be said not to be in the public domain. If a person attempts to make a contribution of code to Linux, it sends an e-mail, for example, to Linus Torvalds. Mr. Torvalds looks at the e-mail and decides the contribution is of no real value, and it doesn't make it into Linux. That I would characterize as an unsuccessful Linux contribution that didn't make it into Linux. Most successful contributions, Your Honor, do make it into the public domain because a person generally contributes to Linux by offering up a contribution on its public website for the world to see those, for the world to evaluate whether the code makes sense to include it or not, and then Linux itself is actually developed in the public domain over the Internet.

So there is a very small set of documents, Your Honor, that one would call nonpublic contributions. To the extent IBM made contributions through some indirect means, nonpublic means, and they didn't make it into Linux, which would make them public, we looked for those documents pursuant to Your Honor's order, and we produced it. And to the extent that any in the future are made, that they don't make it into the public domain system because someone within IBM sends it to Linus Torvalds, we will search for them, and if he rejects it and it doesn't make it into the Linux Kernel, we will make those documents available to SCO.

Now, Your Honor, let me just pause for a minute and

drop the Court a footnote. Though IBM objected to SCO's requests with respect to producing Linux contributions because we thought for the reasons I said, that they were overbroad and burdensome, we did not refuse altogether to search for documents. Your Honor will remember that at the beginning of the case the allegations of the complaint left, we thought us unsure as to what this case was about. And that's what precipitated the set of motion practice about figuring out how we would receive the discovery. And Your Honor set up protocol, as I think of it, by which SCO would identify the code at issue in the case. Once identified, IBM would then provide discovery with respect to that. That is as we understand it has been the protocol in the case.

So the footnote is we have provided substantial discovery relating to those very requests. They didn't just find out that we somehow had not, and I will show Your Honor that to be the case. And I will come back to the particulars of what we produced, if I may, shortly, Your Honor.

But the point is we never indicated that we would provide, as they suggest in their papers though they back off it a little here this morning, every piece of paper in the company relating either to Linux or even the development of Linux. We indicated that we would undertake a reasonable search for responsive documents based on the allegations of the complaint as we understood them. And the letters that

Mr. Shaugnessy that you have displayed here say nothing more than that. IBM will undertake a reasonable search. We did that, and we produced a substantial number of documents, Your Honor.

We produced -- just to give Your Honor an example, we produced documents from 70 or so custodians, whose documents related essentially only to Linux. And to the extent those custodians had in their files of documents related to Linux, those documents if responsive to these requests were produced. They amount, Your Honor, not to tens of thousands of pages of papers, as Mr. Singer suggests, but they're hundreds of thousands of pages of paper.

And with every production, Your Honor, in this case, we have given SCO a log identifying whose documents we were producing and the number of pages of documents being produced. Pursuant to interrogatories early in the case, they asked who the players were, who were making contributions. You've heard different numbers of 7,000 and hundreds of developers being mentioned. They knew exactly what we were doing, Your Honor, all along because the log is a record of exactly whose files we produced it from. So the suggestion that somehow we promised to do a reasonable search and then reneged on that only from their position to give them nothing which they just found out, is frankly not true.

Back to the first point after that long footnote,

Your Honor. We did not agree to give them every document in the company relating to Linux. We simply did not. The parties met and conferred over a course of days for a total of several hours about these original requests, Your Honor. None of the lawyers sitting at this table were involved in any of those negotiations. Mr. Shaugnessy was, and Mr. Ligh was. And they tell me that they made perfectly clear to SCO that we were not turning IBM upside down to produce pieces of paper from every single person in the company that might have a document related to Linux.

We also made clear, despite what Mr. Singer suggests, Your Honor, throughout the case in our papers that we were not doing that. Not just the production logs, but we made it abundantly clear in this litigation what we were doing.

And, Your Honor, the suggestion here that we agreed to do this sometime ago is a suggestion that comes for the very first time in a litigation two and a half years old in a reply brief. That reply brief is in stark opposition to what SCO said in its moving papers on the very same subject. And I point Your Honor to Page 5 of their opening brief in which they say, quote:

IBM has persistently denied SCO this discovery.

And that's absolutely right. We have persistently declined to turn the company upside down to provide every

scrap of paper that might relate to Linux. Your Honor, Linux is a pervasive thing. It is like saying to the computer company, give us every document that relates to computers. The notion that they asked for that and we would agree to that is frankly absurd.

My second point, Your Honor, is that contrary to what counsel for SCO suggests, we do not believe that Your Honor's orders required IBM to produce documents in any way, shape or form relating to Linux from all of the people in IBM as their papers suggest, although again this morning they back off of that, we're now talking about hundreds of people. Just so there's no doubt, Your Honor, in describing the Court's orders, I do not presume to speak for you or tell you what you intended. I'm comfortable that Your Honor will tell us what these words in your mind meant, and we will all live by it. But what I do want to communicate is what we understood the orders to mean, and what we understood them to mean, Your Honor, not in our fanciful imaginations, but from the language used by the Court and from the context in which the Court used that language.

