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

_____)
THE SCO GROUP,)
)
)
)
Plaintiff,)
)
vs.) Case 2:03-CV-294
)
)
INTERNATIONAL BUSINESS MACHINES)
CORPORATION,)
)
Defendant/Counterclaim-Plaintiff)
_____)

BEFORE THE HONORABLE DALE A. KIMBALL
FEBRUARY 24, 2006
REPORTER'S TRANSCRIPT OF PROCEEDINGS
MOTION HEARING

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

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SALT LAKE CITY, UTAH, FRIDAY, FEBRUARY 24, 2006

* * * * *

THE COURT: Calling now the case of SCO Group, Incorporated, vs. International Business Machines Corporation. I'm going to in a moment ask counsel to state their appearances for the record, as it looks like we have some new, different or additional counsel for purposes of this hearing.

I would indicate before we begin that I did ask counsel to come to side bar for the purpose of handling some housekeeping matters related to some orders that need to be prepared and, as well, to indicate that there is a further motion that will be scheduled before me for hearing at a later date. And I've notified counsel as to which orders and what hearing that will be.

Counsel, if you'll state your appearances, please.

MR. HATCH: Your Honor, Brent Hatch and Mark James for SCO Group. With us is our client, Darwin McBride.

MR. SHAUGHNESSY: Good afternoon, Your Honor. Todd Shaughnessy and Curtis Drake for IBM.

THE COURT: Thank you, gentlemen.

As I indicated at side bar, I'd like to begin with the issue related to the depositions, particularly SCO's motion for leave to take prospective depositions, and that's found at docket Number 607. I have with regard to this motion as well as the other motion reviewed all the submissions from

1 both parties and am prepared to hear your arguments at this
2 time.

3 Mr. Hatch?

4 MR. HATCH: Thank you very much, Your Honor. And
5 as I understand it, when the motions were originally filed,
6 there were some issues regarding which particular depositions
7 would be at issue today here. And as I understand it, we have
8 reached either through previous hearings with Your Honor or
9 through agreement of the parties the handling of the
10 depositions of Messrs. Messman, Chatlos, Wilson and Kennedy.
11 So what we're talking about today are the 30(b)6 depositions
12 of Intel, Oracle and the Open Group.

13 THE COURT: That's correct.

14 MR. HATCH: Your Honor, our position -- this has
15 somewhat been I think unfortunately recast by counsel for IBM
16 and also counsel for Intel, who has made an appearance, as a
17 motion to extend the discovery cutoff. And we, of course, do
18 not believe that that is really what this motion is. We
19 believe this motion came about because we actually did
20 properly subpoena each of these three parties prior to the
21 discovery cutoff date. And the issues relating to that will
22 go to I think timing and some other issues. But what we are
23 seeking from the Court is the ongoing permission to complete
24 these depositions for which there is either a dispute as to
25 whether the parties should show up or frankly just a refusal

1 to appear.

2 THE COURT: Mr. Hatch, before you go on, let me
3 indicate for purposes of the record and so that you may
4 address this, my concern in this regard is the order of, I
5 think it was October 12th, wherein, it states:

6 The Court hereby increases the number of
7 allowable depositions by 10 as to each side.
8 However, all depositions must be completed by the
9 applicable discovery cutoff date as set forth in
10 Judge Kimball's July 1st, 2005, order. To the
11 extent that such depositions cannot be completed
12 within that period of time, they must be foregone.
13 The Court will not entertain any motion for an
14 extension of time to complete depositions. IBM's
15 request for additional time to depose SCO's
16 witnesses is denied. Both sides are required to
17 adhere to the current rules on additional
18 deposition days.

19 MR. HATCH: Right. I'm very familiar with that
20 order, Your Honor. And I think the answer to that is frankly
21 somewhat simple. Your Honor knows her order better than
22 anyone, but I think it is not inconsistent with orders on any
23 discovery cutoff date or anything that is provided under the
24 rules.

25 What we are alleging here is that we did properly

1 notice up depositions that should have been taken in that time
2 period, but for reasons related to these parties those
3 depositions did not occur. And if the order was to be viewed
4 in a hard-and-fast way, that for reasons that are outside of
5 my client's control and out of my control, these depositions
6 don't get taken, that would insert into this litigation or any
7 litigation kind of an odd policy, which would be a motivation
8 that would be provided to the other party and certainly to
9 third parties to not cooperate in discovery with the hopes
10 that a discovery date would be able to come and go.

11 And as a matter of fact, we met that here. And
12 without casting aspersions on anybody, as the date got a
13 little closer, we started to get those types of discussions
14 from particularly third parties where magically they became
15 unavailable until March.

16 And, you know, it wasn't a loss on us the fact that
17 these people weren't being able to find dates in February and
18 the fact that it had been become publicly known, one, your
19 order; and, two, the date by which things had to be completed
20 under your order. And I think if we took a very hard-and-fast
21 look that even if it were third parties that caused this
22 problem that that date was going to be held to, that provides
23 a motivation to witnesses not to cooperate in discovery. And
24 I don't think that was --

25 THE COURT: When were the subpoenas served upon

1 them?

2 MR. HATCH: The original, these original subpoenas
3 were served on January 12th with the deposition notices on
4 January 13th.

5 THE COURT: And weren't they defective in some
6 manner?

7 MR. HATCH: Yes, they were.

8 THE COURT: So when were the subpoenas that you
9 would argue were properly served served and for what day?

10 MR. HATCH: Well, I think, Your Honor -- I think I
11 know where you're going. I think the final service properly
12 put together subpoenas was essentially a day before the cutoff
13 date. But what isn't said in that and I think is said well in
14 the case we've cited from the Fifth Circuit in the Eastern
15 District of Pennsylvania, and there really haven't been
16 contrary cases cited by the other side, is that particularly
17 when you're dealing with the corporation and people knowing
18 what is going on, that these folks had the notice of the
19 subpoenas well within a time period in which they could make
20 the arrangements to appear. And largely what they were
21 complaining about in this situation were technical
22 deficiencies and ongoing discussions going on with the parties
23 to resolve these.

24 But I think it goes a lot towards them
25 understanding trying to take your order in a very, very rigid

1 interpretation, because --

2 THE COURT: How do you interpret, Mr. Hatch, my
3 order anything other than how it's phrased? It says, they
4 must be foregone if they're not completed.

5 MR. HATCH: Let me give you an example, Your Honor.
6 I mean, largely the types of things that they were objecting
7 to in this particular instance were technical things like a
8 check wasn't given with the original subpoena or that the
9 topics were with the deposition notice and not with the
10 subpoena itself. They weren't saying, we don't know about the
11 dates. They weren't saying, we don't know what the topics
12 are. They weren't saying it made any difference to them one
13 way or the other to get the \$40, or whatever it is in this
14 district nowadays. They were putting up a fight because they
15 know there is a date. And if they put it off long enough,
16 then they're going to have an argument, we don't have to show
17 at all.

18 Now, if I take that to an extreme, we have just got
19 a very onerous request for a lot of depositions, a lot of
20 which I can complain on the same basis which they complain
21 about the depositions that we've noticed, and am I to take it
22 that the next discovery deadline is a hard-and-fast thing so
23 if people are going to be out of town or just can't make it
24 that they're out of luck? And I don't think so. And I think
25 that's why parties are asked to cooperate in discovery in this

1 matter.

2 And Intel, in particular, I think this is a telling
3 example, Your Honor, that if you read, for instance, in
4 Intel's brief closely here, because they're the ones who filed
5 a brief as a third party complaining about this. And it's
6 interesting to me that Intel, a third party, even, you know,
7 picked up on this notion that there was even a cutoff because
8 typically a third party that is in litigation, you know,
9 they're just dealing with the subpoena and whether or not
10 they're going to produce people because that's what they're
11 obligated to. It isn't usually, we're going to fight you on
12 the discovery cutoff because we don't want you to get
13 discovery.

14 But in their own brief, in complaining about the
15 fact that the original deposition notice in this case was
16 faxed to them on January 12th -- now that's 15 days before the
17 discovery cutoff. And in this district, at least in the
18 practice as long as I've been here, that's considerably enough
19 time before a deposition is taken to give notice.

20 THE COURT: Did you note, and I'm sure you have,
21 the case, and I don't remember from what circuit, that said
22 30 days was insufficient?

23 MR. HATCH: I think it's a case by case. But, Your
24 Honor, I know -- I think the practice in this district in both
25 state and federal court for a long, long time has been it can

1 be less than 10 days. Certainly 10 days is more than
2 adequate. And so they certainly cited nothing from this
3 district, and it certainly isn't the practice of anyone I know
4 in this district.

5 But what's more interesting here is, you know, they
6 complain about not having discussions with us and about this
7 12th day, which is 15 days before. But what's more telling to
8 me here is they say SCO's counsel had dealt with specific
9 Intel outside counsel on these very matters as recently as
10 45 days earlier.

11 Well, they weren't raising it for that point. They
12 were raising that for another point. But that's a very
13 telling point, because what that says is they've admitted that
14 SCO had been working with them since late November, because
15 45 days prior to January 12th would be late November, trying
16 to get their deposition and talking to them about, and they
17 say, these specific matters, in other words, the matters that
18 are in the deposition notice, which are the topics, since
19 November. So we didn't wait until the last minute. But
20 they're trying to characterize these in a way, and that's why
21 I find it quite interesting that now they try to cast this as
22 we're trying to move the discovery date.

23 We're not trying to move the discovery date. We're
24 trying to get discovery that we were seeking to get properly
25 and were thwarted from getting by third parties, by IBM

1 potentially within the time period you set for us. We were
2 ready, we were willing, and we wanted to take those.

3 Now, IBM, you know, to try to make this sound like
4 it's our fault to Your Honor, and I take some umbrage of this,
5 is they bring up the other depositions that we've now worked
6 out. And they bring it up in a context, well, you know, SCO
7 was asking for all of these other depositions outside the
8 period.

9 Well, that's just simply not true. And that's
10 couched in a way to make it look like SCO is really trying to
11 do something that it's not here, because, for instance, in the
12 context of the Novell witnesses, Mr. Chatlos and Mr. Messman,
13 they came to us and said, we can't do it in the time period.
14 And we told them, we've got a deadline. If IBM is agreeable,
15 we're willing to accommodate you.

16 That isn't us asking to extend the deadline, as IBM
17 has cast it in their brief. That is us saying, if it's okay
18 with IBM and it can be stipulated with the Court, we will
19 accommodate you, witnesses, third-party witnesses, but we have
20 an obligation here.

21 Now, IBM was willing to do that. But I take some
22 umbrage that they now cast that as that was our request,
23 because it was not our request.

24 There are other issues regarding IBM witnesses,
25 Mr. Wilson and Mr. Kennedy, but we didn't ask for those to be

1 taken outside the period. IBM has agreed to produce them
2 outside the period for reasons that were unique to Mr. Wilson
3 and Mr. Kennedy. So at no time have we tried to cast this
4 motion as one that we need additional time. But we do expect
5 witnesses to show up when they're properly noticed inside that
6 time period.

7 Now, you've identified the one small issue that,
8 yes, when Bois Schiller filed these subpoenas originally,
9 there were defects in them. But the Fifth Circuit and the
10 District of Pennsylvania, which is the only case cited in this
11 matter before you now found that technical defect that will
12 not keep you from -- because the question, the only issue, the
13 only real question is, did they have adequate notice? And
14 they had that. They were raising technical defects toward
15 discovery. And the purpose of the federal rules is not to
16 thwart discovery, but it is to encourage discovery.

