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

THE SCO GROUP, INC.)
)
)
 Plaintiff/Counterclaim-Defendant,)
)
)
 vs.)
)
)
 INTERNATIONAL BUSINESS MACHINES)
 CORPORATION,)
)
)
 Defendant/Counterclaim-Plaintiff.)
)

Case No.
2:03-CV-294 DAK

COPY

BEFORE THE HONORABLE DALE A. KIMBALL

DATE: OCTOBER 24, 2006

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

Reporter: REBECCA JANKE, CSR, RMR

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1 OCTOBER 24, 2006

SALT LAKE CITY, UTAH

2 P R O C E E D I N G S

3 * * *

4 THE COURT: We're here this morning in the
5 matter of the SCO Group, Inc., vs. International Business
6 Machines Corporation, 2:03-29 -- 2:03-CV-294. For
7 plaintiff, Mr. Mark James. There you are.

8 MR. JAMES: Yes, Your Honor. Good morning.

9 THE COURT: Good morning.

10 Mr. Stuart Singer.

11 MR. SINGER: Good morning, Your Honor.

12 THE COURT: And Ms. Sashi Boruchow, correct?

13 MS. BORUCHOW: Yes. Good morning.

14 THE COURT: For defendant, Mr. David Marriott
15 Mr. Todd Shaughnessy, Mr. Michael Burke and Mr. Wing
16 Chiu. Correct?

17 MR. MARRIOTT: Good morning.

18 MR. SHAUGHNESSY: Good morning.

19 MR. BURKE: Good morning.

20 MR. CHIU: Good morning

21 THE COURT: All right. This is plaintiff's
22 objection to the order of Magistrate Wells. Who is going
23 to argue? Mr. Singer?

24 MR. SINGER: I will, Your Honor.

25 THE COURT: And, Mr. Marriott?

1 MR. MARRIOTT: I will, Your Honor.

2 THE COURT: How long do you need?

3 MR. SINGER: Your Honor, if I could have up to
4 40 minutes for the initial argument, I would appreciate
5 it. I probably could get by in 30 minutes.

6 THE COURT: The initial argument? That means
7 how much are you going to need later?

8 MR. SINGER: I would like to reserve 15 minutes
9 if I could.

10 THE COURT: Fifty-five minutes?

11 MR. SINGER: Yes. There are a lot of issues in
12 this motion, but I think if I had 30 and 15.

13 THE COURT: I'll give you 35 and 15.
14 How much do you need?

15 MR. MARRIOTT: Forty minutes should be fine,
16 Your Honor.

17 THE COURT: All right. Go ahead, Mr. Singer.

18 MR. SINGER: Thank you. Your Honor, we've
19 prepared a book with certain exhibits, if I could present
20 it to the Court.

21 THE COURT: Have you given defendants their
22 copy?

23 MR. SINGER: Yes, I have. May it please the
24 Court, we have looked forward to this argument on these
25 objections for some time. First of all, the issue before

1 the Court is significant. The Magistrate's order that's
2 under review and the issues here relate to a significant
3 number of the technology claims which have been dismissed
4 without a day in court. And we think that's wrong
5 for the reasons which I will spend my argument on.

6 But, beyond that, the order is predicated on
7 the view that the SCO group and its attorneys have been
8 derelict in following orders of this Court and have been
9 sandbagging, laying in wait with certain information that
10 we have not turned over, to spring it on IBM at some
11 time, presumably at trial, and that could not be further
12 from the truth.

13 We have sought, in responding to this Court's
14 order of July, 2005, and the interrogatories and other
15 discovery, to be as forthcoming and complete as possible.
16 And there is record evidence of that which supports it.

17 The nature of these items is that every last
18 coordinate of source code is simply not known to SCO for
19 each of the items, and we submit that is not a basis on
20 which those items are to be tossed out of Court without a
21 hearing.

