ADDENDUM E

IN THE UNITED STATES DISTRICT Court

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP, INC.

Plaintiff/Counterclaim-Defendant,

vs.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant/Counterclaim-Plaintiff.

Case No. 2:03-CV-294 DAK

BEFORE THE HONORABLE DALE A. KIMBALL

DATE: NOVEMBER 30, 2006

REPORTER'S TRANSCTIPT OF PROCEEDINGS

MOTION HEARING

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P R O C E E D I N G S

* * *

THE COURT: Good afternoon, ladies and gentlemen. We're here in the SCO Group, Inc. vs. International Business Machines Corporation on IBM's motion to confine SCO's claims and to strike allegations in excess of the final disclosures.

Counsel, I see some of the same players but others that are different. If you'd make appearances for the record, please.

MR. HATCH: Brent Hatch on behalf of SCO.

MS. BORUCHOW: Sashi Bach Boruchow from Boies, Schiller & Flexner for SCO.

MR. PADMANABHAN: Devan Padmanabhan for SCO group.

MR. TIBBITTS: Ryan Tibbitts. I'm the general counsel for SCO Group.

MR. SCHAUGHNESSY: Good afternoon, Your Honor. Tod Shaughnessy for IBM.

MR. MARRIOTT: David Marriott for IBM.

THE COURT: Thank you, Counsel. Counsel, I have reviewed all the submissions related to this motion and believe myself conversant with the issues. I am also

apprised of Judge Kimball's order of yesterday affirming the Magistrate Judge's order of June 28, 2006. I'm not certain but would ask counsel to address specifically in their arguments how, if in any way, you believe that Judge Kimball's ruling may affect this motion.

So, with that having been said, and this is IBM's motion, Mr. Marriott.

MR. MARRIOTT: Thank you, Your Honor to answer Your Honor's question, the disposition of the present motion is dictated, Your Honor, by yesterday's order by Judge Kimball as well as by the four prior related orders that preceded it. Those orders, we would respectfully submit, unequivocally compel the granting of IBM's motion in the present circumstance. In fact, Your Honor, the reasons for granting the present motion are far more compelling than were the reasons for granting IBM's prior preclusion motion.

The issues presented by the preclusion motion, Your Honor, were whether SCO could proceed with that allegedly misused material which was identified in its final disclosures but not identified in the final disclosures with the requisite particularity. And now both Your Honor and Judge Kimball have said they can not proceed with that allegedly misused material which was not identified with the requisite level of specificity.

The issue presented by the present motion, Your Honor, is whether or not SCO may proceed with respect to material that is not identified at all in the final disclosures, let alone identified there with requisite specificity.

SCO's final disclosures, for example, identified 326 lines of allegedly infringing material in the Linux kernel, 326 lines. SCO's expert reports, Your Honor, expand that number to essentially every file and every line of code in the Linux kernel.

So, with Your Honor's permission, I would like to do three things: First, I would like to emphasize the critical facts which, we submit, are undisputed and which are dispositive of the present motion.

Second, Your Honor. I would like to list for the Court, and I emphasize "list," the reasons in support of this motion. And I say "list," Judge, because since I believe the present motion is dictated by the prior orders, I believe Your Honor is familiar with the rationale that would underlie the ruling that I urge upon the Court.

And, finally, Your Honor, I would like to respond to the primary argument offered by the SCO group in response to IBM's present motion.

If I may approach, Your Honor, we have prepared

a little booklet which I hope will make it easy to follow our presentation.

First, the facts, Your Honor. I know Your Honor is familiar with the facts, but I would, nevertheless, ask your indulgence in at least some repetition for the sake of context here. If Your Honor takes a look at the first tab within the binder, you will see that SCO filed its Complaint in March of 2003. At the same time, it began what the Court has, at times, referred to as making a plethora of public statements about the scope of its evidence. And at tab 2, you will find reference to some of those statements with which I know Your Honor is familiar.

From the beginning, Judge, we have asked SCO to Identify the allegedly misused information with specificity and in detail. And the requests that we asked are, among others, included at tab 3 of the binder we have given Your Honor. We did that, Your Honor, because, as you know, I believe, SCO's claims implicate literally billions of lines of allegedly misused code, and you can see that at tab 4 of the binder.

We also did that, Your Honor, because the nature of these claims requires a line-by-line analysis of SCO's allegations, and if you look at tab 5 of the binder, you will see, in what we have already previously

given Your Honor in connection with the preclusion motion, a list of related copyright principles and then, behind those principles, a set of the questions that naturally flow from them. And answering those questions is, by and large, a line-by-line exercise.

And it is for that reason that we asked, and I believe Your Honor ordered a line-by-line recitation by SCO. SCO declined. IBM moved to compel. Your Honor issued two orders requiring the disclosure of that information. I know they are familiar to you. They are excerpted at tab 6. SCO nevertheless failed to provide the information, Your Honor, and we moved for summary judgment. And as I think you also know, Judge Kimball denied IBM's motion for summary judgment with leave to refile at a later date, which we have done, but, in connection with that motion, observed that despite SCO's public statements and the passage of, by that time, nearly two years of litigation, it had adduced no competent evidence of the alleged infringement.

And Your Honor can see that from the chronology which appears at tab 1 of the Your Honor's book.

Following Judge Kimball's order denying IBM's motion for summary judgment, we proposed to the Court that it set a final deadline for the disclosure of allegedly misused material, with an interim date

preceding it. We proposed, Your Honor, that that be the end of the parties' ability to finally identify the allegedly misused information. And an excerpt from our proposal is found at tab 8 of the binder which Your Honor has.

We were clear in that proposal, Your Honor, that final meant final and that the parties were not to attempt to use expert reports as a means of end running the requirement to provide information finally in specificity. SCO opposed that motion and, interestingly, opposed it on the grounds that there was no need for such an order because the Court already had a full arsenal of power to cause a party not to be able to use information not properly disclosed. And, if you look at tab 9 of the book, you will see a quote from SCO's papers where it indicates there is no reason for the order because the Court already has that power.

On July 1, 2005 Judge Kimball effectively adopted SCO's proposal and set a deadline for interim and final disclosures. He made clear and the Court has subsequently made clear that what was required is a specific identification of that which is alleged to have been misused. And so clear was it, Your Honor, I would submit, that thereafter, as you will see on the chronology, and at tab 11 of the book, IBM and SCO

entered into a stipulation of a related discovery matter, and SCO stipulated that it would not disclose and that it would not seek to use information not identified with specificity within the final disclosures.

On the 22nd of December of 2005, the parties submitted, exchanged their final disclosures, and SCO identified, in its final disclosures, 294 items of allegedly misused information. Some of those items concern copyright infringement allegations. Some of them concern breaches of contract. Very few of those items, Your Honor -- and I emphasize this -- very few of them are at issue on the present motion.

I would refer Your Honor to tab 12, if I may, of the book. As to SCO's allegations of infringement within the Linux kernel, it identified 326 lines of code, the 326 I've mentioned previously. As to SCO's allegations of breach of contract, it identified a variety of alleged misused code, only two items of which are relevant to this motion. One concerns JFS, which stands for Journal File System. In that regard, SCO identified 17 lines of code. It also identified certain testing technology code and there identified approximately 9,000 lines of code.

Now, for simplicity, Your Honor, what I would like to do, with your permission, is focus you on the 326

lines of code because I think the point and the problem that this motion seeks to address is illustrated as well by the 326 as it is by reference to all. So, if you take a look at tab 13 within the book, you will see a little bit more detail about these 326 lines of code.

They fall into three categories: Certain header file code. The final disclosures identify 181 lines of supposed header file code. Certain specifications, L. specifications. There are 121 lines identified. And then, finally, certain miscellaneous code, which concerns memory allocation, of which 24 lines were identified.