Chronology, Your Honor, and context here are important. They're important because these orders did not issue against a blank slate. They issued against a set of discovery disputes and prior hearings and prior orders. And without going into all the detail, I want to tell Your Honor a

little bit about that. Well, it takes more time than I would like. I think it's important to our understanding of the these orders.

The first order, Your Honor, that SCO suggests in its papers and here again today that IBM has violated throughout the course of discovery is the Court's March 3, 2004, order.

And again if I may borrow this chart. May I counsel?

MR. SINGER: Certainly.

MR. MARRIOTT: As I suggested, Your Honor, you will recall that at the beginning of this litigation, there was a dispute among the parties as to how discovery should proceed. And in IBM's view, the SCO complaint failed to disclose with requisite particularity what the case was about such that we were left perplexed as to how precisely we were to go about producing documents relating to a subject like Linux like computers without knowing more specifically what the case was about. And we asked Your Honor to require them to provide some details.

About the same time that we moved, they made a competing motion to compel, which is the motion we're effectively here on in a renewed fashion today. Your Honor said at the outset that you were going to hold their request for production in abeyance. You said, I want you to go first,

SCO, and tell IBM what's going on here and to state sua sponte all their discovery until they provide the information. That was in December.

We came back to the Court in February. Your Honor asked me whether I thought SCO had complied. And I said that was difficult to say for certain. That was a judgment Your Honor should make. You subsequently made that judgment in your order from March 3rd and lifted the stay and required some discovery of SCO because Your Honor found, I believe in effect, in the order that there was still more that could be provided. And your order, Your Honor, ordered IBM to undertake certain things.

It's important in understanding I think what the Court's order means to reflect back on what SCO asked for. If you look again at SCO's request, Your Honor, Mr. Singer put on here 11, 35, 42. I believe, Your Honor, that the only requests at issue in the motion to compel were 11 and 35. And what was argued then by myself and Mr. Heigh on behalf of SCO at that hearing was that IBM should be required to provide all of its contributions to Linux. Not surprisingly because that's what the requests are actually about. And we argued, Your Honor, that that didn't make sense because the contributions were by definition public, and they could go get them for themselves on the Internet.

In Your Honor's words, Your Honor said that SCO

should endeavor as best it could to get what publicly was available concerning IBM's Linux contributions, and to the extent there was nothing that might not be public, for example, a failed contribution that didn't make its way to the public where it had failed, IBM should provide that. And as I said at the outset, Your Honor, that we have done.

Now, also at this hearing, though not raised in the papers, not squarely before the Court, counsel for SCO, Mr. Heigh, made essentially two additional arguments. First he said in effect, we're concerned that IBM is omitting documents from the files of senior executives. That was untrue, Your Honor, but that was his concern at the time. Second argument that Mr. Heigh made was that IBM, according to a public report, had in the late fall of 1999 undertaken a project to decide what its Linux strategy would be and figure out whether it would embrace Linux. Mr. Heigh waived around the article, and the Court later refered to in its order. Mr. Heigh said in effect, this is important. We need to have this document. They haven't produced it to us.

In Your Honor's words, you among other things begin in Paragraph 2 by reiterating that IBM is required to produce those contributions which are not public. You then go on in Paragraph 2, Your Honor, I believe in response to Mr. Heigh's argument, in the first two sentences to essentially say, as I read that, that IBM shouldn't omit documents from executives.

IBM is to provide documents and materials generated by and in the possession of employees that have been and are currently involved in the Linux project. IBM is to include materials and documents from executives including Sam Palmisano and Irving Wladawasky-Berger.

That to me was saying, IBM, do not exclude in your production of documents from your high level executives, which again, we weren't doing, but the concern was expressed, and I believe Your Honor addressed it in that order.

The Court then goes on I believe in the following sentence to address Mr. Heigh's request for information concerning the decision made by IBM in '99 to embrace Linux. And Your Honor specifically asked IBM to include that document and the materials related to that document. And you quote from it there by referring to IBM's ambitious Linux strategy. And that decision -- the article itself is here, Your Honor, on the first page. It says:

Less than two months later, a few days before Christmas, IBM had fashioned and Louie Gerstner, Jr., the chairman, had approved an ambitious Linux strategy.

That is what I believe Your Honor is referring to in your order, the decision at that point in time by IBM to do something which was then not traditional and embrace an open source project like Linux.

We understood Your Honor's order to say, don't omit

to the extent they have documents responsive to these requests, documents from your high level executives. We weren't doing that. We'd first begun searching for Mr. Wladawasky-Berger's files, Your Honor, I believe in August of '03, well before this motion to compel which came before the Court.

In the last portion of the order here, Your Honor says:

> The Court finds these materials relevant because they may contain information regarding the use or alleged use of source code of IBM in its contributions.

To us, Your Honor, what that meant is IBM undertakes the '99 and adopts it. And there's a consideration then of whether we shouldn't adopt it because it may be code in Linux which properly shouldn't be there.

What that order does not say anywhere so far as I can tell, Your Honor, is that IBM is required to produce every document in the company relating to Linux, every document in the company relating to the development of Linux, or even anything about IBM's Linux contributions.