22 There are a number of bases for this -- these
23 objections. They include the fact that the order did not
24 have particularized findings for virtually all of the
25 technology items that have been struck; did not, as

1 required by Tenth Circuit law, consider alternatives to
2 striking those actions; did not result from an
3 evidentiary hearing, although it was based on factual
4 issues; did not require IBM to prove specialized,
5 particularized prejudice; did not, as a matter of law, we
6 believe, follow from the earlier orders that this Court
7 and the Magistrate Judge had entered; and, finally, does
8 not rest on any factual basis that shows that SCO has
9 willfully, intentionally flouted any orders of this
10 Court.

11 But, before turning to those and the standard
12 of review with respect to those issues, I'd like to
13 address how these disclosure items were prepared. As
14 reflected on tab 1 and tab 2 of the book which we've
15 presented to you and IBM's counsel, we took the
16 obligations of this Court's orders in July 2005 very
17 seriously.

18 Before that time, as the Court is aware, there
19 was a lot of jockeying between the parties as to who had
20 to provide what discovery, what level of specificity was
21 needed, a lot of orders on both sides on motions to
22 compel.

23 THE COURT: That occasionally happens, doesn't
24 it?

25 MR. SINGER: I'm sorry, Your Honor?

1 THE COURT: That occasionally happens?

2 MR. SINGER: It happens in other cases, and it
3 happens, as the Court is aware, a great deal in this
4 case. And the Magistrate Judge and the Court gave us a
5 substantial amount of discovery that we received in the
6 early part of 2005. We had experts working with that
7 discovery, and over principally 2005, we have had,
8 working with our experts, prepared a comprehensive list
9 of 294 items that we called the December submission
10 because they were submitted in December pursuant to the
11 Court's order, and various interrogatories were updated
12 at that time pursuant to the Court's orders that have
13 thousands of pages of supporting exhibits, and almost in
14 all cases the actual disclosure that is in controversy.

15 It doesn't just talk about, well, IBM somewhere
16 disclosed something but reproduces as an e-mail in the
17 exhibits what we're talking about. This is the
18 disclosure in question.

19 The principal -- other than the lawyers, the
20 principal individual who was involved in that preparation
21 was a gentleman named Marc Rochkind. He is an expert in
22 UNIX programming. He is an expert on it, and he offered,
23 in connection with these issues, a declaration where he
24 makes clear that, in almost all cases, the actual written
25 communication constituting the disclosure was provided.

1 And then, as we reproduce at tab 2, he stated, for each
2 of the 294 items, "I did everything I could to ensure
3 that everything we had was disclosed and that it was
4 organized in the most accessible possible manner."

5 Counsel to SCO made it very clear that this was
6 what they wanted me to do. I made sure that every tab
7 contained a publicly -- containing a publicly available
8 e-mail had the complete URL address where it could be
9 found on the internet. He states that he made sure that
10 versions, lines and files would be cited where available.

11 There has been no hearing, no evidentiary
12 hearing in this case, no basis upon which Mr. Rochkind's
13 sworn testimony, buttressed by the representations of
14 counsel in open court, that we have provided everything
15 we have; we are not holding back anything; that the
16 information that was available on these was provided.

17 Now, I think it's useful to consider the
18 information that's being requested that is at the heart
19 of this order along with IBM's terminology of nine
20 coordinates of code, even though that never appears in
21 any Court order that has been rendered in this case, but
22 it's a useful way to think about the issue.

23 At tab 3, the breakdown of what IBM talks about
24 is the nine coordinates of code that they are claiming
25 are missing, and they are really for each of three areas:

1 Versions of file systems, operating systems, files within
2 those operating systems, and lines of code. And the
3 first one of those three areas is the disclosure itself.
4 And where there is an item in controversy that involved
5 source code -- and there's a lot of items that aren't
6 subject to today's motion that involve source code where
7 we were able to provide chapter and verse; the version,
8 line and file. They are not the subject of IBM's motion.