And Your Honor made clear, and I point you to tab 14 of the book, that the parties were only to use that information which was identified there with the requisite specificity.

Now we moved, Judge, as you well know, to preclude certain of the 294 items. The preclusion motion did not address, did not concern the 326 lines that are at issue here in the Linux kernel code. They didn't concern the testing technology code here, and they did not concern the JFS code.

Now, following the receipt of SCO's final disclosures, IBM undertook discovery with respect to these 326 lines of code. Now, Just to back up for a

second, if you remember, Judge Kimball denies IBM's motion for summary judgment. The Court, in July, enters an order indicating the final disclosures will be required.

At that time, Your Honor, SCO identified no code, as Judge Kimball acknowledged, indicating supposed infringement. We believed then that roughly three months of discovery with respect to what SCO would identify would be sufficient, and we undertook, following the Court's -- following the submission by SCO of its final disclosures of discovery as those 326 lines of code, a line-by-line related analysis, and on May 19, as you will see from the chronology, the parties submitted their opening expert reports.

IBM's opening expert reports addressed the 326 lines of codes which our experts had then spent five or so months evaluating, evaluating on a line-by-line basis. And I would refer you to tab 15, where you will see an excerpt from the report of two of our experts. That table, Judge, lists the files in which these 326 lines of code are found and some of the analyses, and I underscore "some," only some of the analyses that IBM's experts did. And if you flip further into that same tab you will see an excerpt from one of the Linux files, and you will see the highlighted code which SCO contends was --

THE Court: What tab is that?

MR. MARRIOTT: This is tab 15, your Honor -- 14, I'm sorry. You will see a blue chart, and behind the blue chart you will see an excerpt from a file, and if you look in the left margin, you will see colored dots by each of the lines. Those colored dots reflect just some of the analyses that were done on a line-by-line basis by IBM's experts. If you look back at tab 5 and you look at all of those questions, we asked those questions, and we undertook those analyses as to each of those 326 lines of code.

At the same time IBM submitted its expert reports, you received reports from SCO's experts, including the three reports that are at issue on this motion. Each of those three reports in some respects, not in all respects, exceeded the scope of SCO's final disclosures. And, if you look at tab 16, you will see that, Your Honor.

With respect to Linux, the final disclosures had identified 326 lines. SCO's expert reports effectively claim every file and every line of code in Linux.

With respect to JFS, the expert reports identified seven times the code identified in the final disclosures.

Now, with respect to testing technologies, there were an additional 15 thousand lines of code identified.

Now let me point you to, if I may, to the 326 lines specifically, so if you look at tab 17, those 326 lines consisted of header files, specifications and certain miscellaneous code. With respect to the header files, Your Honor, no new additional code was identified. With respect to the specifications, we went from 121 lines to essentially the entire ELF format which represents, certainly, thousands of lines of code. With respect to the miscellaneous category, we went from 24 to a hundred.

Far more problematic, however, Judge, was not adding lines of code within an existing category, though that was clearly what is and was problematic; far more problematic was identifying entire new categories of alleged misused information.

The Cargill report, one of SCO's experts, claims as misused the entire structure of the Linux operating system as well as the entire file system of the Linux operating system, as well as roughly all of the system calls in Linux. That effectively amounts, Your Honor, to claiming every file and every line of code in the Linux kernel.

Now, also identified was new streams material, which is a footnote here, Your Honor. That material is not in the Linux kernel. We don't emphasize it because our claim for a declaration of non-infringement is about the Linux kernel, but there was also material outside the kernel that was new for the first time in SCO's expert reports.

Now, IBM moved for summary judgment on September 25 of this year, and in November SCO filed its opposition papers, and in those opposition papers, opposition papers to IBM's motion seeking a declaration of non-infringement relating to Linux, SCO argues, in effect, that IBM's motion should be denied, and it should be denied because IBM fails even to address all of this new material identified by SCO for the first time in its expert reports.

Your Honor was, as I indicated before, clear. The parties were not to use, in connection with summary judgment filings, material not identified in their final disclosures. We promptly brought this motion to the Court's attention. We did not and could not have considered the code beyond the 326 lines in IBM's expert reports. We didn't do it, Your Honor, because we believe the Court has been clear from the beginning that that was not required, and we could not have done it, Your Honor,

because it took us roughly six months, five, six months of evaluating the 326 lines, to do that analysis, and that was with the benefit of discovery.

It would take, to put it mildly, a very long time to evaluate all of this new, allegedly misused information. Going from 326 lines of allegedly infringing code to all Linux code files being supposedly infringing, is like going from an arena, Your Honor, of 22,000 fans in which one is identified, to claiming that all are, in some sense, implicated. And you can see that at tab 18 of our binder.

And I would just remind you, Judge, as you think about these issues, that in opposing IBM's first motion for summary judgment, which SCO -- which Judge Kimball denied, SCO argued that the Court should not enter summary judgment because it would require roughly 25,000 man years to compare just one version of Linux to one version of UNIX. And that is, effectively, now, what IBM is being asked do.

So, why should Your Honor grant these motions? Your Honor, the reasons why the Court should grant these motions are on these facts I think familiar to the Court. They are set out in IBM's papers in support of this motion, and I will not belabor them here, Your Honor, and though it's IBM's motion, we didn't feel, as Your Honor

may recall, that oral argument was even necessary in this motion.

But let me emphasize three points, if I may. First, Your Honor, the Court has been clear, I think crystal clear, that the parties were not and are not allowed to proceed in this litigation with respect to any material that is not specifically identified, as the Court has now laid out, in the parties' final disclosures. No exceptions were made for end runs based on information analyzed or discussed in expert reports which followed. Yesterday's order makes that clear. The preceding four related orders make that clear. The case law makes that clear as illustrated in tabs 19 and 20 of the book. Rule 37 makes that clear, and the parties' stipulation, I respectfully submit, ought, in this respect, to count for something.

Second, your Honor, the material that is at issue here was not identified by SCO in the final disclosures. And it certainly was not identified by SCO with the requisite specificity required by the Court, and I would refer you, in this regard, if I may, to tab 22 of the book, the last of the tabs. Here, Your Honor, we have indicated the material that is new, as a result of SCO's expert reports. And based on SCO's opposition papers, Your Honor, there is no link to this allegedly --

to this allegedly new misused material to the final disclosures. This is taking SCO's opposition papers and looking at the citations they provide.

As I indicated, the Cargill report claims the entire overall structure of Linux. It is now identified as allegedly infringing material, the entire structure. Is there a citation in SCO's brief to the final disclosures for that? No. As to the overall file systems, there is no citation in SCO's papers to where in the final disclosures that's found. It's not there.

In SCO's opposition papers, there is likewise no indication of where, in the final disclosures, SCO claims system calls. The 76 new miscellaneous items, likewise, Your Honor, have no citation. What citation is there? If you look toward the bottom of this chart, SCO's expert is now claiming the entire ELF format is infringed by their alleged copyrights in UNIX. And, in support of that proposition, they point to item numbers -- and this is the item numbers in their final disclosures. They point, in their opposition papers to item 171, item 272, item 273 through 275.

Well, let's look at those, Your Honor. Item 171, precluded by this Court in your order of 6/28/06, affirmed yesterday by Judge Kimball as lacking the requisite specificity. That could not support the claim

that this material was identified previously. Item 273 through 275, abandoned by SCO in its summary judgment opposition papers as material not part of its claim, not material in which it claims copyright. Item 272, Your Honor, in fact makes only specific reference to certain lines of code. It does not claim the entire ELF format, which is what SCO's expert reports are now seeking to claim.

And, finally, and just parenthetically, Your Honor, the streams format, which, as I said, is not -- the streams code is not in the Linux kernel. The SCO expert reports nevertheless identify new material relating to streams. The only citation is to items 165 and 166 of SCO's final disclosures, which are also items that were precluded by Your Honor's June order.