The Court in Paragraph 2 immediately before says:

> IBM need not produce its Linux contributions in so far as they are publicly available.

SCO's position, Your Honor, that the language in

Paragraph 3 swept broadly to require the production of everything related to Linux or everything related to the development of Linux is impossible to reconcile with Paragraph 2, under which Your Honor said quite plainly we are not required to produce every document in Linux. If their interpretation that this is right, Paragraph 2 would be meaningless.

Moreover, the footnote, which is not -- it is up there. The footnote makes specific reference again to Mr. Heigh's pitch to the Court that we ought not be omitting documents related to -- from the files of executives, and we ought to be looking for documents related to that strategy.

We did that, Your Honor. Not for a minute did we consider that the Court was by that provision saying, forget the protocol of the months past, forget that SCO's to go first and tell us what's at issue and IBM with respect to what's been disclosed come forward and give us a little bit, give us discovery as to that, or we are going to go from broad to narrow until we reach a point where we have an issue we might actually try.

Never for a minute did we think that was completely out the window, because now SCO had, never having asked for it, never having moved on it, an order that said, IBM, produce everything in the company that's related to the Linux. And that, Your Honor, is how they read this clause.

Such materials -- produce such materials from Linux strategy or provide documents in the Linux project.

Which presumably they read to mean Linux. Produce any materials related to Linux.

Your Honor, not only would that reading entirely make irrelevant Paragraph 2 of Your Honor's order and not only would it totally gut the protocol which I understood the Court to put into place, but it would have been impossible to do. IBM is a company of 320,000 people. That's more people than there are in the city of Salt Lake City. The notion that we were going to somehow without bounds, which they're trying to now put to read this to say, search for files from everywhere -- and by the way, searching for files by last check did not in their view amount to simply sending an e-mail. Not to argue the motion Mr. Shaughnessy intends to argue, Your Honor, but you remember that we've been faulted for affidavits which have all sorts of apparent deficiencies according to them. Those affidavits were generated following a very careful and comprehensive search of people's files, not by sending an e-mail. Do you think for a minute if we just sent an e-mail they would be content with that production? I would submit to you, Your Honor, they wouldn't.

The way you collect documents as a general matter is to identify the people whose files deserve a search, to undertake, to communicate to them what the nature of the

documents we're looking for, in many cases interview them, to collect the documents which result from that and appear that they may be responsive, to carefully review them for privilege and for responsiveness, to segregate out the privileged documents, to take those documents, and if they are responsive put them on a log, to prepare the other documents for production, and to have CDs cut and produce them. It is not a trivial process.

According to SCO, Your Honor, though I don't believe the Court's order actually says how much time we have to do what's ordered here, according to the SCO letter sent to us following this order, they expect a compliance in 45 days. So they're now telling you we were supposed to go to the files of everybody or just take the argument that is being advanced today, to 300, and we were supposed to search the files in a meaningful way of 300 people and produce all of the documents that related in any way to Linux, and we were supposed to do it in 45 days. Your Honor, it strains credulity to think that that's what we reasonably could have understood this order to mean.

Let me just add, Your Honor, let there be no doubt what we understood this order to mean. When we got it, we sent a letter to SCO, and we said to them, this is the way we understand Paragraph 3. We understand Paragraph 3 to require us to search the files of the executives, and we understand it

to be calling for documents relating to what Your Honor says in the order, the IBM documents.

They responded. They expressed some concern, and these letters are in the book, which I provided to the Court. They responded. And in their response, Deiter Goodstone, another lawyer for SCO, expresses some concern that perhaps IBM is trying to say that it's only going to search in the files of its executives for documents relating to that. And we responded and said, no. We understand that this particular provision to be responsive to Mr. Heigh to be saying, make the documents related to the decision from the files available and don't omit the files of executives. But we understand your other requests of SCO. We are not omitting from our production documents which otherwise might be responsive merely because they don't relate to that document.

And again, we haven't done that. We have produced files from 216 custodians. By contrast SCO has produced 65. We have produced documents in the order of millions of pages of paper. At least hundreds of thousands of them, I'm told roughly 700,000, relate to Linux and Linux development and the like.

Your Honor, we have done the best we can do with what we have from them with respect to what we are supposed to -- with respect to what this case is about. And I will remind you, that with respect to what in Linux they have

rights to, you remember we asked and propounded in Interrogatory 13. Your Honor twice ordered them to respond to it. We still don't have what we believe is an adequate response. That's the interrogatory in which they say, here are the contributions that are a problem. We own them. Here's our right to them. Here's how you violated it. We still don't have the answer to that. Yet, they say, under Your Honor's order, the trivial discovery we did do. Yet, in their view, they now have an order which conveniently they're interpreting to say, forget all of that. Give it all to them. We now have carte blanche for every piece of paper in the company. And if you don't produce it, they suggest today, we will contend that you improperly failed to retain responsive documents because you didn't produce every document in the company, which is what Mr. Singer's reference, I believe, was about.