17 THE COURT: But if I accept your arguments,
18 Mr. Hatch, the rules and court orders have no enforceable
19 meaning. They mean nothing if they are intended to be bent or
20 broken.

21 MR. HATCH: But, again, I think that misses the
22 point, Your Honor, because that is casting it as though we are
23 responsible for missing that deadline. Now, maybe I can help
24 by addressing one other issue, because maybe one of the things
25 you're looking at, and you raised this earlier, is why did we

1 wait so late, okay.

2 Now, I don't think by doing it in a time period --
3 and I know Your Honor is a practicing attorney, as well.
4 We've all done it, there are depositions for whatever reason
5 that get put to the end of the period. There's always going
6 to be one or two depositions that are at the end of the
7 period. That's just the way it works. I've yet to meet the
8 lawyer that gets it all done four months in advance. And
9 usually that can't be the case because just the way the case
10 develops, and particularly a case that is as complex and as
11 hard fought as this case is.

12 So I don't think you can -- I really don't think
13 you can ever be thwarted from taking discovery that you got
14 properly noticed inside the time period. I think your order
15 would take effect if you tried something outside the time
16 period.

17 But in this case, even if we assume that in your
18 mind the question is, why couldn't you have done these a
19 little bit earlier, I don't think it's necessarily the right
20 question, but even if we address those, there were -- there
21 are a couple things that happened here. One is, just a few
22 days before the discovery cutoff, IBM produced to us, and
23 without getting into the reasons because I'm sure both of us
24 will probably blame each other for this, but we received
25 approximately 340,000 documents a couple days before the

1 discovery cutoff. Well, it's hard to believe that that late
2 in the process we can receive which what are relevant
3 documents, and Mr. Shaughnessy may get up here and tell you,
4 well, we don't think they're relevant, but we turned them
5 over. But the standard is you're turning over relevant
6 documents. We believe they were relevant. It would be hard
7 to believe that you can't take any discovery on those simply
8 because a party thwarted the discovery that you fought long
9 and hard for, in some cases over a year, they turned over a
10 couple days before the discovery period.

11 THE COURT: But didn't you say that you had known
12 about, been in discussions with the representatives of the
13 deponents as early as November?

14 MR. HATCH: Yes.

15 THE COURT: So, you know, where does that leave
16 you? It's not as though you weren't on notice that these were
17 individuals who needed to be deposed in advance of the cutoff
18 time.

19 MR. HATCH: I understand that. And like I said, we
20 noticed them in advance of the cutoff period. But what you're
21 saying is, we're trying -- you're asking us to apply policies
22 that would be truly, would truly penalize people who try to
23 conduct discovery in a humane manner, because we contacted
24 them and said -- and tried to work this out. And when we
25 finally run out of time working with them, we get the notices

1 on records so that we can get those depositions taken. If we
2 can't do that in discovery, have discussions with the other
3 party and attempt to work these things out, which, again, in
4 Mr. Wagner's brief, that's one of the things he complained
5 about. And I think he probably was not aware of, because he's
6 counsel that just came into the case lately, that these
7 discussions were going on. But you remember he discussed in
8 his brief in the Northern District you have a responsibility
9 to try to work it out with the other party.

10 We understand that. We're supposed to do that
11 here. It's just a matter of common courtesy. And I find it
12 hard to believe that the Court would penalize us for trying to
13 work something out with the other side before going full
14 blown. If we had just filed something there, and Mr. Wagner
15 surely would have said, well, under Northern District you
16 haven't tried to work it out.

17 So we proceed under the rules as we understand
18 them. And I think, you know, one way or another, you know, I
19 don't think we can get penalized for doing what I think we're
20 supposed to do.

21 And so under that regard, I think it would be --
22 you know, and I think the important thing here, Your Honor, is
23 no party has really come to you, at least in the briefs, and
24 said that the information they sought isn't relevant and
25 isn't, in fact, highly relevant. As a matter of fact, as Your

1 Honor knows, the parties did have to come to the Court and
2 seek an opportunity to do additional depositions than were
3 originally asked for in the case, and that was granted. Part
4 of that was because the complex nature of the case and a
5 number of issues that had to come before Your Honor. But as a
6 result of that, there's no question, some of those depositions
7 were taken a little later in the game.

8 And I will point out that one of those,
9 Mr. Palmisano, who was just taken in January, there were
10 issues that came out in that case that were important in his
11 deposition. Now, that's just at the same time that these
12 subpoenas were being filed that are relevant to Intel and
13 extremely relevant to Intel. Also, these documents we talked
14 about in the brief, starting with UDG-PI, those only came out
15 in the last month or two.

16 So a lot of these issues are issues because of
17 documents produced and because of information that has been
18 obtained from depositions that came later in the game. And
19 Mr. Palmisano, as you know, his deposition came later in the
20 game because of hard-fought motions in this court to allow us
21 to take it and was -- we were not able to take that until
22 later in the game.

23 And so now, so that we can take the deposition on
24 issues that came out later in the game, we would be truly
25 prejudiced if it was said, well, you should have taken it

1 earlier in the game, when we couldn't have asked about these
2 things that we know about now. And that's why some parties
3 pick some depositions to come later than others. And I would
4 put to you that if it wasn't Intel and Open Group and Oracle,
5 it would have been someone else, because there is always some
6 depositions that come at the end of the game by definition.

7 So I would ask Your Honor to grant our motion, to
8 be able to take these depositions that were noticed. They
9 were put on notice, they had adequate notice, more than 15
10 days, before the discovery cutoff period. I think one of the
11 reasons we filed the motion in kind of the odd way we did is
12 because we understood that at some level this issue will need
13 to be addressed in the Northern District of California by
14 Magistrate Judge Zimmerman, who I've been in front of in
15 another case and is a very competent judge. But I think he
16 will be looking in large part for your guidance today, as
17 well, for his ruling. Thank you very much.

18 THE COURT: Thank you, Mr. Hatch.
19 Mr. Shaughnessy?

20 MR. SHAUGHNESSY: Thank you, Your Honor.

21 I need to, since Mr. Hatch mentioned this issue
22 during his argument, I do need to inform the Court, with
23 respect to the documents that Mr. Hatch seems to be suggesting
24 were produced to them right on the eve of the close of
25 discovery, what Mr. Hatch neglected to tell the Court is that

1 SCO served upon IBM a document request, the return date for
2 which was, in fact, the day after discovery. So we were
3 producing documents in response to a document request timely.
4 There were also additional documents that were produced that
5 are the subject of the other motion that you will hear today.
6 So I don't want the Court to be left with the impression that
7 we have somehow waited until the last minute to dump a bunch
8 of materials on SCO that it should not have been expecting to
9 be receiving by the time.

10 With respect to the motion that's before the Court
11 now, Your Honor, SCO in its opening memo, very short brief, it
12 said that it served each of these three companies with
13 subpoenas requiring them to appear for depositions, but the
14 companies, quote, simply and improperly decline to do so.

15 That, Your Honor, is not true. SCO did not, and it
16 now acknowledges begrudgingly in its reply and Mr. Hatch has
17 now acknowledged before you, it did not properly serve these
18 companies. Now Intel, as I think is clear from its brief,
19 filed this brief precisely because the memorandum that SCO
20 filed in this case suggested pretty strongly that Intel and
21 Oracle and the Open Group had simply snubbed their nose at a
22 court order. Now, if I were representing Intel, I would have
23 done the same thing. I would have felt it important to make
24 sure that you understand that that is not, in fact, the case.

25 Your Honor, it is undisputed that these defendants

1 were not served with a proper subpoena until the afternoon of
2 January 26th. That subpoena required, purported to require
3 these defendants to produce documents, apparently substantial
4 volumes of documents, to prepare a 30(b)6 witness or series of
5 witnesses to testify, and to do all of that by 9:00 a.m. the
6 next morning. That, Your Honor, under any standard, under any
7 standard of the amount of time that is reasonable to give
8 notice of a subpoena is flawed. And I think Mr. Hatch would
9 agree with that.

10 And that is why, Your Honor, that SCO really
11 doesn't at the end of the day contend that the subpoenas that
12 they served on January 26th for a deposition on January 27th
13 were operative or they required any of these defendants to
14 appear. Instead what SCO argues is that they sent a flurry of
15 paper to these defendants earlier in the month, none of which
16 was proper subpoenaed, none of which remotely complied with
17 any of the requirements of the rules, and that that somehow
18 served as a place holder. That sending out a flurry of paper
19 not complying with the rules is now a place holder. And that
20 allows SCO to wait until the day before the deposition to
21 actually and properly serve these defendants.

22 Now, Your Honor, I do not represent Intel, I don't
23 represent Oracle, and I don't represent Open Group. And I do
24 not purport to speak on their behalf, and I do not purport to
25 raise the arguments and the objections that they may have to

1 these subpoenas. They will, if they determine it necessary to
2 do so, should Your Honor allow these depositions to proceed,
3 they will raise those issues before you or before the court
4 that issued these subpoenas.

5 But it is abundantly clear, Your Honor, that the
6 subpoenas or the purported subpoenas that were sent were not
7 remotely close to complying with the rules. These are not
8 technical defects, as Mr. Hatch characterizes them. These are
9 the most fundamental defects that you can possibly have in a
10 subpoena. Fundamentally, a subpoena at its most basic level
11 has to tell you, the recipient of the subpoena, who it is that
12 is supposed to testify; what documents, if you're supposed to
13 produce documents, are they; and where the person is supposed
14 to be. Where am I supposed to go for this deposition?

15 Each and every one of these subpoenas failed on
16 each and every one of those fronts. SCO served subpoenas that
17 required the production of documents with nothing attached to
18 those subpoenas to indicate what documents were required. SCO
19 served subpoenas requiring parties to designate witnesses to
20 testify on topics without identifying what those topics were.
21 SCO served subpoenas requiring the witnesses in
22 Northern California to travel 2000 miles to New York. Rule 45
23 says that a subpoena, quote, shall be quashed if it requires
24 travel of more than 100 miles.

25 For that reason alone, Your Honor, each and every

1 one of these subpoenas was invalid. It's not a technical
2 defect. That is a requirement of the rules. SCO knows the
3 rules. It had the ability to comply with the rules. It
4 simply chose not to do so.

5 But that's not all. SCO served these notices by
6 fax. The rules require, the cases uniformly require you
7 cannot serve a subpoena by fax. You have to personally serve
8 a subpoena. There's no exception to that rule. That's not a
9 technical defect. That is the fundamental rule.

10 SCO sent faxes to the, quote, legal department of
11 these various companies. That's not service, Your Honor.
12 These are large companies. When you send something to the
13 legal department or you send something to somewhere else, who
14 knows where it's going to go? The requirement is you serve
15 the subpoena, that the subpoena tells you what it is you have
16 to do, and you serve that subpoena on the registered agent,
17 because these companies have procedures, so that they know,
18 okay, we've got a subpoena. Here's what we need to do with
19 it. You simply can't send a flurry of faxes to any possible
20 person in the company and then somehow expect that these
21 companies are supposed to comply.

22 The problems, Your Honor, didn't end there. Two of
23 the subpoenas that were issued from the Northern -- two of the
24 subpoenas were issued from the Northern District of
25 California. The local rules in the Northern District of

1 California require SCO to meet and confer after the service of
2 the subpoena with respect to the scheduling of the deposition.
3 SCO was required to comply with the rules of the Northern
4 District of California. According to the papers that have
5 been filed by Intel in this case and by Oracle in the motion
6 that it's filed in the Northern District of California, SCO
7 made no effort, no effort to comply with that rule.