Now, before I close, Your Honor, if I may just address the primary argument asserted by SCO as to why IBM's motion should be denied. SCO says that IBM's motion should be denied because the final disclosures were not supposed to be what it calls co-extensive with expert reports, and, Your Honor, I agree with SCO that final disclosures and expert reports are not the same thing. The final disclosures were, as has now been made perfectly clear, to define the bounds of the parties' claims. No material not identified with specificity in

the final disclosures was to be used in the case as a supposed basis of liability.

The expert reports, Your Honor, are simply an expert's opinions with respect to material properly identified in the final disclosures. That does not mean, however, that SCO may use its expert reports under the guise of simply offering argument or explanation or analysis. They may not identify entirely new categories of allegedly misused information. They may not identify any new allegedly misused information. That's what the Court's order provided, quite plainly.

In its papers, SCO suggests, Your Honor, that is no reason why the final disclosures should be held to preclude SCO from, by way of its expert reports, adding new information in support of its claims.

Your Honor, I would submit to you that there are at least ten such reasons: The numerous IBM discovery requests requesting that SCO specify its allegations; the December '03 order of this Court; the March '04 order of this Court; the July '05 order of this Court and the June '06 order of this Court, as well as Judge Kimball's order yesterday affirming that. There is also Rule 26(e) which requires the supplementation of interrogatory answers; Rule 37(c), which has, effectively, a self-executing provision precluding a

party from using information that's not disclosed pursuant to Court order; the parties' agreement, Your Honor, and basic, basic fairness, I would submit.

If SCO's, what I would call, revisionist view, Your Honor, of what the final disclosures required were correct, then all of IBM's requests and all of the Courts' orders and the parties' stipulation were for not because SCO can now and could, with the submission of its expert reports, simply reinvent its case, which is, respectfully, what we believe happened here.

Your Honor, to close, this motion is not simply about sandbagging. This motion is about sandbagging in the face of multiple Court orders requiring the party to disclose with specificity its allegations. And the issue presented, I would respectfully submit, is simple: Is SCO bound by the Court's prior orders and by its stipulation with IBM to confine its claims to the items identified with specificity in the final disclosures, or can it ignore the Courts' orders, renege on its agreement with IBM, and expand its case by way of its expert reports to add new material that it could have disclosed long ago, that wasn't the subject of fact discovery, that wasn't addressed by IBM's experts, was not part of the summary judgment filing and the introduction of which, in this case, would result in what we believe is incurable

prejudice?

Thank you, Your Honor.

THE Court: Thank you, Mr. Marriott.

Mr. Hatch.

MR. HATCH: Good afternoon, Your Honor. We also have a few slides I may use during the course of the argument. Your Honor, put the way Mr. Marriott did, I understand how that makes this look a little more difficult than I think it really is. I think we have, in essence, two ships passing in the night here, because our arguments will be very much different than what Mr. Marriott has put forward before you just now. In large part, we believe that we have complied with the Court's orders and that, in the case of misused material, we have indeed disclosed that as was required by the Court in the 2005 submission.

Now, what Mr. Marriott has done in their briefs and in their argument today is they have, in our view, commingled two concepts together; one being the misused material and the second being legal theories regarding structure and analysis involving the copyright, particularly as put forth by Dr. Cargill in his expert report.

Now, to give it in context, and I think that's really -- if we get to the core of what this hearing is

about, it's about whether or not SCO's experts will be allowed to give the opinions, the complete opinions that they have issued. I want to make it very clear that IBM has not challenged all of their opinions but only as to things that relate, in their view, to undisclosed and misused information. Now, that was made fairly clear in the last briefing, and I will just -- I think it will be a little easier for Your Honor -- slide 2. This was something that was taken from IBM's reply memorandum in support of a proposed scheduling order when we were talking with Judge Kimball on setting the schedule and setting these interim and final deadlines for setting forth misused material.

And IBM, itself, said it proposes only that the Court impose deadlines for the parties to identify the alleged misused material. IBM's proposal requires neither that the parties rely on experts, nor that any experts that might be used by parties finalize their expert reports before the close of all fact discovery.

Now, that was important to us at the time because it seemed contrary not only to the schedule that was being proposed but also to Rule 26 and the understanding of the parties that the experts would be required to do all their work, and, in essence, issue their opinions prior to that December 2005 deadline. So

it was made very clear that IBM -- and they are making the position where they are the one proposing the two-part deadline, that they weren't requiring that.

And it goes on to say: "Under IBM's proposal the parties' experts would need to reach final conclusions before the close of fact discovery only with respect to the identification of source code and other material that is at issue in this case."

And, as Your Honor required, the large fight that was going on at that period of time was over identifying, as Mr. Marriott put it, the version, file and line of source code that he had indicated that they were going to go through line-by-line and try to rebut. What is missed here -- and I think it's very, very important, because what has happened here, particularly if we go through with Dr. Cargill, is he simply is applying Tenth Circuit law.

If we go to the Gates Rubber Case, it sets forth an abstraction, filtration, comparison test for determining whether or not there is a copyright infringement. And, under that test -- and it's well accepted Tenth Circuit law. As a matter of fact, I think an analysis of the various Circuits on copyright with regards to computer software, the Tenth Circuit is perhaps ahead of almost every other Circuit in

establishing the law in this area.

And it sets forth the test for dissecting a program at various levels of abstraction, starting with looking at the main purpose of the software. And one goes down through the list: The program structure or architecture. Three is the modules. Four is algorithms and data structures. And five -- we don't get source code until the fifth level. And the last is object code.

Now, it's not required to find copyright, and under the Tenth Circuit rules that you have to have all these things, but you go through this abstraction analysis, and that's exactly the test that Dr. Cargill applied. Now, what they are saying now is that he has -- and I think he showed you his slide number 17, and I think this is kind of where we're passing in the night a little bit is that he indicated that, yes, we did in our final disclosures set forth header files, specifications and other miscellaneous lines, as he characterized it, and then he put the large -- and I think this is done so much for its dramatic effect. He has 5 million plus lines.

But those are largely from overall structure, overall file system and system calls. Well, that's because Dr. Cargill is applying Tenth Circuit law. He is applying his expert opinion, a structural analysis under

the Gates Rubber test established by the Tenth Circuit and looking at the main purpose, the program structure, architecture, modules, algorithms, data structures to show that there is a copyright infringement here.

THE Court: Mr. Hatch, let me ask you this, though: If I accept your premise, then what is the force and effect of each of the previous orders which required SCO to answer with specificity?

MR. HATCH: Well, but we have, Your Honor, because, as he's pointed out, as to that particular copyright claim, it is -- for instance, we talked about JFS files. The entire JFS file was disclosed. I think that was lost a little bit in his argument. We say the entire JFS file was taken in the copyright infringement theory. When we were talking about that, specifically what the orders he was talking about is version, line and file.

Those are not required for making this particular expert opinion under the Gates Rubber test. The Gates Rubber test doesn't say you have to have that. Now, I understand that version, line and file, particularly with some of the contract claims in this case and some of the copyright claims, those would be required, particularly if you were going show a literal infringement, a literal copying.

Now, if you're going claim a literal copying, there is no question you have to show the version, line and file so you can do a side-by-side analysis, and we did that in our December disclosures.

THE Court: Let me get back to my question, though: If I accept your premise and were to deny IBM's motion, doesn't that render meaningless everything we've done up 'til now and every order that has been entered by the Court?

MR. HATCH: Absolutely not. I think it renders meaningless the Tenth Circuit's test for establishing it because we did set forth, with specificity, for instance, that we believe they infringed the copyrighted JFS files. Mr. Marriott, though, now wants -- says, "You should find against them and not allow them to do that because they haven't shown version, line and file."