9 THE COURT: Or of Judge Well's order, right?

10 MR. SINGER: Or of Judge Well's order. That
11 order concerns 198 of the 294 items, so there's a lot of
12 items there where the source code was provided, and where
13 there isn't a source code disclosure, when the engineer
14 at IBM who's telling someone in the Linux community how
15 to do something that we think is protected and doesn't
16 give them source code, we can't create that source code.
17 You can't cite the coordinates that don't exist, and
18 there is no evidence in this record that there are any
19 such coordinates in the disclosures themselves that have
20 not been provided by SCO.

21 The next item is where much of the debate
22 really centers on. It's origin information; the issue
23 being that SCO has not, for many of these 198 items,
24 provided a location of source code either in UNIX or
25 Dynix or AIX, the systems that we maintain are subject to

1 our contractual protections.

2 Now, it's important to note that on almost all
3 of those technology items, there is a written admission
4 in the text of the items that it comes from Dynix or AIX.
5 There is what we would consider an admission of liability
6 if our contract theories are legally correct. It is an
7 admission that that particular method or concept comes
8 out of Dynix. But the technologist did not say that it
9 comes out of Dynix at this file location and at this line
10 of code. And our position is: You cannot expect SCO,
11 and you certainly shouldn't sanction SCO for not being
12 able to tell IBM what lines of code an IBM engineer had
13 in his or her mind when making such a method or concept
14 disclosure.

15 It's information which, if there is a
16 particular location, it is uniquely within the mind of
17 the IBM technologist who's writing an e-mail to the Linux
18 community saying, "I want to tell you about how we did
19 this in Dynix," but he doesn't tell them where that's
20 found in Dynix. If anyone has that information, it's
21 that IBM technologist, and there is no evidence in this
22 record that IBM has ever asked its own employees for that
23 origin information, no position in any expert reports
24 that they have tried to get it from their engineers.

25 If those engineers told them, "We don't know

1 what it is," how can SCO be expected to supply that? And
2 if those engineers know what it is, then the information
3 is already in the possession of IBM.

4 The third category is destination information,
5 where these disclosures wound up having an impact on
6 Linux. For virtually every one of the items that has
7 been struck under this order, we have provided the file
8 locations where SCO contends that information has
9 impacted Linux. There has been no indication that we
10 have been derelict by failing to provide more specific
11 line identifications in all the lines in that file or
12 that IBM is prejudiced because they are told where the
13 file is but there is some question as to which lines in
14 that file were impacted by that method or concept, and
15 there is no finding by the Magistrate Judge with respect
16 to that.

17 Now, I'd like, if I might -- from tab 4, we
18 have reproduced an exhibit that Marc Rochkind prepared
19 that relates to each of the challenged items by IBM. A
20 checkmark in the respective column shows that for the
21 item on that row, what information was provided. Column
22 A indicates that the actual disclosure of code or method
23 and concept was actually provided. Column B indicates
24 where is the source code reference on those. And those
25 were always provided. Column C, a checkmark indicates

1 that somewhere in that item there is an express statement
2 by IBM that that in fact came from Dynix or another one
3 of the protected systems.

4 There is an admission, we contend, of liability
5 if our contract theories are correct.

6 And the final column is: "X" indicates that
7 there have been file locations in Linux identified in our
8 December submission.

9 Now, I'd like, Your Honor, to take a few
10 minutes to talk about just a handful of examples. I
11 think the examples illustrate the thoroughness, the
12 specificity of the disclosures provided. Each of these
13 examples has expressly been raised in briefs below and in
14 arguments. None of these examples were expressly
15 addressed in the June 28 order, but yet all the claims we
16 have relating to these technology items have been
17 precluded by that order.

18 At tab 6 we have an item called differential
19 profiles. It's item number 146. This was a method and
20 concept where we had the entire e-mail chain in which the
21 code submission to Linux is proposed. We had a reference
22 in there to where you had scripts -- that is the source
23 code -- from Dynix and where those could be found in
24 Linux. And as Mr. Rochkind explained in his declaration,
25 he couldn't go behind IBM's apparent protection on the

1 internet to get at that source code because it's on an
2 internal IBM server where that source code is located and
3 so the most we could do is identify the reference to
4 where it could be found.