The bottom line, Your Honor, is in our judgment, one cannot reasonably read these orders as requiring the production of every document in the company related to Linux or even every document related to the development of Linux. There are hundreds of people within IBM's Linus Technology Center, 300 or so developers. We produced documents from at least 50 of those developers and 70 people overall that we believed to have information relating to the development of Linux. That alone is more than the entire set of the

custodians from whom SCO has produced documents in the case.

Let me, if I may, Your Honor, just move briefly to the last of the Court's order, which is alleged that IBM violated. That is the April 19 order. As Mr. Singer has properly said, that order arose out of a dispute among the parties with respect to AIX, and in particular, whether IBM should be required to produce all of the development history for those UNIX products, not for Linux. And as Your Honor knows, we took the position that we shouldn't have to. Your Honor disagreed with us and ordered us to do it, and we did.

In the context of that order, we understood some of the Court's language to perhaps suggest that we were supposed to search the files of 3,000. That concerned us. We raised that with counsel for SCO, who rather than saying, well, we understand that's not what we suspect the Court meant, but what's in it for us? Rather than say that, rather than express the alarm that now has been suggested was expressed about our saying that we were not going to also produce Linux because the order has nothing to do with that, so declined, we raised in our opening brief this issue. SCO responded in its reply in its opposition, and it was further addressed in our reply.

In Your Honor's order, what the Court did, as I understand it, and in the orders in the booklet that we provided to the Court, Your Honor basically said, I reiterate

what I said before. IBM produce its nonpublic Linux contributions. And Your Honor went on to say, because here we were talking about an interrogatory that IBM should make sure that if there were people who made these contributions whose identity isn't abundantly clear, you should identify those people and provide contact information. And we did that.

The word "information," Your Honor, was then introduced into the equation. And SCO then seized upon the use of the word "information" in that order to say, ah-hah, the Court's not just requiring the production of Linux contributions, it's saying contribution information. And what that must mean is IBM has to produce everything in the company relating to Linux or at a minimum, the development of Linux.

And again, Your Honor, we would submit that the Court's order, which we thought was clearly reiterating what had been done before, if it intended to require IBM to produce documents from the files of hundreds if not thousands of people related to Linux, it would have said so, especially when in context Your Honor was saying in that order, for now just produce documents from 100.

Yet, their position is, you're saying it simultaneously, produce from just 100 from AIX and Dynix, which we've now had lots of oral argument on, motions and other documents squarely been focused on. That is limited to 100, but they contend we were simultaneously nearly

subsequential ordered to produce everything under the sun, again, they say, relating to Linux. And I respectfully submit, Your Honor, that that interpretation does not survive scrutiny.

The last point, Your Honor, and I will sit down, is simply that independent of the Court's order, Your Honor, which, again, we don't -- we've never read and don't believe require the production of the kind that is suggested by SCO, we don't respectfully believe there is any reason to require the production of this information. Again, the Court's protocol was quite clear. SCO produces. IBM then goes from there. We still don't have a detailed response to our argument to Article 13.

What we have produced rather than saying, forget it. We're giving you nothing because we don't have a response to your Article 13, we have gone out in so far as we can determine is a bound for a reasonable search and produced files from -- we've produced documents from the files of people in Linus Technology Center. And respectfully, they aren't just figuring this out. They deposed some of these people. They have the logs that say it. There is no mystery about it.

Your Honor, in addition, we do believe -- and I won't burden the Court with this point, these arguments have been made before, and I think they stand true today -- there's

no reason for the production now given the protocol Your Honor has set out for this information. We have produced the contributions that are available. To the extent there were nonpublic things that really didn't qualify as contributions but were failed effort, they have been made available. We have produced, you know, the equivalent of billions of lines and literally hundreds of millions of lines of AIX and Dynix code, all of the development information from that information.

What you don't see, Your Honor, in anything before the Court today is any use of that information. What you don't see is SCO saying, you know, they produced all of this. Here's now what we know. We can define and focus the issues.

We have produced millions of pages of paper that apparently are of absolutely no value to SCO. At a minimum, they are not moving this towards a solution. The closer we get to the close of the case, the more questions we have, the more discovery apparently is needed. And we'll deal with I suppose further, Your Honor, with a request for depositions.

Finally, it would be an enormous burden to produce these materials. We have produced in the case today as I said from 200-and-I-believe-16 custodians. SCO has produced 65. That has taken two and a half years. Now as if it's done in weeks, counsel for SCO suggests that we should be required in the briefs they say everyone in the company, which one can't

believe they really mean. They say 100 people within the Linus Technology Center. That is not a small undertaking. It would be an expensive and all, frankly, Your Honor, for essentially no gain because they have already all that is required.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Marriott.

Mr. Singer, I'll give you 10 minutes if you want to respond.

MR. SINGER: Thank you.

First, Your Honor, these requests are not directed to everything in the company. The particular focus of this that we are asking the Court to rule either has already been required or should be required forthwith are the documents created by the Linus Technology Center that have not been produced to date, that are nonpublic and they relate to IBM contributions that have actually been made to the outside world.