What I am saying is that that's not the Tenth Circuit case in that instance. And that's why I don't want to mix up the contract claims and copyright claims because we have shown what you can do. And, as Rule 26 requires, and the Court has nowhere said -- given an order saying Rule 26 doesn't apply in this case. Rule 26 clearly sets forth that it's expected, particularly where the Court sets a scheduling order with an expert report deadline and an opportunity to depose experts, that that

is the opportunity for that to be disclosed.

That issue is raised, I think, at length in their reply memorandum. In the reply memorandum, they, after we -- and I'll go back to the other experts to deal with some of these other issues with regards to particularly JFS and Dr. Ivey and Mr. Rochkind's expert opinions. They don't respond to that in their reply because I think if they had asked, they would have found out that there wasn't an issue there.

But as to Dr. Cargill, they say: Well, why weren't these copyright theories disclosed in Answers to Interrogatories? Well, Rule 26 -- and I think, Your Honor, I've put the relevant parts -- it's in a slide, I think 14 and 15 in your book. It says, "Rule 26(e) provides that a party is under a duty seasonably to amend a prior response to an interrogatory only if the additional or corrective information has not otherwise been made known to the other party during the discovery process."

And then, on the next page, Your Honor, we get to the advisory notes for interpreting that, and it says, "Where the Court has provided for and/or parties have agreed to a period of specific expert discovery, including expert reports and depositions, it is the specific period of expert discovery that serves as the

means of interrogatory responses."

So, what the rule is essentially saying is -- well, they have said that, well, you didn't disclose anymore detail. And Mr. Marriott got up and said that in his argument that -- why didn't you respond to the interrogatories? The rule is very clear, and that's what we applied, is that when an expert is going to address these types of issues; not the version, line and file, but the structure, selection, those types of arguments that are under the Gates Rubber test under the Tenth Circuit, those have been disclosed. An expert report was given. The deposition was allowed to be taken, and it went forward.

Now, they, in response, in their brief, have indicated that they were somewhat -- I think they called it astonished that -- about these new claims that they -- in the reply brief, I think they used the word, you know, it's completely changed the whole concept of this case and that somehow what Dr. Cargill, in particular, in making his analysis of the copyright claims, that this is somehow changing the whole case.

Well, that's just simply not true because if we go all the way back -- if we go back -- and I would refer Your Honor to pages 9 through 11 in the booklet I gave you. We can go back as far as March of 2004 where IBM

clearly understood, and the first cite there is from their Second Amended Counterclaims, where they allege that SCO threatened to sue IBM for copyright infringement with respect to Linux.

And we go through each one. May 18, 2004. IBM asserted that one critical element that SCO must show is that Linux is substantially similar to the alleged copyrighted work. We're talking about a copyright claim. May 11 and July 9, they attach to their pleadings the 2004 Fortune Magazine article called "Gunning for Linux," which said SCO is complaining not just about verbatim copying -- now, that's version, line and file, remember, version, line and file -- but also about the purloining of the code's structure, sequence and/or organization. There's two different things there. And that is the subject of an expert opinion.

You can't show version, line and file for structure, sequence and/or organization. That's based on the Tenth Circuit case on an overall look of the factors that I stated to you out of the Gates Rubber case. That's not a version, line and file analysis. And so that's why I say, in essence, what IBM is doing here -- and this is why I don't think Judge Kimball's order applies to the matters that we are talking about today. I understand they want to meld it into it. And he

says -- you know, he says it's dispositive. Well, it's not dispositive because the analysis that Dr. Cargill is doing isn't a version, line and file analysis.

And they have known that since 2004. Now they talk about surprise. They talk about undue surprise. They talk about inability to cure, and yet they have known since 2004 what that theory is. The only thing they haven't had is one thing, until May of 2006, Dr. Cargill's report. Well, that wasn't due until then. And what they are trying to do now is kind of reverse the whole order. And even though in the -- from their brief that I read, where they said: "Oh, we understand you don't have to disclose your expert analysis and theories as of December of 2005," now, essentially, they are telling Your Honor you should, by this order, say that they should have done that by December of 2005, despite the fact that the Court order from Judge Kimball that said you've got until May of 2006 to do it.

They knew about it in 2004. They knew it was coming. They prepared for it, and we disclosed it. Now they talk about undue -- I mean surprise. They talk about it's -- they can't cure now. I find that kind of interesting, too. And, by the way, I didn't go through all of these. Pages 9 through 11 give numerous examples of their not knowing about these copyright claims. But

what they did here -- and I think this is what's, I think, a little not right -- and what -- and we heard Mr. Marriott talk about what's fair -- is IBM really created their own undue prejudice here because, despite the fact that since 2004, at least, and probably before that, they knew this copyright claim, based on structural analysis, was coming. And the only way it could come is through an expert report.

I'm not sure what they think we should have said in the December submission. That was for, remember, misused material, where you're talking about the entire structure being in. I think if we had put a line that said the entire structure, they would have been in saying, "Give us version, line and file, but, again, that wasn't the analysis.".

But what did they do? They go -- and I'm on page 16 of the slides I gave you. They had an opportunity to ask Dr. Cargill and the other experts, when they deposed them, about these theories. And they intentionally chose not to do so.

In Dr. Cargill's deposition, for instance, IBM asked no questions about his structural analysis or collective work analysis. And the collective work analysis he gave was under the Tenth Circuit's law in Transwestern. It wasn't, again, a version, file and

line. It's under Tenth Circuit law that establishes that that be done under an expert analysis.

And then, in the Dr. Rochkind deposition, again, IBM asked no questions about the material they complain about here either. So, they purposely shut their eyes, even though since 2004 they knew it was coming, because they wanted to come here and make this kind of an argument, which is somewhat disingenuous, because they know it doesn't revolve around version, file and line.

Now I want to go back for a minute because I got a little bit ahead of myself. I want to talk about some of the other items that they -- that IBM has complained about here that we did not disclose in the December 2005 submission. And one of the other experts that they challenged his opinion, and they want you to limit his opinion by the course of their motion today, is Dr. Evan Ivey.

Now, Dr. Ivey is the expert who gave an opinion on these journal file systems, the JFS systems that are at issue here. Now, in our December submission, we disclosed to IBM that we believed the entire JFS file system was misused material. Now, I don't think Mr. Marriott disputed that. I think what he said -- and certainly in his briefing -- but in his argument was,

"Well, we wanted specific lines."

And, in this particular instance, we indicated the entire file was misused information. And we also identified the JFS system as a derivative of the UNIX System V. Now, SCO provided examples of that. Dr. Ivey concluded his report saying that the JFS was a derivative of the UNIX System V system and that IBM disclosed the entire file system of Linux. That's why we claim the entire thing. We believe IBM disclosed the entire file system into Linux.

Now, IBM's complaint is that Dr. Ivey references additional files in his JFS analysis that were not included in the December submission. That's just not true. SCO disclosed -- the JFS was a particular area of concern for us, and SCO disclosed, one, the entire system. The only additional files that were mentioned by Mr. Ivey are simply further examples of how IBM's JFS system derived from System V.

Those further examples were not discrete misused material. Now, the items also -- and part of the analysis here, since this is a discovery motion, has to be -- under Tenth Circuit law, has to be whether there's any undue prejudice, even if you were to find the facts are as IBM states they are.

And, in response to Dr. Ivey, our expert who

gave this analysis, they put up a Dr. Davis. And he concluded, of course, that JFS was not derived from System V, but he did it by a machine comparison. He didn't go line-by-line or any of the things that Dr. Ivey used. It was totally irrelevant to his analysis. He just did a machine comparison, and so they couldn't possibly be prejudiced because it had absolutely nothing to do with the way Dr. Davis looked at it. He didn't even -- he didn't evaluate or analyze any of the examples that we gave, even in December. And so -- and they have conceded we gave examples in December.

So, as to those items regarding Mr. Davis -- Mr. Ivey's expert opinion, we disclosed all of them. We don't concede that we didn't disclose anything. We did.