8 And the subpoenas failed to include witness fees.
9 Now, Mr. Hatch says this is a technical defect, that nobody
10 should really worry about. But that's not what the
11 Ninth Circuit says. The Ninth Circuit has held that failing
12 to include a witness fee is grounds for quashing a subpoena,
13 period. That's not a technical defect.

14 But more importantly, Your Honor, this doesn't
15 occur on a blank slate, as Your Honor correctly pointed out.
16 SCO has had two and a half years to take these depositions.
17 SCO has identified these companies in discovery responses more
18 than a year ago. And most importantly, as Your Honor pointed
19 out, you could not have made it clearer to SCO what it was
20 that they were required to do should they desire to take these
21 depositions.

22 And finally, Your Honor, we believe, as we've
23 indicated in our papers, that the taking of these depositions
24 is, in fact, precisely that, that what SCO is asking the Court
25 to do is to essentially lift -- to modify the scheduling order

1 to allow them to take depositions, that they could have and
2 should have taken prior to the cutoff.

3 But beyond that, Your Honor, we had a conversation
4 with SCO, which Mr. Hatch alludes to, with regard to a couple
5 of these depositions. We were told by SCO that the two
6 depositions that were at issue, Mr. Messman and Mr. Chatlos,
7 that those were unique circumstances, those individuals were
8 truly unavailable, and that this, we understood, was it.
9 These were the only witnesses we were going to see who were
10 going to come after cutoff.

11 The Court granted -- we did not oppose the motion.
12 We said we would not oppose the motion. We made it clear to
13 SCO, however, that we believed the Court's order required them
14 to get your permission to do that. But we said we wouldn't
15 oppose the motion, if those were the conditions.

16 Well, that's not what happened, because six days
17 later in a telephone conference with Your Honor and myself and
18 other counsel, they suddenly bring up five more depositions
19 that they want to take.

20 Your Honor, it is abundantly clear to me that SCO
21 had the ability, they had the resources, they have the
22 sophisticated legal counsel who knows the rules, who knows
23 what to do, and they simply chose not to do it. And they
24 simply chose instead to impose the burdens on these third
25 parties. And I think Your Honor should not allow the

1 depositions to proceed on that basis.

2 THE COURT: Thank you, Mr. Shaughnessy.

3 Mr. Hatch, did you want to respond?

4 MR. HATCH: Yes. I'm not clear whether you'll
5 allow Mr. Wagner to argue at all for Intel. I prefer to go
6 after him, if you are. But I think Mr. Shaughnessy has made
7 his argument. It should have been one or the other.

8 THE COURT: Do either counsel object?

9 MR. SHAUGHNESSY: I have no objection, Your Honor.

10 THE COURT: All right, then. If you want to speak,
11 go ahead.

12 MR. MARKS: Thank you, Your Honor. I appreciate
13 the opportunity to appear here. I'm Anthony Marks, and I
14 represent Intel Corporation.

15 Intel felt compelled to respond to the motion that
16 was filed even though in most senses they really have no dog
17 in the fight. And they felt compelled to do that because they
18 were accused of being a bad corporate citizen and unfair
19 litigant. Whatever degree of that took place before has been
20 amplified today. The notion has been made that Intel
21 conspired in a sense to thwart the discovery in this case by
22 raising unfair objections. And I'm not sure whom Intel is
23 alleged to conspired with, but there is a suggestion that
24 Intel has done something unfair and improper.

25 Intel takes its reputation as a good corporate

1 citizen, as a fair litigant whether it's a third party,
2 whether it's a plaintiff or defendant, very serious. So those
3 charges are very serious and warrants some discussion.

4 The notion that -- there's a bit of blaming the
5 victim here. The notion that all of these things happened
6 beyond my client's control, I heard SCO's lawyer say. There
7 wasn't much that happened as far as Intel is concerned that
8 was beyond SCO counsel's control.

9 I have a timeline, if I may approach. I don't
10 really wish to discuss it much, but if I may hand that.

11 THE COURT: Have you provided copies to counsel?

12 MR. MARKS: I will. I have copies for all.

13 Your Honor, I'm not going to talk about this in
14 detail. But the salient point, which SCO's counsel has
15 acknowledged already, is that no effective subpoena of Intel
16 was served until the afternoon before the deposition was to
17 take place.

18 The notion that it was beyond SCO's control is
19 really quite simply false. First of all, the timing of the
20 service. The various defects that were made during the course
21 of the subpoena proceedings were as a matter of law not to
22 render the subpoenas a nullity. Intel responded not only
23 promptly but early to the original thing that had been faxed
24 to Intel was not, in fact, a subpoena at all and told SCO's
25 counsel that there were some defects that they needed to

1 remedy. Notwithstanding that, SCO's counsel chose to wait
2 five days before attempting to correct that and then not
3 correcting even all of the issues that had been identified
4 in it.

5 So that brought us to the 25th January. Here we
6 are two days before the deposition, still defects. We
7 promptly, I personally on behalf of Intel notified SCO's
8 counsel that there were still errors. They served another
9 subpoena on the afternoon of the 26th.

10 I will avow to the Court that I was unaware of the
11 Court's order. I knew that there was a discovery cutoff
12 because SCO's lawyer had told me that. So I was aware that
13 there was a discovery cutoff, but I had no idea about your
14 order. There's some suggestion here that I or Intel has tried
15 to take advantage of the Court's order. Other than being
16 aware that there was a discovery cutoff because SCO's lawyer
17 mentioned it, we were unaware of that.

18 So we know that there was no valid subpoena served.
19 There's some discussion in the timeline about the many defects
20 in this. So the notion that these are beyond SCO's control is
21 really quite simply false. Not only were they within SCO's
22 control, but Intel told them specifically what the issues were
23 and how to fix them.

24 Second, let's assume for the sake of argument about
25 this notion of notice and that notice would have been

1 effective. The cases don't, in fact, say that. The cases
2 deal typically with subpoenas for a single deposition and for
3 documents, or in some cases -- I can't recall whether any
4 cases like this or for both. But they are not, as was this
5 particular subpoena, calling for a deposition on six
6 enumerated topics, which in turn had several subsections to
7 them.

8 I also had -- I apologize for not knowing this.
9 But I have the document requests and the scheme of topics.
10 Does the Court have that in its file?

11 THE COURT: Yeah.

12 MR. MARKS: All right. Suffice it to say that
13 Intel has investigated and determined that somewhere between
14 three and nine Intel employees would need to be deposed to
15 respond appropriately to the 30(b)6 notice that was served on
16 Intel, and I don't think we determined how many people would
17 need to be searched, but it would probably be somewhat more
18 than 10. So this is not a small imposition on Intel. This is
19 a significant Intel imposition.

20 Add to that to the fact, and there was some
21 discussion to this and I want to come back to it, the fact
22 that there have been two previous subpoenas served on Intel by
23 SCO, one by IBM. Mr. Hatch I think inadvertently suggested
24 that there had been some discussion with SCO's counsel about
25 this subpoena as much as 30 or 45 days before.

1 In fact, that's not true. I am the lawyer who has
2 represented Intel during the course of the last subpoena, and
3 the discussion that was held related to a different subpoena
4 that asked for a discrete subset of documents and upon which
5 Intel responded 30 to 45 days earlier. There has been no
6 discussion about this particular set of topics. The time the
7 deposition would take place, the time for compliance, et
8 cetera, nothing of substance has ever been communicated on
9 that subject until after the subpoenas were served and,
10 indeed, after the motion was brought.

11 THE COURT: Mr. Marks, let me just ask you because
12 I haven't noticed. Are you officed locally?

13 MR. MARKS: No, I'm not. I'm officed in Arizona.

14 THE COURT: Where?

15 MR. MARKS: Arizona.

16 THE COURT: Arizona.

17 MR. MARKS: So it's important to understand that
18 there has not been discussion about these very matters. But
19 it is also important to understand that Intel's presence could
20 not have possibly gone unnoticed to the SCO lawyers, having
21 served two subpoenas on them, or IBM's lawyers who have served
22 one.

23 It is also important, as I suggested, to look at
24 the topics for deposition and topics for documents. They
25 include such topics as, all of Intel's communications with

1 SCO. All of Intel's communications with IBM. It can't
2 possibly have escaped -- if that was the subject that really
3 needed discovery, it could not have possibly escaped the
4 attention of fine counsel that SCO have that they ought to
5 have discovery on that. I don't know whether it is or is not
6 relevant. I don't know enough about the underlying case. But
7 I do know that it would not possibly -- that's not the sort of
8 topic that comes up the last minute.

9 So the two points that I, the first of which I
10 think we talked about and has not been disputed is the notion
11 that there was no valid subpoena. The Ninth Circuit law and
12 the law of other circuits recognizes that absent a valid
13 subpoena which includes personal service, which includes a
14 witness fee, which includes that there be a subpoena as
15 opposed to just a deposition notice if you're a third party, a
16 third party has no obligation to respond.

17 Notwithstanding that, Intel responded, told SCO the
18 problem, and they didn't fix it, and they didn't fix it until
19 the afternoon before. Intel obviously couldn't produce the
20 half dozen witnesses and all of those documents the next day.

21 More important, even if one regards the original
22 subpoena, which, in fact, is a notice and not a subpoena, as
23 notice in some sense of the word, in two weeks allotted for
24 that, Intel could not have possibly complied with, certainly
25 not by the date in time required by Your Honor's order by the

1 discovery cutoff. SCO should presumably have noticed that by
2 the breadth of the topics they raise.

3 So I'll close by suggesting there really is a
4 problem. I dealt with -- it doesn't sound like a very
5 glamorous job, but one of the things I do as Intel's counsel
6 from time to time is deal with subpoenas, and I've noticed a
7 habit on those third-party subpoenas somebody sends a
8 brand-new lawyer fresh out of law school down to the library
9 to draft a whole bunch of third-party subpoenas and sends them
10 out to third parties without giving any thought to what is
11 required in the case, what sort of an imposition they're
12 imposing on third parties, what the discovery deadlines are,
13 et cetera.

14 That seems to have happened here, because if you
15 look at the topics, they're so terribly broad that no one
16 could reasonably have expected them to comply in two weeks.

17 The second part of the theme that is consistent
18 with that is the notion that -- I have mis-served subpoenas or
19 made those technical errors myself. But there were a really
20 large number of them here. And notwithstanding receiving a
21 gratuitous road map from Intel that says, you need to do this
22 to fix it, it never happened.

23 So the reason Intel decided to file a brief and
24 send me up here and spend their money dealing with this is not
25 because they have a dog in this fight and not because they

1 side with IBM or they side with SCO or they care about those
2 sorts of issues, they decided to spend that money because they
3 had been impugned, and it was bad enough in the briefs. It
4 was frankly offensive to me here today.

5 The notion that Intel is somehow conspiring to
6 thwart discovery is simply false, and the record certainly
7 reflects that. I appreciate it.

8 THE COURT: Thank you for your comments, Mr. Marks.

9 MR. HATCH: Thank you, Your Honor.

10 A couple points were raised by both astute counsel
11 for both of the parties. First I would point out that the
12 timeline produced by Intel is somewhat significant to me. It
13 shows a couple things. As you'll notice, this isn't the first
14 time we've had issues with Intel. You'll notice from his own
15 timeline, he talks about documents that were being subpoenaed
16 in November of 2004. We had ongoing discussions with them
17 including discussions between senior officials of the two
18 companies to try to get them to comply with that subpoena and
19 do what we needed to do.

20 And you'll notice by their own timeline they had
21 not produced documents to us even to our second subpoena,
22 which I think is the first, as well, until, let's see,
23 December 20th of 2005, nearly a year later.