Now, to the extent there are documents that are in the public domain, that's not included. To the extent there was work on dead ends that didn't actually result in contributions, that's not included. To the extent that it includes people outside the Linus Technology Center, that one can debate about, but there should be no debate about within the Linus Technology Center or the Open Source Steering

Committee, those two groups, because that's what they said they would review going all the way back to the beginning of the case.

The second point I would like to make, Your Honor, is that the Linux development that occurs in the public does not obviate the need for this information. There's no question that a lot of Linux development does occur in public. There is also no question that IBM has not just out of thin air created these contributions and then presented them to the public or produced to the public all the underlying memos, e-mails, drafts, work plans that go into the creation of those contributions. That's what we're talking about. But if the contribution is relevant, if we're deposing a programmer about the contribution and what they relied on in making that contribution, so clearly relevant and fell within the scope of these orders and their earlier agreement to get those files from those several hundred people in the center.

Now, on that Mr. Marriott says, well, we have given you information from 50 developers, to which I say, how were they selected? If they didn't have this obligation at all, how did they pick 50 developers? What did they select from those 50 developer files to give us and not give us?

Mr. Frei's declaration simply says in sweeping terms that, we would have to go to hundreds of developers and produce all of their information. And he suggests none of

that has already been done. Has than been done completely for 50 developers? Why them not the other Linus Technology Center developers? In September of 2003, Your Honor, they did not make such a distinction.

Now, I'd like to briefly respond on each of the particular orders of things that we have not previously covered. First of all, there is the issue of the request. The request Number 11 dealt with the actual code, the contributions. Request Number 35 and 42 go beyond that. 35 talks about documents concerning those contributions, as does 42. That is broader than the contributions themselves.

Mr. Marriott did not respond to the fact that if this request in the Court's subsequent order only means contributions themselves and the contributions are made public, then all of this is essentially a nullity. It has to be nonpublic information. And for those contributions, what IBM said they would do would be review the documents in the Linus Technology Center and that they would produce the documents that relate to those contributions. That was clear in the September 15th and in the October letters. We had the right to rely on what IBM's counsel said in that regard. Not that they were searching the whole company, not that they were giving us every document, but that they were going to the Linus Technology Center and the Open Source Committee and that they were producing documents that related to the actual

contributions that they had made, not to every open source project, but to Linux. And no protocol ever trumped that obligation.

Now, with respect to the February 4th hearing, we've acknowledged the focus of that hearing was on the issues of public versus nonpublic code and executive files. We do not believe this was an issue. The Court's order, however, went beyond that. We believe, I mean, the Court will know what it meant by its order. We're only dealing with the plain language of that order. And the plain language of that order is broader than simply the executives. That includes materials from the executives but not limited. And to the extent the Court is telling IBM that information may be included which shows the misuse of source code by IBM and its contributions to Linux, what's more clearly is at the center of that the people at the Linus Technology Center itself. Maybe IBM right now its reasonable argument if it needed to search people throughout the company outside the Linus Technology Center, but how can they make the argument with respect to the people inside of the Linus Technology Center whose job is to come up with those contributions and when we're talking about the actual contributions that they made from that center to the public?

And then there's the issue of the January 18th order that deals with AIX and Dynix. We have heard no

explanation as to how IBM could reasonably believe that the Court could find relevant and require the production of AIX and Dynix programmer's notes, source, drafts, work papers and the like, but that that is not included with respect to Linux itself.

THE COURT: Because hasn't Mr. McBride argued throughout that it related to AIX and Dynix? He did not broaden the argument.

MR. SINGER: Your Honor, our argument -- accepting that Mr. McBride did not broaden that argument, we submit that they -- given the fact that they knew they had said they reviewed the Linus Technology Center and produced related documents and knowing that if the Court says this range of documents at AIX and Dynix is relevant, how could -- we submit that IBM could not reasonably believe that the Linux was not included.

But we did raise that before the Court in opposition to the motion for reconsideration this spring. And IBM at that point only talked about the nonpublic versus public issue. The Court's order at that time says, all, nonpublic Linux contribution information. Again, we're dealing just with the language of that. To us, "all" means all, and the information means any code itself, especially when the code they say has all publicly been contributed.

The Court also noted below that the production is

to be specific in nature including any code contributed that is otherwise not publicly known.

Your Honor, the Court will know what it intended, and we can go by these orders. The argument we submit is that this was within the scope of what was agreed to be produced as reflected in the objections to the Seventh request where IBM said, what you're asking for now is included in the scope of Request 35. They can't have it both ways. They can't say, you didn't request this, it's not related to Linux contribution; and then say, we are duplicating an earlier request.

So in our view, Your Honor, the Court should either find that this information was called for or should clearly find it's relevant. There's no serious argument that it's not relevant. It goes to the very core of what these programmers are doing. We should not be required to depose a programmer about his contribution -- his or her contributions to Linux without having the file from that programmer which shows the notes, the e-mails, the work plans used to create that contribution.