The second category of material IBM challenged is the testing material cited by Mr. Rochkind, our expert, again, his opinions on testing technology. Now, he concluded in his report that IBM contributed certain valuable testing technology to Linux. IBM's complaint is that his analysis of the testing technology included, again, additional material not included in the December submission. Again, we don't believe that that is true.

The files that they are disputing were not material -- were not material that SCO claims was misused. These were additional testing files. And by

that what I mean is what he was simply doing, in virtually every file that IBM is complaining about, is using files, not necessarily because they were misused, but to set a foundation to put, say, a particular IBM programmer in a particular -- set a foundation to put him in a particular time and place to show that he -- this particular programmer was the one that was making contributions.

Now, that's not misused material, and that was what was required under the Court's order. It's just further support of Dr. Rochkind's opinion that IBM was in a position where they contributed material improperly into Linux.

He complains -- they complain -- IBM also complains about two documentation files. Now, that's also not relevant here either because the document files that they are talking about were simply used by Dr. Rochkind to explain that an SPIE test, which were disclosed in the December filing, and MPPIE tests, are two terms for the same thing. So, again, it's not a misused file, it's part of his expert analysis showing that the things that were disclosed were improperly used.

And so we don't believe in either the case of Mr. Ivey or Mr. Rochkind there's any analysis there, and that's why I said earlier that those two arguments --

when we filed our opposition brief, in their reply they don't address those any further, and I think, in part, because there really is no other answer to those issues.

Now, the last thing you heard talked about -- not the last thing but one you heard talked about, and, again, we're back to Dr. Cargill's report. Mr. Marriott talked about system calls. Now system calls are specific words that developers use to come up -- to come up with to talk to an operating system to get it to perform certain tasks.

Now, I think Mr. Marriott gave you a slide that indicated that we didn't disclose any system calls in December. That's just absolutely not true. I will tell Your Honor, we disclosed -- and I don't know the exact number -- but we disclosed a lot of those. And here is the one instance where there were additional materials disclosed; the only instance, I think, but I will explain to Your Honor why I don't think it's particularly relevant.

Dr. Cargill did disclose some additional system calls, okay? But those were part of his overall structural analysis, and they were not relied on specifically for them as a particular misuse. They were to show, as additional examples, as the ones that had already been disclosed, of the structural copyright

problems, to show that this was an overreaching thing, to show that IBM also understood that. And they, through their expert, understood a structural analysis was being made.

IBM's expert, Dr. Kernagen -- I hope I'm pronouncing that right -- he didn't address system calls individually. He addressed it as an overall system, which is the way I have been stating we should be looking at it -- the Court will look at it at trial. In other words, there is no prejudice. There is nothing that they have to look at specifically regarding system calls to be able to understand SCO's legal analysis and theories regarding the copyright claim in that regard.

Mr. Marriott mentioned the stipulation. The stipulation, I'm not sure why it's relevant here. It has very limited relevance. That was a reaffirmation, I think is the best way to describe it, of the December submission and, as I have argued, I don't think we have violated the December 2005 submission. It only addressed discovery issues, and it did not address -- it did not, as I don't think Mr. Marriott said, and I hope the Court didn't think that he was alluding to that somehow that stipulation changed the order -- the December -- the order for the submissions on December 2005, and it certainly did not say that expert reports giving legal

analysis -- I mean expert opinion and analysis of structure were not going to be allowed in May of 2006 in amending Judge Kimball's scheduling order in that regard.

THE COURT: Mr. Hatch, why, if there are issues that remain unclear at the time an order is entered, a decision made, is that not brought back to the Court for consideration?

MR. HATCH: If the order is unclear?

THE COURT: If the order is unclear as to what the meaning of the December cutoff time is and what it includes, why do those matters remain for discussion at this late day?

MR. HATCH: Because I don't believe they were unclear. I believe they are being made -- they are being made -- there is being an attempt to make them unclear now. I don't think they are unclear. As my argument has made clear, we understood those, and we disclosed the misused information. The types of materials they are complaining about now aren't part of that order is what I'm arguing, and I don't think it's unclear at all. And, as a matter of fact, that's why I have argued and set forth, one, from their brief, that they understood that the experts would come later and that the experts -- and under Rule 26, it says that -- it understands that when a Court orders that period, that the experts are

going to produce something later.

And so it would defy any logic --

THE COURT: Isn't there a difference between -- that the experts would produce explanation later or give a more detailed opinion, isn't that something different from expanding the context of the information at all? If you were required, in order after order, to provide, with specificity, the information, how can you then order -- or argue now that that should be totally expanded?

MR. HATCH: Because we did provide that, Your Honor. What the expert does is it puts meat on the claims. I mean, I don't want to get into a position where I say the expert, in giving his opinion -- I think there is a fine -- I don't even think it's a fine line. I don't think Your Honor is saying that an expert, to give specificity, has to give his whole opinion before its due under the Court's scheduling order.

THE COURT: No. But his whole opinion cannot be then used as a mechanism by which to expand what you couldn't get before.

MR. HATCH: I understand, but I don't -- what I'm saying is they didn't do that. Where did he do that? I mean, what IBM hasn't got up and told you is -- what is it they would have had him say to disclose this structure analysis that, for instance, Dr. Cargill gave? Because

they knew about it. We just read -- I gave you three slides that show they understood that since 2004, so I'm not sure what more specificity to let them know that there was a copyright claim, and they even used the words -- and remember, we read them -- "a structural claim."

That's what Dr. Cargill did. They knew that in 2004. So, what more specificity would they need? They haven't identified that.

THE COURT: Well, then, let me go back to another question. You said earlier in your argument something to the effect that even if the Court were to find that there had been, in essence, a violation of the December cutoff date, that they weren't prejudiced. Are you conceding?

MR. HATCH: Oh, absolutely not. I made that as a matter of argument because, even if the Court -- and let me be very clear. I don't concede it at all. But even if the Court, for whatever reason, were to give credence to this, the Tenth Circuit -- and that's a very good point, Your Honor. I had my associate Mr. Douglas pull the Tenth Circuit cases regarding prejudice, and I was able to give him some guidance on that because I would like to think it's a seminal case in the Tenth Circuit that is one that I argued there. Probably not,

but they -- the Tenth Circuit has been very clear. It has a four-part test.

But what it potentially boils down to is that even in a situation like this, even if Mr. Marriott was right, there has to be a prejudice to him, and the Court has been very clear that basically it would have to disrupt the trial. And there are no cases -- there are no cases where a Court has excluded, merely on a -- excuse me, I read that wrong. Every one of the cases has said that the exclusion of evidence is disfavored because airing of all issues is the goal of our judicial system. And you get cases where even -- where this comes up where something new -- allegedly new -- we're saying here it's not new, it's just a theory that came and was produced in a timely fashion when Judge Kimball ordered it to be produced, i.e., in an expert opinion.

But there are even cases where those types of things are disclosed at trial, and if it can be cured there -- and I have been involved in those kind of trials where someone came up with something new and we objected, and the Judge said, "You can take the deposition tonight, and we'll start again tomorrow at nine."

THE COURT: This won't be cured by an overnight recess.

MR. HATCH: I understand that, but what I'm

saying is: Here there's not even a cure because I've gone back and showed Your Honor, from their own briefs, where it doesn't even have to be cured. They have been aware of it forever. And where Mr. Marriott says we'd have to go back -- the reason he -- remember why he's prejudiced? One. In his brief, he said the biggest prejudice was that we're coming up on the trial. Okay?

No mention of that today because we don't have a trial date anymore, and largely at the urging of IBM, who has now argued that the Novell case, which I think Your Honor is also aware of, should go first. And that's not even set for trial until September.