24 You'll also notice that even IBM was subpoenaing
25 documents from them in January of 2005. And Mr. Shaughnessy

1 just got up and said, why couldn't we have done this a lot
2 earlier? I could say the same thing to them. But I assume --
3 I didn't accuse them of that because I assume, like us, as
4 discovery went forth, things became understandable it was
5 relevant information that was required from Intel as late as
6 that period of time. And I think we have the right every bit
7 as much as IBM did to get discovery as late a period it
8 becomes obvious that they had relevant discovery to give us.

9 Secondly, I would note that neither counsel
10 addressed the case law that we addressed. As I indicated in
11 my opening argument, we were the only party who cited case law
12 that was to the effect that the issue here is not -- for the
13 Court is not technical compliance, but it is notice to the
14 party. And neither of them cited another case, and neither of
15 them addressed those cases.

16 And let me -- one of the reason I think why is
17 particularly if you look at the, just as an example, look at
18 the Kupritz case. In that case, the lawyers really messed up
19 big in that case. They first -- they filed a subpoena in the
20 Southern District of Georgia when the guy was actually
21 residing in the Eastern District of Pennsylvania. So they
22 completely missed the right court. Eventually when they got
23 it corrected, they served the subpoena not the day before, but
24 they served it 15 minutes after the scheduled deposition time
25 was to start, which under any circumstances would be certainly

1 worse than the day before.

2 And the Court gave the following -- essentially the
3 analysis was the following five points. They found the
4 subpoena adequate on the following grounds. One, that the
5 deponent was fully aware of the scheduled deposition.

6 Well, neither IBM nor Intel have argued that they
7 weren't aware of the date. They're complaining about, you
8 know, some of the technical details, but they don't say they
9 weren't aware that they had been noticed up for January 27th
10 of 2006.

11 THE COURT: They had 12 or 14 hours notice,
12 something like that.

13 MR. HATCH: Oh, no. Of that point -- they had
14 notice as of January 12th of that point. That, I think, is a
15 very significant issue. That's the difference between why the
16 Court focuses on what's the notice, not the actual technical
17 detail.

18 THE COURT: I understand.

19 MR. HATCH: And so I always have to look at the
20 Kupritz court. They said, just as here, they had actual
21 notice of when it was going to take place.

22 The second point in Kupritz, never indicated there
23 was a change to the schedule date. There wasn't any here,
24 either. There was ample time to prepare for the deposition.
25 Here in this district, 15 days is presumed that. But we

1 certainly -- you know, it wasn't the day that they
2 represented. They had notice of the topics since the 12th, at
3 least.

4 And I would point out, Your Honor, that I think
5 Mr. Shaughnessy got his facts just a little wrong. He said
6 that the subpoenas were faxed. The subpoenas were actually
7 served by process servers. It was the deposition notices that
8 were faxed. But they had those with the topics as early as
9 the 12th or 13th, as well. So they had plenty of time and
10 notice of that.

11 What I referred to, I think -- I misplaced -- here
12 it is. When they said they didn't know the topics, until
13 January 12th they didn't know the topics, I didn't
14 specifically say, as counsel for Intel indicated, that they
15 had had specific discussions about the depositions. I just
16 quoted their exact language out of the brief. It says:

17 SCO's counsel had dealt with specific Intel
18 outside counsel on these very matters.

19 In other words, they just got done talking about
20 being faxed the deposition notice with what was going to
21 happen at the deposition.

22 And then he says that they dealt with these very
23 matters at least 45 days earlier. Now, the reason he's trying
24 to split a hair is because the deposition notice had the same
25 matters as we had been discussing on document productions and

1 other things. The general topic areas are the same. One is a
2 document production, and one is a request for actual people to
3 show up and give deposition testimony. So they've been aware
4 of this for a long period of time.

5 As the Eastern District said, there was no motion
6 in that case to quash ever filed in any court. Intel never
7 filed a motion to quash in the Northern District. They sent
8 us an objection. That is an important factor in the Eastern
9 District.

10 And the second subpoena corrected the possible
11 defects. And then the Court went on to say, he said:

12 That subpoena was valid as to issuance and
13 service. There was not a timely motion to quash.
14 If there was, the only problem is whether the
15 subpoena served at 1:45 p.m. for a deposition to
16 commence at 1:30 p.m. on the same day is unreasonable
17 as to notice.

18 In other words, he's looking at the issue the way a
19 court does, and reasonable notice, not the technicalities.

20 He said:

21 Ordinarily, of course, it would be self-evident
22 that it failed to provide adequate notice. Here,
23 however, there was no question that Mr. Lowry had
24 such prior notice by the defective subpoena. He had
25 adequate notice by the defective subpoena served on

1 January 3rd, 1994, and by the communications with
2 counsel. He could have complied, albeit he might
3 have been a few minutes late. Instead of complying,
4 he filed as promptly as possible on the same day, a
5 motion to quash.

6 So in this case, he filed a motion to quash. We
7 didn't even have that here. So they didn't address the case
8 law because the case law is not good for them because they
9 actually had adequate notice. And instead of dealing with the
10 substance of the discovery request, they choose to fight on
11 technical grounds.

12 Now, it's interesting to me to hear Intel coming in
13 here and complain about the discovery cutoff date because
14 that's not particularly relevant as to them. To them, it
15 should be only, we're going to have to produce witnesses, and
16 when will we do it? But instead of coming to us and saying,
17 look, we might need a little more than 15 days, they did not
18 cooperate with us one iota. They didn't say, we're going to
19 need, like they have today in front of Your Honor, three to
20 nine people. They just said, no, you've got technical
21 problems. You've got a cutoff date. So bad; so sad. And
22 that is not the way it ought to have worked.

23 And we would have certainly have accommodated them.
24 IBM has shown it's willing to accommodate witnesses that for
25 whatever reason were not able to appear before the cutoff

1 date, because that's what we did when their own witnesses
2 couldn't show up before, and that's what we did when Novell
3 witnesses couldn't show up before.

4 So I would put to Your Honor that the objections
5 raised by IBM and Intel are not sufficient to keep us from
6 getting what is really relevant discovery, and that we should
7 be allowed to take these three depositions. And we're willing
8 to work with them and with IBM on an appropriate time to take
9 those.

10 THE COURT: Thank you, Mr. Hatch.

11 MR. HATCH: Thank you very much.

12 THE COURT: Counsel, I'm prepared to rule in this
13 matter.

14 Looking at this case individually on its particular
15 set of facts, I find that the subpoenas on January 26th gave
16 inadequate notice and also gave inadequate time for the
17 deponents to prepare.

18 I find that the subpoenas of January 12th were
19 defective both in substance and service and would have
20 constituted, even if not technically defective, would have
21 also likely provided inadequate notice in time to prepare.

22 I also note and find that the parties failed to
23 comply -- or SCO failed to comply with the meet-and-confer
24 requirement of the Northern District of California.

25 And finally, I find and will deny the motion of SCO

1 to allow these additional depositions, finding that the
2 requirements of the October 12th order were clear and could
3 not -- or were not the subject of unilateral decisions to
4 violate. It was clear. It said, to the extent that such
5 depositions could not be completed within that period of time,
6 they must be foregone.

7 And SCO should have noticed them up earlier and at
8 minimum overseen the preparation of those subpoenas such that
9 the argument would be that they were effective on
10 January 12th. Nonetheless, they weren't.

11 So that would be the ruling. And, Mr. Shaughnessy,
12 if you'll prepare an order as to that decision.

13 MR. SHAUGHNESSY: I will, Your Honor. Thank you.

14 THE COURT: All right. Now let's address the
15 remaining motion, which is the motion to compel. This is also
16 SCO's motion.

17 As I indicated -- Mr. McBride, let me ask you,
18 please, to pay attention here. I know you need to speak, but
19 it's distracting and it keeps us from moving forward.

20 Mr. Hatch, this is SCO's motion. As I indicated at
21 the bench before we began, I have some preliminary types of
22 questions that I would like to pose. They may address various
23 portions of the motion, but let me pose them first, and then
24 you may address them and make your argument.

25 MR. HATCH: I'll be happy to. Mr. James was going

1 to handle this part of this, but if you want to address
2 questions to me, I'll make an attempt, as well.

3 THE COURT: No, that's fine. I didn't know who was
4 going to handle them. Mr. James, if you're willing to, I will
5 do that. Do you want me to pose those questions now?

6 MR. JAMES: If that's Your Honor's preference,
7 sure.

8 THE COURT: All right. First, I'm on notice that
9 and it's been acknowledged today that IBM has made a recent
10 discovery production. I want to know what impact that
11 particular production may have on these motions to compel. In
12 other words, has it resolved anything? All right?

13 Specifically, what specific items is SCO still
14 seeking, and why do you need them?

15 Noting that at the outset of this case or prior to
16 its filing, it was expressed to the media and others that SCO
17 possessed evidence regarding the misappropriation of source
18 code. At this point, don't you have enough evidence to go
19 forward in that regard or, to be candid about it, does it
20 constitute fishing at this point?

21 If I were to grant your motion to compel, what
22 would be the effect upon the scheduling deadlines in this
23 case?

24 And then finally, if you will address in more
25 detail what information you have regarding the location in

1 North Carolina that you allege houses pre-1991 AIX source
2 code.

3 With those questions in mind, Mr. James, go ahead.

4 MR. JAMES: Okay. Thank you, Your Honor. And I'll
5 do the best I can to respond to your questions. I'm going to
6 try and weave my answers to those questions into --

7 THE COURT: I don't mean to mess up your argument
8 as you may have prepared for it, as long as you address those
9 questions at some point.

10 MR. JAMES: Thank you, Your Honor. And I
11 appreciate that.

12 There's been a suggestion that I heard for the
13 first time when counsel for IBM addressed the Court that
14 340,000 documents that have been produced were produced as a
15 result of a recent document request served by SCO on IBM. And
16 I find that to be a very, very curious assertion, Your Honor.
17 And the reason for that is you will see that we filed our
18 motion to compel on, I believe it was December 29th.

19 And if you look at the specific requests that we
20 address in that, you will see, Your Honor, that many of the
21 document requests for which we contend there has been
22 insufficient production dated back some into 2004, others in
23 2005. And you'll see in our memorandum, in particular our
24 opening memorandum, that we address those dates or gave those
25 dates to Your Honor. And so the suggestion I think to the

1 extent it was intended to indicate that all of these documents
2 were suddenly produced this late in response to or because of
3 a very recent document request is just unfair and inaccurate.

4 Now, Your Honor has asked, what impact does the
5 production have? And we do believe it moots many of the
6 issues. We're still attempting to complete our review of
7 those documents, however. And, in fact, IBM has represented
8 in its briefing that there will be additional documents
9 forthcoming in response to requests that we have made.
10 Therefore, it's a little bit difficult for me to stand before
11 Your Honor right now and tell you specifically what has been
12 mooted because that process of reviewing the 340,000
13 documents, while it has been a very intense and aggressive
14 process on our part, is not completed. And we are expecting
15 additional documents. But I think quite clearly a number of
16 the issues have been mooted.

17 And I guess, Your Honor, what I can say best in
18 that regard is while we hope not the need to come back on many
19 of the issues, there is some chance we may need to re-address
20 some more narrow issues based on when we're able to conclude
21 our document review. There were a few areas where we still
22 are very concerned. And based on the review that we've been
23 able to do, we believe that the document production is not
24 complete.