With respect to the burden, we do not believe that 300 people at the core of the project, 50 of whom apparently have already gathered some undefined set of material from Linux is unreasonable for IBM to be ordered to provide. That is at the very core of this case.

Now, with respect to material that has been produced, Judge Kimball ordered us by October 24th to provide our interim disclosures of the technology and supplement that with the final disclosure in December. We are working on that and. We intend to fully comply with the order, which is the current order we understand we are operating under with respect to those mentioned by identification.

THE COURT: Does that encompass interrogatory Number 13?

MR. SINGER: It would encompass supplementing interrogatories to SCO which have asked for information relating to the nature of what we believe has been misappropriated. I don't have 13 in front of me, Your Honor, if that's such the interrogatory that would include that.

Thank you, Your Honor.

THE COURT: Thank you.

MR. MARRIOTT: May I make a suggestion, Your Honor, without any further argument? Again -- well, with further argument. We really do believe these materials are irrelevant. As I said, we've produced files from the documents of 216, and a significant number of them are Linux distributors. What I heard Mr. Singer saying is what he really wants is to have the documents for the developers he's going to depose.

We are agreeable, Your Honor, if SCO wants to give

us a list of the 20 developers that they think they've got to depose and they want to give us a fair opportunity to meet with these people and to collect the documents and if we could put this to rest, we will go to -- they choose the people, because I don't want them to complain that we chose the wrong people later on, they know who the people are. They know who they want to depose. They told the Court recently in an order they had a pretty good sense of what they were going to do by way of deposition. We will go to the files of those 20 people, and to the extent documents are there that haven't been produced from whomever they select, we will provide them.

Thank you, Your Honor.

THE COURT: Thank you. Counsel, I'm ready to rule with regard to this in general terms.

The Court finds that based upon what's before me, the memorandums, the review of the transcripts, the affidavits, the correspondence, I find from that as well as from the argument of counsel that IBM did not agree as argued by SCO to provide the information related to Linux.

Further, I find that the issue of discovery as SCO now argues should be included in the order as it relates to Linux was not raised before the Court. It was not understood by the Court as part of the request. It was not contemplated in the orders that have been prepared by the Court. And IBM has appropriately interpreted the Court's orders. And that I

find specifically that SCO's interpretation of the orders takes out of context the Court's what I believe to be clear meaning.

And I also find that Mr. Shaugnessy's affidavits are sufficiently in compliance with the requirements of the Court to explain those efforts made and those documents not produced.

So I find that IBM has, in fact, complied with the orders of the Court, and I would deny except as has been now acknowledged will be provided SCO's motion to compel.

I also want to address this issue with regard to SCO's compliance with -- it is Interrogatory Number 13, isn't it, about the source code? Now, that's why I asked you the question, Mr. Singer, why has that not been complied with?

MR. SINGER: Your Honor, we understand the Court's order that set forth the two specific dates, one interim and one final, to be dates by which we are to supply specific information about what technology has been misappropriated and to update the responses to interrogatories, and we fully intend to do so by those dates. We are working on that. We have not reached a final determination here, but we believe that the order gives us until October 24th to comply with that request.

THE COURT: Any comment on that, Mr. Marriott?

MR. MARRIOTT: No, Your Honor.

THE COURT: All right. Then that will be required.

All right. We have the other matter that relates to the depositions that we need to address.

MR. SINGER: May I approach?

THE COURT: Certainly.

MR. SINGER: Your Honor --

THE COURT: I'm reminded by Mr. Willey that there's been discussion about the dismissal of the patent claims and that that may affect this question of depositions. So if you would address that, please.

MR. SINGER: I will, Your Honor.

Your Honor, this is our motion seeking an additional 25 depositions beyond the existing 40 that both parties have in the existing order.

As of the present time, SCO has taken 18 depositions and has noticed 14 additional depositions, which when completed would bring that to 32 of the 40. IBM for its part has currently taken 16 depositions and has noticed 17 additional depositions be taken, which would bring that to 33.

We are raising this motion now rather than waiting until the 40 depositions are exhausted because it's necessary to plan our discovery schedule with that in mind what that total will be. This is a complex case with many issues, and even with IBM's dropping of patent claims that could have been dropped a long time ago before a lot of work was done because

clearly their reason for dropping it as they say SCO didn't have many sales there is the information that they would have. But be that as it may, they decided this week to withdraw these claims.

Your Honor, that does not eliminate the need for additional depositions. The chart that I've given you that lists in five columns different individuals is taken from IBM's response to an interrogatory where they sought to identify those witnesses as having knowledge of various subjects. This list I believe which we've reproduced here excludes individuals that have already been deposed, and it shows that IBM's own response to interrogatories, there's about 80 names on this list, there are numerous individuals, go well beyond the 40 that IBM itself has identified as having material information on these topics.