And my point is: The Tenth Circuit is very clear that where you have time before trial to cure an alleged problem, you -- the Court should always give it. But Mr. Marriott's next argument and the reason I think he gave the slide 17 is he put this 5 million plus lines of code, and he has indicated to you: Gee, that's going to be a huge prejudice because we're going to have to go through -- what did he say -- 21 man years to go through those lines of code.

Well, Your Honor, I've got one fairly simple answer for that. I think that is a complete red herring because, you know, we had an expert. What they are talking about is countering our expert, and that is

Dr. Cargill. Dr. Cargill didn't spend 21 man years, did he? And the reason he didn't is because the Tenth Circuit doesn't require that under the Gates Rubber case.

Dr. Cargill followed Tenth Circuit law, and Tenth Circuit law has you look at the structure. It has you look at the items that are listed from that case. It doesn't say -- and this is why I think we're kind of talking over each other and they are trying to get back to version, file and line. It isn't relevant. And Dr. Cargill was able to do it in a relatively short period of time. But they want Your Honor to say that, oh, Tenth Circuit law requires version, line and file. It does not.

And that 21 man years to do this is just not relevant. If Dr. Cargill can give the opinion in a period of months, certainly they can cross examine on it and do the same thing. And, indeed, they have. They have put in expert reports to contradict these people.

THE COURT: I can't help myself. It would probably, then, take only about seven woman years, right?

MR. HATCH: I'm not going there, Your Honor.

THE COURT: Go ahead.

MR. HATCH: But, you know, I have cited Tenth Circuit law, and the cases -- I would say the premier case on that really is Woodworkers, the case I argued,

and this case called Jacobson vs. Deseret Book, both Tenth Circuit cases. The Jacobson case actually cites Woodworkers, which basically says the challenged behavior must substantially have interfered with the aggrieved party's ability to both prepare for and proceed at trial. We don't even have that date, and all those cases talk about the ability to cure.

Now, they cited one case. And it's pretty telling to me, the case they cited was a District Court in an unpublished opinion. And this is what they are trying to get you to rule on, on prejudice, an unpublished District Court opinion out of the Northern District of Illinois. That is a Seventh Circuit case. Well, if you go to the published opinions in the Seventh Circuit, you get -- you get the exact same rule as in the Tenth Circuit.

And it's very interesting because if you go to a case called Keech vs. U.S. Trust, which is at 419 Fed 3d, 626, and at page 640 -- this is a 2005 case out of the Seventh Circuit -- it sets forth the exact same test as the Tenth Circuit. And guess what it cites? The Woodworker case. It cites the Tenth Circuit case. It says you should only exclude the evidence if there is no ability to cure.

And that's certainly not the case here. It

would be the case if Mr. Marriott is right and they have to go look at 5 million plus lines, but how did our expert do it? Our expert's theory is a structure theory, and that doesn't require that. And he ignored that.

THE COURT: Mr. Hatch, I'm going to give you five minutes to wrap up on this, and then I'll give you each ten, 15 minutes.

MR. HATCH: I think that's basically -- let me just real quick, because I kind of -- oh, they are pointing out that I may have misspoke, and it's a point that I think is important. The JFS -- and I'm sorry, I did do that. When we are talking about the JFS, those are contract claims as well. That's one of the reasons -- there we are looking -- in large part, we are looking at specifically what was taken to show the contractual violations under version, line and file. The JFS is a contract -- is part of a contract claim.

When I'm talking about Dr. Cargill dealing with our copyright claims, that's dealing with the structure claims. I think that is what I have now.

THE COURT: Thank you, Mr. Hatch.

Mr. Marriott.

MR. MARRIOTT: That you, Your Honor. Nothing I heard, Your Honor, suggests or, I think, in any way recommends the right result here is to deny IBM's motion.

Let me address, if I may, Mr. Hatch's arguments. First Mr. Hatch -- this is not in the order in which he made them. I will begin in somewhat reverse order. He suggests in closing, Your Honor, that the Court, in some respects, lacks the authority here and there isn't ample authority to permit the granting of IBM's motion. And he refers to several cases.

There is ample authority, Your Honor. I would cite the Court to the cases at pages 19 and 20 of the book that we provided Your Honor. I would cite the Court to its own decision of 6/28 and to Judge Kimball's decision of yesterday. The burden here is no more than the burden that IBM faced with respect to its preclusion motion, and as I indicated at the outset, this is a far more compelling case, notwithstanding Mr. Hatch's arguments, which simply cannot be squared with the facts as they exist in SCO's final disclosures.

Moreover, Your Honor, as to what the Court's authority scope previously itself acknowledged, it even invited the Court to not enter the order requiring the final disclosures because it said the Court had a full arsenal with which to deal with exactly this situation, and I refer you to tab 9, Your Honor, of our book for that.

Now, Mr. Hatch read from IBM's brief in

connection with our request that Judge Kimball enter the deadline for final disclosures, and it's one of the slides in SCO's papers. And he suggested to Your Honor that IBM had said to Judge Kimball and to SCO that in entering the final disclosure deadline, the parties need not worry about experts because that's something we'll deal with later on. I would suggest, Your Honor, that you look at the brief that IBM attached to its reply papers and submitted to Judge Kimball in connection with this request, which says the opposite of what Mr. Hatch represents.

At page 4 of that brief we said, quote, "Unless the Court imposes a deadline by which the parties must identify the allegedly misused material then they may not learn the identity of the material they are alleged to have misused until after the close of fact discovery or potentially even expert discovery, when it would be too late to prepare a defense to claims related to the material."

At page 5. "No party could contend that another party --" this is IBM's proposal. "No party could contend that another party misused material not identified by the August 11 --" which was then the date -- "deadline. No expert could opine as to the misuse of material not identified by the deadline."

We could not have been more clear that expert reports, as we proposed it, were not to be used as a means of adding, identifying new allegedly misused material.

And finally, on page 6, your Honor, of the same paper: "Moreover, requiring the parties to disclose the allegedly misused material before the close of all fact discovery will allow the parties to engage in meaningful expert discovery and refine the issues in dispute for summary adjudication. The parties may or may not require the assistance of experts to identify the material they contend one another misused. If they do, then their experts can assist them in making their disclosures."

"Expert discovery is not the time, however, for identifying the allegedly misused material. It should be done in advance of expert reports so that the parties' experts can focus on what is really in dispute. It would make no sense and would plainly be unfair to allow either party to identify the allegedly misused material for the first time by way of one of its experts," which is exactly what has happened, Your Honor, in this case.

Mr. Hatch waxes on, Your Honor, about the Gates Rubber case. Well, Gates Rubber was the law at the time this case began. This structure, sequence test to which Mr. Hatch refers is nothing new. If it were part of

SCO's case then, as it claims by reference not to its discovery responses, Your Honor, but to a newspaper article and statements made to a reporter; if it were part of its case then, great. It should have disclosed the particulars of that claim pursuant to the Court's orders.

Mr. Hatch suggests that somehow the word "structure" tells IBM something particular about its allegations. It says essentially nothing, Your Honor. It's essentially like saying that because the party knows the party with whom it's in litigation has a contract claim or a claim for a breach of a disclosure provision, that somehow it's understood what it is precisely the case is about.

Mr. Hatch asked the question: What is it that IBM wants to know about the structure of Linux that it somehow didn't know from the beginning of the case? What we wanted to know, Your Honor, and what the Court required SCO to provide was a detailed, specific identification of SCO's theories. And I would refer you, if I may, to tab 6 of the book.

What we wanted, Your Honor, we set out in our discovery requests -- and I won't burden you with all of them -- the same discovery requests that Your Honor adopted, as written, into her orders, multiple orders,

words with which Judge Kimball has now, as of yesterday, concurred.

And in Interrogatory No. 12 we said, "Please identify with specificity all source code and other material in Linux to which it has rights."

And then in 13, "Describe in detail how IBM is alleged to have infringed plaintiffs' rights."