25 And, in fact, there has been some ongoing

1 correspondence recently between counsel in an effort to kind
2 of sort out what's still left in light of the recent
3 production. We have identified just recently several areas
4 that we think are still at issue that have not been produced,
5 and we've identified those to IBM. Those include IBM's global
6 market view database as it pertains to Linux and Unix. IBM's,
7 it's either FIWC or FIW-C database as it pertains to AIX.
8 IBM's IBC service tracker and documents evidencing the Linux
9 related financial materials that were copied to IBM senior
10 executives.

11 We think these documents, Your Honor, and this in
12 part I think goes in answer to the second question you asked
13 relating to evidence of misappropriation, many of these
14 documents, we believe, goes to the damages issue as opposed to
15 evidence of misappropriation. My understanding, and I'll
16 represent to the Court, is, yes, we do have evidence of
17 misappropriation of the source code.

18 I would say, though, in that regard that
19 irrespective of what quantity of evidence we may have or may
20 not have in that regard, to the extent there are relevant
21 documents in IBM's possession or control that go to that issue
22 that have been requested and not produced, they ought to be
23 produced because those are the rules of the game. And there
24 never comes a point, to my knowledge, in litigation where the
25 Court or a party says, you now have an enough. You don't need

1 any more, irrespective of whether the opposing party has
2 additional information or documents in that regard.

3 But again, Your Honor, many of the documents at
4 issue are damage-related documents that are unrelated to
5 misappropriation, although I'm going to talk a little bit
6 about misappropriation issues, a couple of issues still. And
7 so hopefully I've at least somewhat answered a couple of the
8 questions that Your Honor has asked.

9 We've talked about the Project Monterey. You've
10 heard about that, and we've talked about it. And IBM has now
11 come back and represented, as far as we can tell, that they've
12 given us everything. We're still reviewing the documents.
13 And if they've given us everything, then that's all we can
14 expect.

15 Again, however, we may be back, Your Honor, after
16 we complete our review and based on our review saying to Your
17 Honor, based on what we have found, we still think there's
18 this area missing. We hope that's not the case. But
19 certainly that issue has been narrowed. And IBM has made
20 representations that they believe they've now produced
21 everything within their possession and control on
22 Project Monterey. That's my understanding of it now.

23 With respect to documents predating 2001, let me
24 talk about that for a minute, because IBM has objected
25 routinely and imposed a 2001 deadline for producing documents.

1 And you'll see, Your Honor, we address that on Page 6 of our
2 reply memo. It's unclear to us where that 2001 deadline comes
3 from and why IBM feels it has the right to unilaterally impose
4 that deadline on us. In fact, our contentions are that IBM's
5 activities in breach of their agreements with SCO date back
6 before 2001 into the 1998 time frame.

7 In addition, you may recall that IBM is basically
8 in its counterclaim in this case asked the Court for a clean
9 bill of health with respect to all of its conduct relating to
10 Linux activities. Therefore, if there are Linux activities of
11 IBM that predate 2001 and IBM has documents that are
12 responsive to the documents we've asked for before 2001, they
13 ought to produce those documents.

14 Yet, IBM has routinely objected to the documents
15 saying that before 2001 for whatever reason that we don't
16 understand, the claim is irrelevant. And we don't think
17 that's appropriate. And if they have pre-2001 documents, they
18 ought to produce those documents relating to IBM's plans and
19 efforts to market, promote or advertise Linux-related products
20 and services.

21 So we think that is still an issue that's out
22 there, although again, we're continuing to review the
23 documents, and we're near completing that. And if there are
24 more specific areas, then we'll certainly call those to
25 Your Honor's attention.

1 Let me talk about the AIX versions prior to 1990,
2 and I think this is the area where Your Honor was referring
3 with respect to the location in North Carolina. IBM has told
4 us that they have now produced everything they have and that
5 they can't find certain pre-1990 AIX related documents.

6 And our position in that regard is if IBM has now
7 looked everywhere that they know of to look and looked in
8 areas where we've suggested that they look and are
9 representing to the Court that they don't have anything, then
10 we accept that representation. But we want to be absolutely
11 clear that that is IBM's position, that, in fact, they have
12 looked everywhere reasonable that both we've suggested and
13 they've suggested and that there are no more documents
14 responsive in that regard.

15 Again, we've been quite surprised that we get
16 340,000 documents this late in the game, many of which, even
17 according to IBM's contentions, moot our motion to compel.
18 And they clearly do.

19 THE COURT: Well, that raises this question, and
20 maybe I should have asked it sooner. Based upon that, should
21 this hearing be continued until such time as you have had the
22 opportunity to review those documents so that we can narrow
23 the issues and aren't wasting people's time today?

24 MR. JAMES: The answer to your question in my
25 opinion is yes. However, we didn't feel like we were in the

1 position, Your Honor, to ask for that continuance because we
2 were concerned that IBM would come and say the deadline is
3 over. You should have asked for this and done this sooner and
4 you didn't. And, therefore, you've lost the opportunity.

5 But I think you're absolutely right.

6 THE COURT: Well, let me ask Mr. Shaughnessy and
7 Mr. Drake to respond to that right now because there's no
8 point in us going forward.

9 MR. SHAUGHNESSY: Your Honor, respectfully, I think
10 this motion needs to be denied. I will --

11 THE COURT: The motion to compel?

12 MR. SHAUGHNESSY: The motion to compel needs to be
13 denied.

14 THE COURT: Well, I understand --

15 MR. SHAUGHNESSY: We don't need to have another
16 hearing after they've had more time to look at the documents.
17 They have had plenty of time.

18 THE COURT: When were those documents produced?

19 MR. SHAUGHNESSY: I'm not sure exactly what
20 documents counsel is referring to.

21 MR. JAMES: The 340,000 that you just produced.

22 THE COURT: The 340,000.

23 MR. SHAUGHNESSY: We produced, and I'm prepared to
24 explain to you in detail, the financial information that
25 apparently Mr. James is referring to and the two depositions

1 that they took with respect to that financial information and
2 the follow-up information that we provided in response to
3 their requests and the further information we provided as
4 early as Tuesday of this week and my conversation with
5 Mr. Normand yesterday on this very subject. There's nothing
6 to produce.

7 THE COURT: I want to be fair about this and hear
8 from both sides. So, Mr. James, go ahead.

9 MR. JAMES: Okay. Let me now just address, if I
10 could, Your Honor, and this is an area where we do not believe
11 documents have been produced based on what we've been able to
12 see and do so far, and that is we had requested that IBM
13 produce documents and, in fact, a witness relating to IBM's
14 interpretation of language used in AIX and Dynix licenses.
15 IBM's response has been, well, you can read those licenses.
16 You don't need to have anyone from our side testify and tell
17 you what we think those mean.

18 The reason those are important, Your Honor, is
19 because much or at least some of the critical language in the
20 AIX and Dynix licenses of IBM is very similar to the language
21 in the SCO licenses that are at the heart of this case. And
22 we have made a request through letter to IBM stating, IBM, if
23 it is your position that the language of your contracts is
24 clear and unambiguous and can be interpreted as a matter of
25 law by the Court, fine, we accept that.

1 Not surprising, IBM has not been willing to
2 acknowledge that that is the case. And we believe, Your
3 Honor, that we are entitled to have IBM's evidence on what the
4 language in their licenses that is very similar to the
5 language in the license in our case how they interpret that
6 language and what it means. It's clear relevant, yet IBM
7 stonewalls and refuses to produce anyone and says it is not
8 relevant. And that is just untrue. And I do not understand
9 how a party can claim that the language at issue in a license
10 agreement of their own that is very similar to the language at
11 issue in this case is irrelevant when we ask them how they
12 interpret that language.

13 Finally, let me just address briefly the
14 Chicago 7 issue. Chicago 7 is a group of seven companies.
15 They call it the Chicago 7 because they met in Chicago. We
16 received some documentation from IBM that very strongly
17 suggested that these were a group of companies dealing with
18 Linux and, in fact, that were talking about sponsoring a
19 company that would compete against SCO.

20 When we asked for a 30(b)6 deposition on that
21 subject, they agreed to produce a witness. They did produce a
22 witness, Karen Smith. However, IBM unilaterally limited her
23 deposition or narrowed her deposition to IBM's definition of
24 the topic and absolutely refused to allow Karen Smith to
25 testify or answer questions that went to our designation and

1 that went beyond the limited designation that IBM had
2 provided.

3 IBM does not have the right, Your Honor, to
4 unilaterally narrow or change our deposition topics. And
5 moreover, in the context of a deposition, an attorney does not
6 have -- it is improper to instruct a witness not to answer
7 based on the fact that allegedly the testimony being requested
8 goes beyond the narrowed subject provided by the firm or the
9 company that's being deposed.

10 And in this case, that's exactly what happened.
11 And we ought to have the right, Your Honor, to get the
12 documents and take whatever testimony is appropriate based on
13 our designation of the subject matter from a Chicago 7
14 witness, and that has not happened. And so that is still an
15 issue that remains.

16 Under the circumstances, it's a little difficult,
17 as I indicated, to tell you specifically what remains because
18 we're still reviewing the documents. And I agree if Your
19 Honor is suggesting we ought to be back that we can do this
20 more quickly and narrow it some. But based on those --

21 THE COURT: Answer the question, Mr. James, about
22 how long it would take you.

23 MR. JAMES: To complete? I think within a couple
24 more weeks we're done on our review.

25 Thank you, Your Honor.

1 THE COURT: Thank you.

2 MR. SHAUGHNESSY: Did Your Honor have questions,
3 specific questions that you want me to address?

4 THE COURT: I do.

5 MR. SHAUGHNESSY: Okay.

6 THE COURT: You allege that much of SCO's motion
7 relating to the 30(b)6 testimony is moot. What witnesses have
8 been designated, what topics have they been designated on and
9 when are the deposition dates?

10 Second question. When IBM renews its summary
11 judgment motion, is there any information which has not yet
12 been provided to SCO that IBM will use in support of its
13 motion? For example, let's say IBM does not produce any
14 documents related to IBM customers who migrated to Linux from
15 other operating systems. Is IBM, therefore, going to point to
16 SCO's failure to analyze this type of market information in
17 its support of summary judgment? Obviously what I don't want
18 is either side to use information that has been withheld in
19 support of a summary judgment motion or in support of their
20 case at trial, all evidence needing to be on the table for the
21 other party to analyze and take a look at.

22 Will IBM file an affidavit stating that they will
23 not use information that has not been provided to SCO in
24 support of its motion for summary judgment or at trial?

25 Third question. Previously I ordered IBM to

1 produce all versions and changes to AIX and Dynix. This
2 included the code found within the CMVC and RCS system. But
3 does IBM have a depository containing pre-1991 AIX source code
4 anywhere else? This goes to that issue of a possible location
5 in North Carolina. In other words, is IBM prepared to file an
6 affidavit saying it's produced all versions and changes to AIX
7 and Dynix pursuant to this Court's order, whether or not the
8 code is found in CMVC or RCS?

9 Fourth, IBM recently subpoenaed Hewlett-Packard,
10 Sun, Microsoft and Baystar Capital. How does the information
11 that you are seeking from these parties differ from SCO's
12 request for testimony to test the credibility of IBM's
13 interpretation of the Unix license? Aren't you seeking to
14 test the licenses between those entities in the hopes to
15 defend its own licensing activities from SCO?

16 And those are the questions posed.

17 MR. SHAUGHNESSY: Thank you. Thank you, Your
18 Honor. That is helpful.

19 I think what I'd like to do, Your Honor, if I may,
20 is give you a little bit of background on what I think is the
21 big issue that is before the Court, and that has to do with
22 the financial information that SCO has requested and that IBM
23 has produced that I really think is at the heart of this
24 motion, at least of the motion that was originally filed.