5 IBM has access to it. SCO does not. But yet
6 this item, without any discussion in the order, is one of
7 the items struck for lack of specificity. And I might
8 note this is an unusual item for another reason. This is
9 the one example that IBM pointed to in a declaration
10 filed with its opposition papers of where we were
11 lacking. So we're taking IBM's own example here and
12 showing on that example there's specific -- there's
13 sufficient specificity.

14 At tab 7, talking about a method and concept
15 involving locking, and there's source code patches
16 identified that consist of hundreds of lines of source
17 code with version, file and line in there. There is an
18 admission by the IBM developer of that, Mr. Lindsley, who
19 said this his experience with this came out of things he
20 did at Sequent, which we believe are subject to our
21 contractual protections.

22 So, you have specificity here, you have an
23 admission, but yet this was struck. You don't have
24 anything in the record that IBM ever went to Mr. Lindsley
25 and asked him, "Where in Dynix exactly in the source

1 code -- where were you thinking of when you came up with
2 this method and concept?"

3 But if there is such a location, Mr. Lindsley,
4 who works for IBM, would be the person who knew that.

5 At tab 8, there's another method called
6 semaphores, number 53. It's used in the locking
7 mechanism. Again, the IBM developer, a man named Tim
8 Wright, says that under -- these are not currently used
9 in Linux and that the classic coding style in Dynix/ptx
10 is the following. And we provide the exact source code
11 that he revealed to the Linux community relating to that
12 method and concept. He then testified under oath that
13 that particular code and method came from source files of
14 Dynix source code.

15 And we identified specific Linux files that
16 related to that method and concept and the Linux
17 developer, a man named Phillips, to whom the disclosure
18 was made. IBM has, in the briefing on this and the
19 argument on this said not one word about item 53. There
20 is no finding about item 53 in the Magistrate's order,
21 but it has been struck from our case.

22 Item 38 at tab 9 is another example of checking
23 for updates in memory. Item 46 at tab 10 on bug fixes is
24 the same thing. And, in addition to these five examples,
25 Your Honor, we have cited upwards of a dozen other

1 examples in the objections we filed together with an
2 appendix. And we think that it leads to the first fatal
3 defect in the order below, which is the failure of that
4 order to make particularized findings required by Tenth
5 Circuit law if you're going to throw out and sanction a
6 party in the way which has been done here.

7 We cite at tab 11 Tenth Circuit case law that
8 that requires particularized findings for a sanction
9 order of this type, the Proctor & Gamble case, the Gripe
10 vs. City of Enid case. You need detailed and specific
11 findings, and you don't have those here. For virtually
12 all of the disclosures where we've been dismissed to
13 present claims to a jury involving that technology, there
14 is no particularized finding or discussion at all. All
15 there is, is a Magistrate's statement that all the 198
16 items were reviewed but are not legally sufficient.

17 We are not questioning whether or not the
18 Magistrate reviewed those. That's not the issue. The
19 point is: We cannot meaningfully address, and the Court
20 cannot meaningfully review, as the Tenth Circuit said, a
21 determination that just says, "I've looked at everything,
22 and these 198 items just aren't sufficient in my view."
23 That does not meet the requirements of law established in
24 this Circuit and elsewhere that you have to have detailed
25 and specific findings.

1 We think that stems from a second related
2 failure, Your Honor, and that, as we point out at tab 12,
3 is the failure to hold an evidentiary hearing. Now, SCO
4 expressly requested an evidentiary hearing at the
5 argument in this case. IBM has said, well, we didn't
6 request it in writing earlier. Well, the first time that
7 they submitted any evidence -- their initial motion was a
8 ten-page motion. No declarations. And it really just
9 talked about the July 2005 order, not about other
10 discovery requests. We responded to that fully.