To tell IBM that it knew there was a -- that this was a structural related case is to tell us nothing, Your Honor. The statements that Mr. Hatch seizes on as somehow disclosing that IBM knew and that support Mr. Hatch's assertions that we have known all along precisely what this case was about, those statements were made prior to the Court's -- the Court's order requiring that SCO identify -- I'm sorry -- they were made prior to the summary judgment motion that IBM made and prior to Judge Kimball's order in which he recognized that SCO had not in fact offered any competent evidence of infringement.

So, apparently, Your Honor, the notion that that was known in particular is simply unsupportable by the facts here.

Now, Your Honor asked a question of Mr. Hatch of why it is that the position SCO takes here would not gut the Court's orders. And the answer you got, Your

Honor, respectfully, was a non-answer. The answer you got was that JFS is an important part of SCO's case and that SCO identified the JFS file from the beginning of the case, and it's part of their copyright case, Mr. Hatch said. And then he stood and corrected himself and said it was both part of the contract and the copyright case.

It's part of -- according to the final disclosures, Your Honor, it's part of the contract case. It's only part of the contract case. Mr. Hatch suggested that there was a single file that was disclosed and that we have known that from the beginning. There was a JFS file that was disclosed. It was in the final disclosures, and this motion is not about that file. This motion is about the other files which are identified for the very first time in SCO's expert reports.

Mr. Hatch talks much, Your Honor, of this notion of non-literal infringement, and the suggestion seems to be that if your case is about non-literal infringement, you are free and clear of any order of the Court, of any discovery request, of any obligation whatever to tell your adversary what specifically the case is about. It's similar, Your Honor, but worse than, I would submit, SCO's methods and concepts argument.

The idea there was: This is about methods and

concepts, so there is no version, file and line information to disclose. Well, that argument, Your Honor, as you well know, was rejected. It was rejected by Your Honor. It was rejected by Judge Kimball. And the allegations here about non-literal infringement somehow not being something that SCO was required to disclose, amount to saying, Judge, that the more vague the allegation, the more abstract it is up from the actual code, the less they have to tell us about it.

So, you know, if it's about specific source code, we can be told, but the more abstract they choose to make their theory, the less we get to know about what the theory is. The opposite is true, Your Honor. As a case gets more abstract, more explanation, more particularity and more detail is required, which is why our order -- which is why our request of SCO and of the Court was that they be required to provide specificity and detail.

That doesn't mean less with respect to so-called non-literal elements, it means more. Saying, Your Honor, that they mentioned a couple of lines of code in the final disclosures, and, therefore, that was enough to tip us off to this notion of non-literal infringement, Your Honor, is like saying that the mere mention of a couple of lines of code in the final disclosures is

enough to tell us that the entire system was claimed. It's like saying the use of a word is enough to disclose to us that the whole English language is being claimed or that the mention of a brick and mortar or of nails and wood somehow tells us the particulars of a structure.

If structure is what SCO wishes to claim, and they are now citing their own public statements of having approached this theory years ago, then we should have been told what it is in its particulars. What it is it about the structure? What is it about the sequence? What is it about the organization? We have never been told that, Your Honor. The first suggestion of that was the Cargill report.

Mr. Hatch suggests there's no big deal here. Just go out and do a report like Cargill. The Cargill report, Your Honor, is rife with generalities. IBM is accused of having, in a still abstract and ill-defined way, failed to disclose the structure, which we didn't hear about in any particular way, until SCO's expert reports.

Your Honor, what does IBM want? Again, what we want is the particulars of exactly what it was. That's what they were required to provide. That's what they didn't provide. Now, Mr. Hatch has suggested, again, Your Honor, that IBM knew all along. And I don't want to

belabor this point too much, but, again, the suggestion of -- because the word "structure" was used, we knew, is, frankly, absurd.

I mean, the reason we asked discovery requests, the reason that the Court entered orders requiring particularity, the reason, I would submit, that Judge Kimball said what he said, is because merely mentioning the word "structure," like mentioning the word "breach of contract" or "breach of non-disclosure provision" tells a person nothing.

It's been suggested by SCO here today and in its briefs that IBM's experts have already looked at these questions. That's absolutely untrue, Your Honor. That assertion is -- has no support whatsoever. None is offered in SCO's papers, and the citations to which they refer do not show that, and Professor Kernagen and Professor Davis, who were mentioned here today, made perfectly clear in their papers that they didn't address this.

It simply wasn't and isn't possible, Your Honor, to go from a six-month analysis of 326 lines of code, which they labored over, to now be required to disclosure every version -- to be required to evaluate every line and every file of an operating system comprised of millions of lines of code. Mr. Hatch calls

the 5-million-line-of-code number faulty, Your Honor. The number is not faulty. The number is the number that corresponds to that which is disclosed in SCO's expert reports.

Now, the suggestion further has been made that we failed here to demonstrate prejudice. I would suggest to you, Your Honor, that the prejudice here is self-evident. The Court previously found prejudice. Judge Kimball found prejudice, and it is far more extreme here. Here we are being asked to do an analysis as to something that has never been disclosed except, now, even in a general way, until SCO's expert reports.

326 lines took six months, Your Honor. Evaluating anything and everything would take an extraordinary amount of time. Mr. Hatch impunes the 25,000-man-hour number, which he calls 21,000. It's not my number, Your Honor. It's the number of SCO's witnesses who submitted affidavits in support of SCO's opposition to IBM's summary judgment motion.

SCO suggested the fact that the trial has slipped is somehow immaterial, and now there's adequate time, and we can run out and knock off a few depositions and ask their guy a couple of questions and all will be well. That's not the way, Your Honor, that one properly prepares a defense to allegations of copyright

infringement.

And I would refer you to tab 5 of the book. And if you look, if you would, please, at some of the copyright cases and the principles that are relevant there and the questions that correspond to them, and an enormous amount of effort is required to do a line-by-line, file-by-file analysis of this overall, still ill-defined structure to which Mr. Hatch refers.

Mr. Hatch mentions the JFS files and the testing technology files and says he doesn't understand what's happening here, we're like ships passing in the night, that there's really no issue there. Your Honor, in SCO's opposition papers, what they say, and why we made very little of it in our reply, is that that isn't actually allegedly misused material. Yes, they concede in their opposition brief, though Mr. Hatch suggests otherwise here today, that that material is in fact, you know, not new.

The material is absolutely, unquestionably new. It was not in the final disclosures, and they have not pointed you to a single line in the final disclosures where it's found. If they showed you the final disclosure item, Your Honor, what you would see is that it says "for example," and they mention the JFS file that was identified.

So, the suggestion seems to be that it's enough in the final disclosures to have said "for example," and point to a line so that you can later come around and say, "Well, gee, we gave you an example, so now we can claim anything and everything related to JFS."

In SCO's opposition papers, what they say about JFS and the testing technology is, "Yes, this stuff wasn't mentioned specifically in the final disclosures, but it's no big deal because we aren't arguing that IBM misused it. So, what's the problem? We don't understand the disconnect."

I would say to SCO that, well, then, if that's right, Your Honor, they should have no problem stipulating that the JFS code and the testing technology code is not allegedly misused information. We read their opposition papers. We called -- picked up the phone and called them and said, "There seems to be a problem here. You're saying it's not misused. Why don't we just stipulate that this isn't misused?"

They declined. If the material is not allegedly misused as it relates to JFS and testing technology, then they ought to stipulate to that and not pretend, you know, Your Honor, otherwise.

THE COURT: Mr. Marriott, wrap up, please.

MR. MARRIOTT: Your Honor, with that, I will

close.

THE Court: All right.

MR. HATCH: A couple points, Your Honor, and I'll try to be brief. One as to JFS. Their motion doesn't try to dispose of all JFS, just what they claim was improperly disclosed. The problem with that is: If you go to item 1 of the disclosures in December 2005, we disclosed the JFS system. So to sit here and say there is anything new that wasn't disclosed before is just not correct. Okay.