25 Your Honor, IBM spent months, literally months

1 collecting documents regarding IBM's revenue, expenses and
2 profits for AIX, Dynix and Linux. That is the heart of the
3 motion as it was filed. And even in the reply memorandum that
4 was filed, that is really the heart of the motion. An
5 individual at IBM, William Sandve, headed up that effort along
6 with a number of consultants and attorneys who are involved.
7 Mr. Drake from my office was involved in that effort. We
8 gathered -- Mr. Sandve himself spoke with more than 80 IBM
9 employees to gather information and documents. We gathered
10 documents and information from across all of IBM's brands and
11 divisions. We gathered documents and information from a
12 variety of IBM financial marketing databases. Mr. Sandve,
13 consultants and others spent over 1,000 hours talking to
14 people, collecting information, putting the documents together
15 and putting the documents together in an organized fashion so
16 they would be easily understandable to SCO.

17 After they had been collected, we produced to SCO
18 more than 23,000 pages of documents responsive to these
19 requests. We produced with these 23,000 pages of documents
20 summaries and overviews, sort of a higher level view of the
21 information, and then all of the supporting and backup
22 information behind all of those numbers.

23 We then agreed -- SCO had asked for a 30(b)6
24 deposition on this subject. We agreed to put up Mr. Sandve
25 for that deposition, the purpose of which was to have

1 Mr. Sandve sit down and explain to SCO the information,
2 explain to them what was there, what it means, where it came
3 from, all those sorts of issues. We shipped sets of these
4 documents down to Austin for Mr. Sandve's deposition. We
5 prepare detailed summaries and indices of all of this
6 information so that if a question was asked, you know, about P
7 series revenue in a particular year, we would have an index
8 with the Bates number so we could go right to that page of the
9 document and show them exactly what it is we're talking about.
10 Mr. Sandve himself spent 300 hours in this effort.

11 Mr. Sandve appeared at his deposition. Mr. Drake
12 defended his deposition. We were prepared, Mr. Sandve was
13 prepared to walk SCO through that information to make sure
14 they understood it, to make sure that it was complete, to make
15 sure that there were not things that they said that we had not
16 produced. That was purpose of the deposition. Mr. Sandve
17 spent an entire day with SCO's lawyers, the purpose of which
18 was to explain to them this information.

19 Now, the reality, unfortunately, as it turned out
20 is that SCO's lawyers seemed to have no interest whatsoever in
21 the financial information of the documents. They had no
22 interest in having him explain these documents and how they
23 work and the indexes and everything so they would have a full,
24 thorough understanding. And they spent all day talking about
25 other issues. They get to the end of the day and they said,

1 this is unfair. You've given us all of these documents at his
2 deposition. We haven't had time to review them.

3 We disagreed. We said, we think that was the
4 purpose of this deposition, was to have this witness available
5 so that he could explain these documents to you. But
6 nevertheless, we'll put him up again. We'll allow you to take
7 his deposition again. So Mr. Sandve's deposition was taken
8 for a second day, Tuesday of this week.

9 Shortly before his deposition, SCO, one of the
10 lawyers for SCO, not Mr. Hatch or Mr. James, wrote a letter to
11 me in which they said that 24,000 pages of documents were
12 unusable. It was too much. How in the world are they
13 supposed to be able to understand 24,000 pages of documents?
14 We should produce it to them in electronic form, and we should
15 give it to them by February 17th.

16 On February 17th, we delivered it to them that same
17 information, all of those documents in electronic form,
18 exactly as they requested. They sent another letter. They
19 said there were other issues that they thought that we needed
20 to follow up on in connection with Mr. Sandve's deposition.
21 We tracked those down, spent substantial amount of time doing
22 that, tracking all of those issues down, gathering up all of
23 this information and sending it down so that Mr. Sandve would
24 be prepared to deal with all of these issues at his deposition
25 earlier this week.

1 He spent another full day in his deposition, again
2 prepared to walk SCO through all of this information to make
3 sure their lawyers understood, to make sure that they
4 understood that it was thorough, to make sure that they
5 understood the basis and rationale, how the information was
6 put together, how it answered all of their questions.

7 Your Honor, we spent an extraordinary amount of
8 time and money and resources in collecting this information,
9 producing this information to them. Now I want to contrast
10 that, if I may, Your Honor, with what we got from SCO on the
11 same subject.

12 We asked SCO for similar kinds of financial
13 documents. They delivered the documents to us, and they
14 delivered the documents to us in electronic form. We asked
15 for a witness, similar 30(b)6 witness, Mr. Hunsaker.
16 Mr. Hunsaker, it turns out, had spent less than an hour
17 talking to other people about the subject of his testimony.
18 Mr. Sandve spent hundreds of hours. Mr. Hunsaker, it turned
19 out had maybe talked to a couple people in total. Mr. Sandve
20 personally talked to more than 80 people to prepare for his
21 deposition.

22 Mr. Hunsaker's most consistent answer during his
23 deposition was, I don't know. You really have to ask Mr. X.
24 So when we would ask, did you talk to Mr. X about this? No, I
25 didn't.

1 Your Honor, that is the contrast between the
2 lengths to which we have gone to answer their questions as
3 opposed to what we have gotten from SCO in return on the exact
4 same subject.

5 Now, with respect to this motion and the issues
6 before this motion, I began having conversations with
7 Mr. Normand a week ago today on the subject of this motion,
8 what was at issue on this motion, did we really need to have
9 this motion, because in our view we had produced all of this
10 information. I don't mean to disadvantage Mr. James because
11 he was not involved in those calls. But we started having
12 those conversations. And we had those conversations precisely
13 because I needed to understand from him what was at issue.
14 Why are we appearing at this hearing on Friday? What's at
15 issue? Tell me what it is that you claim that we haven't
16 produced.

17 We had conversations every couple of days on this
18 subject, and every couple of days the answer was, I don't
19 know. The last time we spoke was yesterday morning. We had
20 the same conversation again. I asked Mr. Normand, why are we
21 appearing at this hearing? We walked through their reply
22 memorandum category by category by category by category. I
23 explained to Mr. Normand how we had responded, how we had
24 produced all the documents responsive to each category, how
25 Mr. Sandve in his deposition was prepared to give SCO whatever

1 additional information they may need with respect to all of
2 these categories.

3 And as of yesterday morning, Mr. Normand, and I
4 posed the question to him, what's missing? Why are we
5 appearing at this hearing tomorrow? What's missing? His
6 answer to me yesterday morning was, I don't know. I don't
7 know. I don't know what it is that we're going to go before
8 the Court tomorrow and ask Judge Wells to order. I don't
9 know.

10 Now, the second reason I started having these
11 conversations with Mr. Normand, Your Honor, was I was
12 concerned I was going to get sandbagged at this hearing, that
13 I was going to show up with no idea what it is that SCO was
14 complaining about and here for a hearing for the first time
15 that IBM has supposedly not produced. That was my other
16 reason for having these conversations.

17 So last night at 7 o'clock, I get an e-mail from
18 Mr. Normand and again an e-mail at 10 o'clock this morning.
19 And he identifies in this e-mail, Your Honor, these very four
20 items that Mr. James has just mentioned in his arguments.
21 This e-mail is the very first time, very first time we are
22 ever told that these items have not been produced, that these
23 items are missing from our production, that these items are
24 the subject of a motion to be heard the next day. And quite
25 frankly, Your Honor, there was no attempt by counsel for SCO,

1 and I fault Mr. Normand, not Mr. James, there was no attempt
2 by him despite my repeated requests to meet and confer with me
3 about the claimed deficiencies in IBM's production.

4 THE COURT: Let me stop you for a minute and say
5 something, and that relates to the communication issues
6 between counsel. We have different counsel appearing at
7 different times. We have counsel located in different areas,
8 and that's for both parties. And I don't have a great deal of
9 patience with an excuse that is based upon lack of
10 communication between parties or counsel for either side. You
11 are expected to know what your other counsel is doing and
12 saying. And I think that's been a problem in the past. And
13 as I indicated, I don't have a great deal of patience with
14 counsel who come before the Court who may not be aware of what
15 other counsel have said or done.

16 MR. SHAUGHNESSY: And, Your Honor, I should tell
17 the Court, I have a very good working relationship with
18 Mr. Normand.

19 THE COURT: I'm not saying that.

20 MR. SHAUGHNESSY: A tremendous amount of respect
21 for him.

22 THE COURT: I'm just indicating --

23 MR. SHAUGHNESSY: Tremendous amount of respect for
24 these counsel.

25 THE COURT: -- that counsel for both sides are

1 expected to have communicated fully and be prepared to make
2 representations that are known to all.

3 MR. SHAUGHNESSY: Okay. I appreciate that, Your
4 Honor.

5 But my problem is that I have been trying for some
6 time to find out what it is that is supposed to be the subject
7 of this hearing so that we can intelligently address you. And
8 I said, you know, earlier in the week, I said, look, if there
9 are items that are not on the table, we need to let the Court
10 know so the Court doesn't spend time reading briefs and
11 looking at issues that aren't really ripe, that aren't really
12 before the Court. And, you know, I understand everybody in
13 this case, myself included, have been extraordinary busy with
14 respect to not just these issues but any number of issues in
15 this case.

16 But the bottom line, Your Honor, is that we have
17 produced the documents that they have requested that are
18 sufficient to tell them all of the information they need with
19 respect to revenues, expenses and costs, the very thing that
20 is the heart of this motion today.

21 THE COURT: Now, you indicated earlier that you
22 produced documents in a timely fashion pursuant to their
23 request for documents. When were those produced? This
24 340,000 page submission that we're talking about, how long ago
25 was that produced?

1 MR. SHAUGHNESSY: I don't have the exact timing,
2 Your Honor. And I hope I was clear when I mentioned this
3 before. It is not my understanding, and I hope I didn't
4 represent to the Court, that each of those 340,000 pages were
5 documents that were produced in response to the set of
6 discovery requests that they had served 30 days earlier.

7 THE COURT: What I'm trying to find out is how much
8 time has SCO had to review the submissions that do not allow
9 them -- and, Mr. James, you answer this -- that doesn't allow
10 you to narrow the issues today? So he can answer that if you
11 don't know, Mr. Shaughnessy.

12 MR. SHAUGHNESSY: Okay. And all I can say on that
13 particular subject is that the document productions that were
14 going on in the month of January were document productions
15 that were responsive to, you know, document requests that they
16 had just served. We were also -- and they understood this
17 because we had a lot of discussions about it. We were
18 also supplementing our prior discovery, as we are required to
19 do. So we were in the process of supplementing our prior
20 discovery and producing that information to them. And in
21 addition, we produced to them these financial documents, this
22 financial information.

23 So the problem, Your Honor, is that I find out last
24 night at 7 o'clock for the first time about these four
25 databases that they contend should have been produced, which

1 I've never heard about before, which is not in a brief before
2 you, which we've not had an opportunity to address, for which
3 there's been no meet and confer. And the argument really is
4 ironic because I don't hear and have not heard SCO argue even
5 in the papers that they filed and in Mr. James' comments
6 today, I don't hear SCO arguing to you that, we don't have
7 information that we need to prove our claims. They don't
8 argue that in the brief that they filed about, you know, we
9 need this information. They don't say, we need this
10 information because we can't prove damages, or, you haven't
11 adequately told us what your revenues and expenses and profits
12 and all of those things are.

13 We certainly and clearly have done that, Your
14 Honor. We have given them that information in excruciating
15 detail in documents, in summaries, in indices, in witnesses,
16 in every way imaginable that I can think of. SCO is instead
17 arguing that they simply want more. They simply want more
18 documents. They want more databases. They want us to produce
19 documents from these databases.