11 In the reply below is when IBM submitted its
12 first declaration from Mr. Davis, one of their experts.
13 Therefore, it was appropriate at oral argument -- and we
14 submitted then or got leave to submit a responding
15 declaration from Mr. Rochkind, but at that point you have
16 an evidentiary conflict, and at that point we asked for
17 an evidentiary hearing so that these issues could be
18 decided not just based on declarations or arguments of
19 counsel but on the facts.

20 Let's hear Mr. Wright and Mr. Lindsley say,
21 even though they are the developers from IBM who
22 disclosed this method and concept, that they don't know
23 where in Dynix it's found, but yet we should be thrown
24 out of court on those items because we can't tell IBM.

25 Some of the issues that an evidentiary hearing

1 would have been required for: The disputes between the
2 respective experts; Davis on their side, Rochkind on our
3 side over whether sufficient specificity was provided;
4 whether we in fact have but are simply not disclosing
5 more specific code locations, the idea that somehow we're
6 sandbagging IBM. And it should be noted that Courts in
7 many cases have recognize that if there is a concern with
8 sandbagging, the remedy is -- you don't throw out the
9 evidence and the detail that's provided. What you do is
10 you stop that party later at trial from introducing
11 evidence or disclosing an item that should have been
12 mentioned earlier.

13 And IBM has full rights to object if that were
14 ever to occur later in this case; at the trial of this
15 case or otherwise, if we say, "Forget the 294 items. We
16 have item number 295." And they, of course, know how to
17 object to that. There has not been sandbagging going on,
18 and this is not an appropriate remedy for it. An
19 evidentiary hearing could have looked at the prejudice to
20 IBM on an item-by-item basis rather than a generalized
21 discussion.

22 And it could also have dealt with an item which
23 is the subject of a separate motion before the Court,
24 which is the effect of IBM's own actions in this case
25 after this lawsuit was filed, and directing people in

1 their Linux technology center to do what's been called
2 cleaning their sandboxes. Their sandboxes are actually
3 work spaces where they are working on this. The Linux
4 technology center is the heart of this lawsuit. That's
5 where this work is being done.

6 After this lawsuit was filed, directions went
7 out, confirmed by Dan Frye, the head of the center, for
8 those developers to take off their system, to clean their
9 sandboxes of the AIX and the Dynix code. We think that
10 is wrong, and we have a motion dealing with that pending
11 before the Court. But that is also a factual matter that
12 relates to our ability to come up now with all those code
13 locations relating to those developers' work.

14 In addition, as pointed out in the cases on tab
15 13, the Court did not make any express findings about
16 alternative remedies. That's required under the
17 Ehrenhaus case, a Tenth Circuit case, which says that a
18 lesser sanction needs to be considered before you throw
19 out claims. There is nothing in this order that supports
20 it. As I mentioned, there are clear alternatives that
21 should have been considered. If there is a concern that
22 SCO is sandbagging someone, that is addressed at the time
23 of trial by excluding improperly withheld evidence.

24 Moreover, we argued and still argue that the
25 specificity and the prejudice involved here should have

1 been considered in light of expert reports. This order
2 was entered before the expert process. We have tendered
3 seven expert reports, IBM eleven, but for a case in which
4 IBM has throughout the case said our claims are totally
5 without merit, Your Honor, they have seen the need to
6 retain no fewer than eleven experts to submit reports in
7 this case.

8 These are very highly technical issues, and if
9 one is to make judgments about requisite specificity and
10 prejudice, that should be done after the expert discovery
11 process, which has now been done. All the reports have
12 been tendered, and all those experts have been deposed.
13 To the extent there is an issue about getting additional
14 time for discovery of their experts to respond, that is
15 an additional lesser remedy, again not considered on the
16 record.

17 Now I'd like to say a few words, if I might,
18 about the scope of review. It is our position that this
19 ruling is dispositive. It is, on its face, a motion --
20 an order that grants IBM's motion -- they call it this --
21 to limit SCO's claims. Now, they have tried to backtrack
22 some in their briefs on that, but, as filed, it was a
23 motion to limit SCO's claims. And when it is granted, it
24 does exactly that. It limits our claims.