We have talked about other things, about other examples from System V, but that's another topic. That doesn't have anything to do with their trying to limit the expert talking about JFS. It was disclosed, every line. And he didn't dispute that. He talked around that, quickly, but I want to make it very clear that that is still there.

Now, when we get to Mr. -- Dr. Cargill's report, Mr. Marriott talked about the man hours and these kinds of things. I find that kind of interesting because the reason I find it so irrelevant every time I come to a hearing and we hear about the thousands of man hours of work that it would take to do something, is that what they are doing when they talk about that, particularly in the context of a copyright claim, is they are completely

ignoring that that is the exact reason why the Tenth Circuit, in Gates Rubber, gave a test that didn't require any party to do that because the Tenth Circuit understood -- and that's why I think the Tenth Circuit is really the leading Circuit on dealing with copyright in the context of computer software -- they understand nobody can do that.

We can't do that. What makes them think we can do that any more than he can do that? But the Tenth Circuit recognized that, and that's why they allowed -- they provide, in case law, a structural analysis so you wouldn't have to do that. So, for him to sit here and say they would have to do 25,000 man hours is just completely disingenuous because that's not the law. That is not how you do it. They would be doing it improperly under Tenth Circuit law, and it's a complete red herring.

And it's made to kind of -- to scare up a prejudice that doesn't exist, and it shouldn't be looked at.

THE COURT: Don't you concede that Judge Kimball has already determined that IBM suffered prejudice? I recall reading that order.

MR. HATCH: But we're talking about -- in the last order?

THE COURT: I don't believe it was this last

order.

MR. HATCH: Which order? Well, I mean, let's put it in context for that. In this particular instance, I'm saying they haven't suffered any prejudice because what I'm saying is: What they are trying to do is -- the only way to give them what they want is -- would have been to file Dr. Cargill's report in December of 2005 instead of when Judge Kimball asked it to be filed. Bottom line, that's what this is about.

They are trying to keep out an expert report that doesn't rely on new information, it gives the legal theories behind what they understood -- and, again, I read from their own briefs, from 2004 -- they understood was coming. He puts the meat on it. He wasn't required to do that prior to May of 2006, from Judge Kimball's own order, and so it makes no sense to sit here and argure that as to -- there were things that the Judge ordered and Your Honor ordered for us to do with specificity, but never was it put the expert theories in specificity at that -- at an earlier date than what was required by Judge Kimball's order.

Now, what they are essentially arguing here is, he says, "Well, what are we supposed to do with this Cargill report?"

We say -- they say it says all these

generalities. Well, what I'm hearing is a totally different motion. That is not a motion to exclude evidence because we didn't disclose misused information because we say that's not true. What they are essentially saying is -- and I think the appropriate way for them to attack the Cargill report, given what Mr. Marriott just said -- if he says it's rife with generalities, it's not supportable, it's not good -- he's essentially saying it's not a good opinion.

Well, they've got plenty of opportunities to attack it, then. They can attack it by opposing it with another expert saying that he's full of -- he's full of it. He's wrong. It's a bad opinion. They have the right to do that through another expert, if they can. They have the right if, for some reason they think his analysis is faulty, to challenge him under a Dauber challenge. It isn't to come in and try and get some technical way to throw the expert out.

It's isn't to come in and claim that he should have given his opinion in December, 2005, when it wasn't due until May of 2006.

He did not say -- and I said this in my opening argument. What is it that we should have said about Dr. Cargill before he gave an opinion? And he didn't get up and tell you what he should have said. The most he

says is, "Gosh, if he had given us lines -- version, lines and file, then we would have had something to go on."

But that wasn't required. We would have never given him that because that's not the analysis that we were making.

He indicated the prejudice is self-evident. That's another way of saying that I don't have a prejudice that I can specifically speak to. Then he went back to the lines and code again. I just don't think that's it. He talked about the 25,000 man hours. That's not prejudice because that's not required here. No one is asking him to do that. We didn't do that. You can't talk about -- we're not facing a trial. He has the ability to enter an expert report.

I would say, Your Honor, and I think -- the remedy I have seen Courts give, and I don't think it's particularly appropriate here, but the remedy I have seen is -- and the reason I don't think it's appropriate -- is giving them another shot to depose, for instance, Dr. Cargill, is because they refused to ask him about his opinion on these things. It was sitting there in front of their face, and they didn't ask -- they had the right to ask about and then argue later that it's not relevant, argue later that it's a bad opinion, but they didn't do

that.

So, I think they had that, but if there was even a slightest bit of prejudice, because somehow Mr. -- that IBM doesn't understand Dr. Cargill at this point, then they would be -- the appropriate remedy would be to give them an opportunity to retake his deposition for a limited period of time on that specific subject and then their expert can -- their expert can rebut that.

But he hasn't asked for that here. He has asked for an extraordinary remedy that Tenth Circuit law, Seventh Circuit law, virtually every Circuit in this country says is the disfavored one, which is: He wants to exclude evidence because he wants to avoid seeing the merits.

If the merits are so bad, as he says, then counter it. Counter it with an expert. Counter it with a Dauber petition. Counter it with something, but don't come in and make technical arguments and try to get out of substantive claims that way.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Hatch.

Counsel, I'm prepared to rule. The Court orders as follows: That, as provided in this Court's order of July 1 of 2005, agreed to by the parties through stipulation, reaffirmed by this Court's subsequent order

of June 28 of '06 and in yesterday's order by Judge Kimball, SCO may not challenge as misused, by expert report or otherwise, any material not specifically identified as misused by IBM in the final disclosures.

And, Mr. Marriott, if you or Mr. Schaughnessy will prepare that order.

MR. MARRIOTT: Yes, Your Honor.

THE COURT: All right. Anything further?

MR. HATCH: I would only ask: Is the Court going to give clarifications on what it views as not specified as misused, or are we leaving that for another day?

THE COURT: We'll leave that for another time.

MR. HATCH: Okay. And that would be included in the order, too, I suppose?

THE COURT: What is counsel for IBM's response to that? I think it's fairly clear based upon the arguments. I don't see why we need to do that, Mr. Hatch. I think it's all encompassed in the previous orders of this Court and stipulations that, if it wasn't disclosed by -- let's see, what is it -- October 28, 2005, the interim deadline, and the final deadline December 22 of 2005, then it's out.

MR. MARRIOTT: And, Your Honor, I think -- my

difficulty is: I think it is as plain as day what the Court's orders previously said, and I believe I understand this order. I am, at the same time, a hundred percent confident that my friends at SCO take the position that there is absolutely nothing that wasn't disclosed with specificity, Your Honor. I don't think that can be reconciled with the facts in any, way, shape or form, but I am happy, Your Honor, as a solution to today's problem to have Your Honor's reaffirmed order that material not identified with specificity in the final disclosures, which I take to include structure, sequence and anything else that they want to claim as part of their case, is out.

And this very issue is, of course, raised in connection with IBM's summary judgment papers because we asked for summary judgment as to the 326 lines of code. And the answer back is: Ah, but you're forgetting everything else.

THE COURT: Well, that is my intent. That is the intention of this order. All right. I adopt IBM's reasoning in this regard.

MR. MARRIOTT: Thank you, Your Honor.

THE COURT: And you can take that up with Judge Kimball, again, if you wish to do that. All right. Anything further?

MR. MARRIOTT: Not here, Your Honor.

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

(Whereupon the proceedings were concluded.)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, REBECCA JANKE, do hereby certify that I am a Certified Court Reporter for the State of Utah;

That as such Reporter I attended the hearing of the foregoing matter on November 30, 2006, and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting, and the foregoing pages numbered 1 through 66 constitute a full, true and correct record of the proceedings transcribed.

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

And hereby set my hand and seal this 2nd day of February, 2007.

REBECCA JANKE, CSR, RPR, RMR