20 I mean, Mr. James did not mention during his
21 argument this issue of transaction level data, which occupied
22 so much of their brief. I'm assuming based on his failure to
23 discuss that today that SCO is not asking us to produce
24 transaction level data. If that's not the case, Your Honor,
25 then we need to discuss that, because the reality is, as I

1 think my affidavit explains, and I won't go through it again,
2 but the reality is producing that transaction level data would
3 present a problem of enormous magnitude in this case. I
4 can't, Your Honor, even tell you how long that would take.

5 THE COURT: Well, I've noticed how long it took to
6 address it in the brief, so I think I understand on some level
7 the magnitude.

8 MR. SHAUGHNESSY: The magnitude is huge. Mr. James
9 has not addressed it, so I'm assuming that issue is off the
10 table.

11 The point, Your Honor, is we have given them the
12 information that they've asked for. We've given it to them.
13 We made it simple for them. We've given them witnesses to
14 help explain the information. And I am at a loss as to why
15 we're here this close to the end of the case with SCO saying,
16 we really haven't had enough time to look at it. We really
17 don't know what we want.

18 It would appear, Your Honor, that this motion to
19 compel was filed simply as a place over. They filed a motion
20 to compel. They included a whole bunch of broad categories,
21 and then they were going to decide at some point down the line
22 what it is that supposedly hadn't been produced.

23 And what I'm hearing today suggests to me that is
24 exactly what is going on. What they want to do is have this
25 motion to compel hanging out there as a place holder so that

1 they can come back to you at some point in time and ask you to
2 fish through, to order us to produce something so that they
3 can fish and get more information.

4 I think if you're going to bring a motion to
5 compel, you bring a motion to compel because you are able to
6 identify information that has not been produced. And you
7 respond to it, and the information is either produced or not
8 produced. I don't think you float a motion to compel out
9 there as a place over so that you can later on raise various
10 challenges to it.

11 I understood that Mr. James and SCO were abandoning
12 most of the other topics that were the subject of the motion
13 to compel. He talked about Project Monterey materials. We
14 have informed SCO that we have produced documents concerning
15 the process, procedures and guidelines for making a GA and
16 PRPQ release of a product, which is what they asked for.
17 That's what we produced to them. And SCO in its reply
18 memorandum concedes that with that representation, the motion
19 is over with respect to that issue. On that basis, I'm
20 assuming that issue is dead.

21 They asked about pre-2001 Linux marketing
22 materials. Mr. James briefly mentioned that. In our view,
23 Your Honor, documents before 2001 are totally irrelevant.
24 Documents after 2001 on this particular subject are
25 irrelevant. Nevertheless, we have conducted a reasonable

1 search for Linux marketing materials. We have produced
2 thousands of pages of materials, and we have produced
3 documents that predate 2001. And we know that SCO has them
4 because they have used them in depositions. They have marked
5 them as exhibits in depositions and asked witnesses questions
6 about them. So they have the information. In our view, that
7 is a dead issue.

8 Pre-1991 AIX source code. I want to make sure I
9 answer all of the Court's questions in this regard to the
10 extent I am able to do so.

11 THE COURT: And I'm basing that question on the
12 previous order which required IBM without limit to provide it.

13 MR. SHAUGHNESSY: They do, Your Honor. And without
14 getting into too much detail, if I can summarize for you what
15 we've done.

16 We have produced to SCO the CMVC database and the
17 equivalent RCF database, which is the database for the Dynix
18 operating system. That endeavor, as I think I have explained
19 in an affidavit I filed with the Court, involved 400 employees
20 and 4,000 hours of work. That database goes back to 1991.
21 The database does not go back further than that. That's when
22 the database begins. We have made an exceedingly reasonable
23 and thorough search for pre-1991 source code to see if it
24 exists anywhere.

25 SCO has asked for a 30(b)6 witness to testify on

1 this subject. She has had her deposition taken. SCO has been
2 able to ask her every question they could think of about
3 pre-1991 source code, where it could possibly be. We've made
4 an effort to look for it.

5 Your Honor, you need to understand that by the time
6 this lawsuit was filed in 2003, this source code had been
7 obsolete for more than a decade. This was not information
8 that IBM, and certainly SCO has never suggested that there is
9 any standard, any rule, any regulation, anything that required
10 IBM to keep decades of old obsolete material lying around
11 somewhere.

12 Now, I received a letter from Mr. Normand on this
13 subject. Mr. Normand told me, has IBM checked these data
14 recovery centers located in various parts of the country? In
15 response to that letter, we checked. We looked into these
16 data centers. These data centers don't really keep IBM data.
17 They tend to keep customer data, and they don't keep source
18 data, but we checked. We did what they asked. We went out
19 and looked.

20 THE COURT: Is that North Carolina?

21 MR. SHAUGHNESSY: No. The North Carolina is a
22 different issue.

23 But we checked these data recovery centers. We
24 told them what we found. We gave them a detailed explanation
25 of what these recovery centers are, why they don't have any

1 information, why we weren't able to find it.

2 And during the deposition of Ms. Thomas,
3 Joan Thomas, who was the witness on the issue of pre-1991
4 source code, she testified at length about all the work she
5 had done to try to find, all the people she talked to,
6 everyone she'd gone to, people who were involved in the
7 project, everyone she could think of that may have an idea of
8 where this information is, was unable to find anything.

9 There was a period of time when the AIX source code
10 was stored on a mainframe computer in Austin. And as I
11 recall, Your Honor, don't hold me to this that closely because
12 I wasn't actually at her deposition, but my recollection is
13 that during her deposition she testified that she was aware
14 that one of the mainframes or computers or some of the
15 mainframe computers that could possibly have at one time had
16 AIX source code on it had been moved from Austin to Raleigh,
17 North Carolina; the actual hardware, the iron had been moved
18 from Austin to Raleigh, North Carolina. She testified in her
19 deposition, I believe, that she had no idea whether the AIX
20 source code was on those machines at the time that they were
21 moved. She simply knew that those machines had been moved.

22 SCO raised this issue. Have you looked in
23 North Carolina? We have. We have attempted to determine, my
24 understanding, our best estimate -- our best understanding is
25 that the AIX source code was removed from those mainframes and

1 put on other computers before those mainframes were ever moved
2 to Raleigh, North Carolina. But even if it had been on those
3 mainframes when they were moved to Raleigh, North Carolina,
4 the actual disk drives, the disks that the material would have
5 been on would by now be basically obsolete and unusable. So
6 that even if they had been on them and they had been
7 transferred, there simply is no plausible reason to believe
8 that they would still be there.

9 Now, you know, can I stand here and tell you that
10 IBM has checked every single computer of every single employee
11 in every closet in every single IBM location in 160 countries
12 in the world, all 320,000 people? No, I can't. We haven't.
13 We're not required to do that. We have done more than what is
14 required to rule out the possibility that this pre-1991 source
15 code may be somewhere.

16 Does the Court have questions about that? Is there
17 anything I can help you with on that subject?

18 THE COURT: No. Thank you, Mr. Shaughnessy.

19 MR. SHAUGHNESSY: All I can say, Your Honor, is we
20 have tried very, very hard to make sure that we have followed
21 up on issues, issues we think are kind of crazy, but they
22 raised these issues. We followed them up. We give them the
23 information. We tell them what we found. And in this case,
24 we followed up. We have not been able to find something that
25 was 10 years obsolete before this lawsuit was ever even filed.

1 30(b)6 topics. As I understand Mr. James'
2 argument, the only 30(b)6 -- strike that. He is raising
3 issues with respect to 30(b)6 topics. Let me deal first with
4 this Chicago meeting that Mr. James references. He said a
5 whole bunch of things about the Chicago meeting. And again, I
6 apologize, because this is a conversation I had with
7 Mr. Normand to which Mr. James was not a party, yesterday.
8 Mr. Normand told me yesterday that if this July 7 meeting
9 about which IBM's witness testified was the only meeting that
10 occurred, then in his view, there was nothing further to
11 pursue, and this motion was a dead letter. That's what he
12 told me yesterday.

13 I've gone back. I've checked Ms. Smith's
14 deposition. I've got a copy of it here. She testified in her
15 deposition that this was the meeting, this was the only
16 meeting with this particular group of people on this
17 particular subject. So that the Court understands the context
18 here, SCO has somehow got in its mind that these people all
19 got together with the idea that they were going to meet and
20 talk about SCO.

21 What Ms. Smith testified to is, yeah, these people
22 got together. SCO never came up. No one ever mentioned SCO,
23 and they never got together again.

24 They've had a 30(b)6 witness testify on the
25 subject. They've asked her questions. Your Honor, when the

1 lawyer who was asking those questions, after she had gone
2 through everything that Karen Smith could possibly have
3 testified about with respect to this meeting including whether
4 there were follow-up meetings, she concluded by saying, that's
5 all the questions I have. She didn't say, as Mr. James says
6 now, look, I'm reserving my right to bring you back because I
7 think you've improperly interpreted the context, or, I think
8 you have not answered questions you should have answered.
9 None of those kinds of questions. She concluded her
10 examination at the deposition, and she said, that's it. I'm
11 done.

12 Mr. Normand told me yesterday that if there was not
13 a follow-up meeting to this July 7 meeting, this was not an
14 issue. This is a dead letter. It is over with. There was
15 nothing, Your Honor. There is nothing to talk about with
16 respect to this issue.

17 Finally, Your Honor, this issue of interpreting AIX
18 licenses and putting up 30(b)6 witnesses to talk about AIX
19 licenses. Now, just so that the Court is clear on this, what
20 SCO would like IBM to do is to put up a witness to talk about
21 IBM's AIX license agreements with companies other than SCO,
22 license agreements that don't have anything to do with the
23 claims -- license agreements that are not part of this case.
24 There's no claim in the case that relates to any of these
25 license agreements.

1 But the problem, Your Honor, is broader than that,
2 because they don't tell us what contracts they're talking
3 about. They don't identify for us, we want you to put up a
4 witness to talk about this contract with this date with this
5 company. I mean, we can't even begin -- I don't even know how
6 we could even begin to designate a witness to talk about a
7 contract that SCO hasn't even bothered to tell us what it is.
8 Beyond that, Your Honor, they haven't bothered to tell us what
9 provision in what contract they're interested in having
10 someone talk about.

11 It is impossible, Your Honor, for us to identify
12 and to prepare a witness to talk about something on such a
13 vague and morphas topic. Rule 30(b)6 requires a party to
14 describe with reasonable particularity what it is the witness
15 is required to testify to. They haven't done that. But more
16 importantly, Your Honor, this is not, the testimony that they
17 seek in this context is not a proper subject of Rule 30(b)6
18 testimony, and SCO has conceded that earlier in this case.

19 SCO propounded almost the same 30(b)6 topic on IBM
20 asking IBM to designate a witness to testify about the
21 contracts that are at issue in this case, not these unrelated
22 contracts, but actually the contracts that are at issue in
23 this case. We objected. We said, that's not an appropriate
24 30(b)6 topic. If you want to take the depositions of the
25 people who signed those contracts or negotiated those

1 contracts, you can do that. But you can't take a 30(b)6
2 deposition on the company's interpretation of a contract.

3 We raised the objection, and what did SCO do? They
4 abandoned the topic. They did not further pursue it. They
5 haven't further pursued it since that time.

6 Your Honor, I fail to understand how SCO could
7 possibly say that we should be required to put up a 30(b)6
8 witness to talk about contracts that are not at issue in this
9 case and that have nothing to do with this case when they have
10 not required us to put up a 30(b)6 witness to talk about the
11 contracts that are at issue in this case. It's not a subject
12 that's appropriate for 30(b)6 testimony.