The patent claims amounts to about nine of that list of 80. There are many issues in this case beyond patent claims. And while that reduces the need somewhat, it does not really get to the core of the fact that every issue has been contested by IBM. They have produced declarations from individuals going back to the source code, licenses, when they were entered into in 1985. We have taken depositions of those declarants. There's issues regarding copyright ownership that involves people not only at IBM but people at Novell. There are issues regarding the Linux development, the AIX

development. In a case of this scope, a request for 65 depositions we submit is not unreasonable. This is not a case where IBM has just taken 10 depositions and they said, how can we need more than 40? They will be at 33, and we will be at 32 after we complete just the depositions that are currently noticed.

In addition to this information, Your Honor, we have produced two other lists here which is work taken from discovery the Courts previously have ordered as well as other work to try to identify individuals who are programmers who have made contributions to Linux and at the same time previously worked on Dynix and have knowledge of a derivative product which is within the scope of our protected technology. That list of 16 identifies individuals, which while there's some overlap on these lists, but for the most part goes beyond it.

Then there were other individuals which are listed in the list of 20 which are individuals who have experience in AIX or more generally in Dynix and who have made Linux contributions of particular types of this in the third column.

We think the initial motion gives a particular sufficient basis for why we need more depositions, and it certainly if that did not in supplemental information shows why it would be appropriate for the Court to expand to 60 or 65 the number of depositions which party should take.

We are not asking for any modification of the discovery deadlines. There are numerous lawyers involved on both sides of this case, and we have months remaining within those deadlines to take this discovery. It can be done within the existing scope of discovery provided by the current schedule.

IBM in its response, Your Honor, says that if we get additional depositions, then for every additional deposition we get they should be allowed a second day to take a deposition of one of SCO's witnesses. And we don't see how that at all follows. If they needed more time to depose one of our witnesses beyond the seven hours provided, and the current order says each side can designate two witnesses that can be deposed for two days, but if they needed more time than seven hours, they should ask for it on its own right. If they don't need it, the mere fact that we need to depose more than 40 witnesses does not give them the right to take a longer deposition than they need of our witnesses. Those two are not going to follow, and we assume that IBM doesn't intend to simply harrass our witnesses by deposing them for two days if one day would suffice. If they need two days, they should make that request on it own basis.

But, Your Honor, we do need these additional depositions. Even with the witnesses that are currently listed, we are at 32 out of 40. There are many other

witnesses who have material knowledge of this, and we suggest it is an appropriate modification of the order.

THE COURT: Thank you, Mr. Singer.

MR. MARRIOTT: Thank you, Your Honor. I will be brief. The rules -- I will really try to be brief.

The rules presumptively, Your Honor, give the parties each 10 depositions. We agreed early in the case this is a case in which more will probably be required. We came to the agreement of 40. And from our perspective, there is no reason why 40 shouldn't suffice. In earlier papers before the Court, SCO told Judge Kimball that on the patent side of the case it requires as much as 65 depositions on patent issues. In its moving papers here, Your Honor, SCO suggests this morning it's now nine witnesses.

And as of yesterday, Your Honor, IBM for reasons set out in the paper -- in our opposition papers withdrew IBM patent claims. With the patent claims gone, Your Honor, it's hard to see a need for any more depositions. Indeed, arguably less depositions are required. We aren't proposing to the Court to lower the limit of depositions. There seems to be no additional basis for that. That showing hasn't been made here. There is no reason for us to have any more than 40 in this case. That is an extraordinary number, four times the presumptive limit.

As to the idea, Your Honor, that the number of

depositions that are proposed can be conducted on the current schedule, I think that's simply at odds with the party's experience in the case. By our count, SCO has taken 16 depositions of its allotted 40, not 18. Over the course of the case, Your Honor, the parties have taken on average a deposition a month. In the busiest of months, there were 10 depositions. Under the SCO proposal, as we say in our opposition papers, it would be necessary to have 25 depositions a month in the four months that remain. And that's assuming that IBM reserves 10 for defensive discovery and SCO reserves five for defensive discovery. So the notion I think as a practical matter that a request for 65 depositions a side for a total of 130 depositions when the rules presumptively allow 20, I think it's unrealistic to think that's not going to have a negative impact on the schedule in the case.

SCO has suggested in the piece of paper provided, Your Honor, that there are 20 persons who are, it seems apparent, important to their presentation. He proposes to depose those 20 and it's perhaps from these 20 that would extend -- the documents haven't been provided, ask to be provided in discovery. But I don't believe there is any need for additional depositions.

We do propose in our suggestion that if the Court is inclined to give anything, in fairness IBM should be

allowed additional days with existing SCO witnesses rather than just additional deposition. That's not why we're trying to have extra -- things in an uneven way, but rather because as SCO says in its papers, there are a lot more IBM people to depose than SCO people. There are fewer SCO people who have more information which will take longer to develop. And for that reason, we request the motion be denied. Thank you.

MR. SINGER: Very briefly, Your Honor. The 40 depositions per side figures were arrived at before any counterclaims were asserted by IBM. They asserted at least 10. The withdrawal of three patent counterclaims does not deal with the fact that they've asserted additional counterclaims dealing with copyright and other things which expanded beyond the original 40. We believe we've made a specific showing, and the material will be provided as to why we need additional depositions.