13 Now, let me just look and make sure that I've
14 answered, I've answered your questions.

15 With respect to producing documents, I believe that
16 parties are required to produce documents before they rely on
17 them at summary judgment or at trial. That runs both ways.
18 Parties can't come up -- parties can't intentionally withhold
19 a document and then suddenly parade it up and say, here you
20 go. We win.

21 We have absolutely no intention of doing that. We
22 assume that SCO has no intention of doing that. They're bound
23 by the same standards.

24 The only other item that you mentioned, Judge, that
25 I want to make sure we address and Mr. James didn't, but you

1 talked about this list of customers who moved from Linux to
2 other operating systems. I don't know if that's an issue
3 still. Mr. James hasn't talked about it.

4 The short answer to that, Your Honor, is that IBM
5 does not systematically maintain that kind of information. We
6 don't systematically maintain information that says, okay,
7 this customer bought this particular product. And in doing
8 so, they move from something else. So we don't have the
9 ability to give them a list of these customers and the
10 products from which they moved.

11 So that's the short answer to that particular
12 issue. We've given them the information that we can. They've
13 identified customers who moved to Linux. They're welcome to
14 call those people. They're welcome to depose those people and
15 they can ask them. But we can't be asked to create something
16 we don't have the data to create.

17 Thank you, Your Honor.

18 THE COURT: Thank you, Mr. Shaughnessy.

19 Go ahead, Mr. James.

20 MR. JAMES: I'll be very brief, Your Honor. Let me
21 just hit on a couple things, if I could.

22 Counsel has indicated he doesn't know why we're
23 here, that it's unclear to him what's still at issue. And
24 that's something we have struggled with because, Your Honor,
25 we filed our motion. We outlined the areas that we think are

1 at issue. We tell you the document requests where we don't
2 think we've had documents produced. Soon thereafter, and my
3 understanding is the last week of January in answer to your
4 question about when the majority of these documents were
5 produced, we get 340,000 documents. And we're diligently
6 going through those.

7 And IBM tells us in their opposition memorandum,
8 Your Honor, we've now produced a lot of the documents, of
9 additional documents, and we anticipate producing even some
10 additional documents that we haven't seen yet. And as a
11 result, the great majority of the complaint that SCO has is
12 mooted.

13 And I've tried to be candid with Your Honor, and
14 I've indicated that may be the case. Many of the areas we
15 believe likely are mooted. The problem that we have is we
16 don't know yet if there are still some clear areas that aren't
17 mooted. And we think it is a bit unfair for IBM to come in
18 and say, hey, now we've produced all of these documents, and
19 it is a moot issue, and you ought to just deny their motion
20 across the board, because we're diligently looking through
21 those documents, and if there are areas where documents that
22 should have been produced and they haven't been, we want the
23 right to be able to address those issues with Your Honor, and
24 we anticipate doing so.

25 That's why I feel like I'm put at somewhat of a

1 disadvantage when they come in and say, Gees, they can't even
2 tell us now after all of these discussions over the last
3 couple weeks specifically what's still at issue --

4 THE COURT: Let me ask you this, though. You've
5 indicated four areas that you said they have not provided
6 discovery. But how do you know that if you haven't gone
7 through everything?

8 MR. JAMES: There are four areas we think they have
9 not produced based on --

10 THE COURT: You're not even sure of that?

11 MR. JAMES: We're not 100-percent certain, because
12 originally, Your Honor, when you do these huge document
13 reviews, you try to take an initial cut and get a sense of
14 what's there. But it is just a gross review of the documents.
15 And then you go from that. You do your detailed review, and
16 we're doing that. And as I indicated, my understanding is
17 we'll complete that in a couple more weeks. And that's why
18 it's very, very difficult for us to be able to still come in
19 and say in response to IBM's response, it's all moot because
20 we produced all of this stuff now, for us to say, we agree or
21 disagree.

22 And we have pointed out several areas, Your Honor,
23 where we are concerned. Now, it's an interesting thing. And
24 I suppose maybe where I can hit the nail most closely on the
25 head, perhaps, is to just talk for a moment about a statement

1 that the Honorable Magistrate Boyce frequently used in
2 response to these type of arguments. And I heard it. It was
3 used on my behalf, and it was used against me by him on a
4 number of different occasions. And what he would say is,
5 unless the burden of producing the documents requested exceeds
6 the effort required to clean the -- and I'll slaughter the
7 word -- the Augean stables, you know the Hercules myth,
8 produce the documents.

9 THE COURT: He had a tendency for animal analogies.

10 MR. JAMES: He did.

11 And, Your Honor, what this is about is not what IBM
12 has done, and they stood up and told you everything they've
13 done and we could stand up and tell you everything we've done.
14 The issue is, are there relevant documents in this case within
15 IBM's possession and control that we've requested that they
16 haven't produced? That's what we're trying to get at.

17 There is no point that I'm aware of in discovery
18 where you say, well, we may have another 10,000 documents that
19 are relevant that we can produce to you reasonably. But
20 because we've already given you a whole bunch, we don't need
21 to give those to you. And, Your Honor, that is what I think
22 I'm hearing.

23 Your Honor asked the question, with respect to the
24 pre-1991 AIX versions. Can you submit or sign an affidavit
25 that says you've made your searches, and it doesn't exist as

1 far as you can tell?

2 You know what, if they'll just provide that
3 affidavit, we're happy. That's all -- all they can do is what
4 they can do. But telling you what they've done doesn't answer
5 the question about what they haven't done.

6 And on the Chicago 7 -- and, Your Honor, I'm
7 sensitive to Your Honor's comments about knowing what counsel
8 has discussed, and I apologize for not knowing exactly the
9 content of the conversation that apparently occurred
10 yesterday.

11 My understanding with respect to the Chicago 7
12 issue is, again, our request went to, we want to know what
13 discussions have occurred among that group relating to
14 Linux-related activities, AIX-related activities, SCO and a
15 couple other things.

16 THE COURT: But when you had the opportunity to
17 address that during the deposition, it apparently was not
18 addressed.

19 MR. JAMES: No. My understanding was different.
20 Maybe I misunderstood what Mr. Shaughnessy said. What I
21 understood him to say, and, in fact, what my understanding is
22 when it was attempted to be addressed during the deposition,
23 that line of questioning was cut off with an objection, we're
24 not going to allow the witness to answer those questions. And
25 then at the end of the deposition, the lawyer for SCO asking

1 the questions did not say, we want to come back and reserve
2 this and keep it open. And I view that as two very different
3 issues, Your Honor.

4 THE COURT: All right.

5 MR. JAMES: Let me lastly say, and then I'll sit
6 down, that the standard that governs obviously in this case is
7 Rule 26, and that is, do they have documents that are relevant
8 or may lead to the discovery of additional relevant documents?
9 We're concerned about some areas. But because of what I've
10 talked about at length before, I can't answer that question
11 entirely, other than the areas I've hit. And I don't know
12 what more I can say about that.

13 THE COURT: How can I order them to provide
14 something that they say they've already provided but you don't
15 know if they've provided?

16 MR. JAMES: Well, and that's the point, Your Honor.
17 Your Honor indicated at the start, and when I started, are we
18 going to be back here in some period of time to address
19 anything that's still out there? And my response was, in
20 fact, we probably should in light of the very late production
21 of documents that they provide.

22 THE COURT: Wasn't that, as Mr. Shaughnessy said,
23 didn't that comport with your timeline for request of those
24 documents?

25 MR. JAMES: No, Your Honor. And the reason I say

1 that is because if you look at our motion to compel and look
2 at the document request that are at issue, many of those
3 document requests date back to 2004. And they didn't produce
4 those documents until the last week of January in this case.
5 And then they come in and say, hey, we've now produced all of
6 these documents. It's moot. Accept our representation.

7 THE COURT: Let's address this issue that is of
8 some concern to me, and that is that your motion to compel is
9 dated December 29, before the due date of some of those
10 documents. How do you address Mr. Shaughnessy's argument that
11 this motion was intended as a place over?

12 MR. JAMES: Because my response is when you look at
13 the documents that we complain about in our motion to compel,
14 those documents or those requests, areas where we specified
15 our motion address document requests, not that we're served
16 two or three days later, but were served months and months and
17 maybe over -- well over a year before the motion to compel was
18 filed.

19 If Your Honor has any other questions, I'll do my
20 best to answer them.

21 THE COURT: I do not. What I would intend to do
22 now, Mr. Shaughnessy, unless you have something in particular
23 you want to address, is I'm going to take a recess and decide
24 how to address these issues. Do you have anything you want to
25 say?

1 MR. SHAUGHNESSY: That's fine, Your Honor.

2 THE COURT: All right. We'll be in recess for a
3 few moments. And let's see if Judge Kimball has gone home or
4 we need to go somewhere else.

5 (Recess.)

6 THE COURT: I'm going to rule now on the motion to
7 compel.

8 And I'm going to deny SCO's motion to compel at
9 this time. I'm going to deny that without prejudice. And I'm
10 going to allow you 30 days in which to file a renewed motion.
11 Should you file such a renewed motion, however, it must
12 clearly and narrowly define those areas which are not
13 addressed in the documents that you've been presented and
14 which cannot be resolved through some additional
15 meet-and-confer requirements. All right?

16 MR. SHAUGHNESSY: So then will the motion then be
17 limited to this production in January and the deficiencies --

18 THE COURT: Yes. Yes.

19 Are there any other questions that need to be posed
20 or should be posed and answers given, or is that clear?

21 MR. SHAUGHNESSY: I think that's clear. Would you
22 like me to prepare an order on that, as well?

23 THE COURT: Yes. Yes.

24 MR. JAMES: I'm sorry, Your Honor. If you don't
25 mind, I want to make sure that I'm absolutely clear because I

1 don't want to have any quarreling, I suppose, with opposing
2 counsel about issues that may come up as far as relating to
3 the January production. And that is, there are a number of
4 issues that we have already identified in our motion but that
5 I wasn't able to clearly articulate whether they're satisfied
6 or not because I haven't been able to -- you know, we haven't
7 completed our review. We'll be able to raise those issues,
8 won't we, if we can narrowly address them?

9 THE COURT: Yes.

10 MR. JAMES: Okay. Thank you.

11 THE COURT: Is that understood?

12 MR. SHAUGHNESSY: So then it's whatever items that
13 are in the motion, the currently pending motion, if any?

14 THE COURT: Yes.

15 MR. SHAUGHNESSY: And then deficiencies in the
16 January production?

17 MR. JAMES: That's my understanding.

18 THE COURT: Yes. And that's what I intended.

19 MR. SHAUGHNESSY: And I expect the Court would
20 require the parties to meet and confer, obviously before that
21 motion is filed.

22 THE COURT: Yes. I'm going to require that.

23 All right. Is there anything further we need to
24 address this afternoon?

25 Thank you, counsel. We'll be in recess.

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MR. JAMES: Thank you, Your Honor.

MR. SHAUGHNESSY: Thank you, Your Honor.

(Whereupon, the court proceedings were concluded.)

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1 STATE OF UTAH)
2) ss.
3 COUNTY OF SALT LAKE)

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

6 That as such reporter, I attended the hearing of
7 the foregoing matter on March 7, 2005, and thereat reported in
8 Stenotype all of the testimony and proceedings had, and caused
9 said notes to be transcribed into typewriting; and the
10 foregoing pages number from 1 through 42 constitute a full,
11 true and correct report of the same.

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

14 And hereby set my hand and seal, this ____ day of
15 _____ 2005.

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KELLY BROWN HICKEN, CSR, RPR, RMR