The fact that a lot of depositions haven't been taken in the front end reflects the normal course of litigation if you're wanting to review the documents before you take the depositions. And most of those documents are documents that have been produced within the last several months. There is no reason why the Court should not extend the number of depositions since we are not extending the time in which the depositions should be complete.

THE COURT: I am going to increase the number of

allowable depositions by 10 as to each side with this requirement, that they are to be completed within the alotted cut-off day. To the extent that they cannot be, they must be foregone because we will not entertain any motion for an extension of time to complete depositions.

Additionally, Mr. Marriott, I'm going to deny your request for additional time with them and hold both sides to the seven-hour requirement.

All right. Now, is there anything further of a substantive nature that we need to address?

MR. MARRIOTT: None here, Your Honor.

MR. SINGER: None here, Your Honor.

THE COURT: All right. I think we need to talk about the dates.

Mr. Marriott, with regard to the -- or Mr. Shaugnessy, whoever's going to deal with this, with regard to the 20 developers whose information you're going to provide, how much time do you reasonably need to provide that?

MR. MARRIOTT: I think if we had 60 days, Your Honor, we could do that. And if it is the people who are on the list that we already have, it would be useful to know that now because we could begin immediately on that.

MR. SINGER: Well, we'll need to look at the list and see which 20, since that's the number which is provided, the ones that are most significant.

THE COURT: What is the cut-off date for depositions?

MR. SINGER: Currently it is January 27th of 2006. I should say, there are two dates. There's January 27th, 2006, for general fact discovery; there's an additional period that runs to I believe March 17th for discovery relating to each party's defenses. I think it's a little unclear to us, Judge, what is encompassed and limiting to that period between January 27th and March 17th.

THE COURT: All right. I'm going to just require you to set your depositions for the people that may be affected by this information before the cut-off deadline but after IBM has been required to comply. And it will be 60 days from today.

MR. MARRIOTT: If we can do it faster, Your Honor, we will. I just want to make sure we don't promise a date we can't deliver.

THE COURT: Now, additionally with regard to the requirement that SCO renew the motion that is still pending, let's set a date for that in December. And I'd say the second week of December. Is there any conflict there?

MR. SINGER: None here.

MR. SHAUGHNESSY: I don't think so, Your Honor.

THE COURT: Ms. Pehrson?

(Discussion held off the record.)

THE COURT: We'll hear any outstanding motions, then, including -- does IBM have a motion to compel that's outstanding?

MR. MARRIOTT: We do, Your Honor. We have the privilege of --

THE COURT: We'll hear that, as well.

MR. NORMAND: Your Honor, Ed Normand for SCO.

Is it possible to do it later than the second week in December?

(Discussion held off the record amongst court personnel.)

THE COURT: I'm reminded that I'm on the criminal rotation calendar the week of the 5th and the following week. So we're going to need to set it the week of the 19th. Obviously people have plans around there. So let's set it either on the 19th or 20th. Is that a problem?

MR. SINGER: No, Your Honor.

MR. SHAUGHNESSY: That's fine.

THE COURT: How about the 20th, then? Tuesday, the 20th, at 10 o'clock?

MR. NORMAND: That's fine, Your Honor.

MR. SINGER: That's fine.

THE COURT: All right. We're going to verify that. We can access our calendar here.

MR. SINGER: Your Honor, may I raise one additional issue with respect to --

THE COURT: Just a second. Does it relate to --

MR. SINGER: It relates to the point before this, not the setting of the dates.

(Time lapse.)

THE CLERK: That hearing will be set for December 20th at 10:00 a.m.

And that will be in what courtroom?

THE COURT: Our courtroom is just so small it's hard to accommodate counsel, much less all of this. So we'll leave a note upstairs. We'll make certain you know which courtroom. We may possibly use this courtroom or Judge Campbell's courtroom.

Mr. Singer?

MR. SINGER: Your Honor, there's one issue as we think about the interaction of these different dates. If we produce, just immediately produce the list of 20 developers and they produce development information and that takes 60 days for IBM to produce, we're already somewhere deep probably into December. That both leaves until January 27th, a limited period of time for those depositions, and we also have the interim order -- or not the interim order, but the final date for disclosure of technology that is in December. We would request that IBM seek to produce this information on a rolling basis so that we can set some of these depositions earlier, and that perhaps that would not require a full 60 days for

complete production.

MR. MARRIOTT: We're happy to try to do that, Your Honor.

THE COURT: All right. We'll include that, Mr. Singer, in the order.

Counsel, may I see one counsel from each side at the bench for just a moment, please, or two? It doesn't matter.

(Discussion held off the record at the bench.)

THE COURT: At the bench, I've asked counsel for IBM to prepare the order in this matter, or these matters, and that proposed order will be reviewed as to form by SCO and presented to me probably on Wednesday or no later than Wednesday of next week for signature.

All right. Is there anything else we need to address with regard to any matters this morning?

MR. MARRIOTT: None here, Your Honor.

THE COURT: All right.

MR. SINGER: No, Your Honor.

THE COURT: All right. Thank you. We'll be in recess.

(Whereupon, the court proceedings were concluded.)

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