25 THE COURT: So your argument is that this is

1 subject to de novo review?

2 MR. SINGER: Precisely, Your Honor. And we are
3 supported in that by a lot of case law. We have cited
4 that in our briefs, and we have some at tab 15 in this
5 book, that when the decision has the effect of a
6 dispositive ruling, de novo review is required. The
7 Ocelot case from the Tenth Circuit says that -- that was
8 dealing with a discovery sanction saying it's equivalent
9 to an involuntary dismissal of a claim. It requires de
10 novo review. And the Tenth Circuit has indicated you
11 don't have to look at the label, although in this case
12 the label on IBM's motion supports our point, but even if
13 IBM had labeled their motion differently, the effect of
14 the order is dispositive.

15 There are 188 claims of technology disclosures
16 which we contend each and every one of which is a breach
17 of contract which will, if this order is left in place,
18 never see a jury, will never have their day in court.

19 Even less drastic orders -- and we provide
20 examples of some of those at tab 16 -- have been given de
21 novo review. And as we point out in tab 17, with Wright
22 and Miller's reference to the Tenth Circuit's approach,
23 requires the Court to consider the impact of the action
24 taken on the case.

25 Your Honor, one of the cases we've cited in

1 connection with this is a patent case out of New York
2 where in fact one claim out of a lot of patent claims was
3 dismissed because it wasn't appropriately -- it wasn't
4 timely filed. Not 188, but one. And the Court there
5 said, "That dismisses a claim on which liability could be
6 found," just like these technology claims dismiss a basis
7 on which liability could be found, and de novo review is
8 required.

9 Now, I'd like to briefly note that even
10 deferential review is not non-review. IBM has talked
11 about that the review here should be something like abuse
12 of discretion or even a dead fish standard. It has to
13 smell like dead fish. And that's not found anywhere in
14 the Tenth Circuit case law.

15 THE COURT: An interesting standard, though.

16 MR. SINGER: It is an interesting standard.

17 And I can see why a party who is defending a ruling would
18 like to invoke it from time to time, but it's not the
19 law. And, in addition, regardless of the general scope
20 of review, Your Honor, as the Court knows, issues of law
21 are always reviewed de novo. The interpretation of this
22 Court's orders, that's a de novo issue. Whether or not
23 you should have an evidentiary hearing on particularized
24 findings, those are matters of law applying Tenth Circuit
25 precedent. Those are clearly issues that, regardless of

1 standard of review for the factual findings, have to be
2 reviewed de novo by this Court.

3 But as we point out at tab 21, even mixed
4 questions of fact and law, where it's predominantly
5 applying the legal principles, calls for de novo review,
6 even if there's a more limited scope of review generally.

7 Now, I'd like to discuss next the issue that we
8 have violated a Court order because we contend that, in
9 addition to providing tremendous specificity, that we
10 have not violated any Court orders in connection with
11 this matter.

12 At tab 22, we reproduce what IBM had proposed
13 this Court include in its July order. It's July 2005
14 order said that the parties should disclose misuse of
15 materials with specificity. It didn't say anything about
16 line coordinates of code. IBM has proposed Language
17 which talks about providing, for each misused item,
18 version, file and line of code and origin information.
19 The Court did not include that in its order. We believe
20 it was reasonable for the Court not to include it in its
21 order because the type of specificity required and
22 available is going to differ depending on what the source
23 material has. We are being sanctioned as though this was
24 in the order, when in fact it isn't.

25 Now, with respect to the nine coordinates of

1 code -- and I point this out at tab 23 -- there has never
2 been an express order on the subject. This whole
3 position -- and I am not going to go into detail on all
4 these because I think that the briefs set these forward.
5 What's clear is there is no express orders on the subject
6 of nine coordinates of source code. That is something
7 which IBM seeks to glean from these discovery requests.

8 Until this whole proceeding on the motion to
9 strike our claims, there has been no consideration or
10 argument on the level of specificity that should be
11 provided for method and concept disclosures where source
12 code is not a part of the disclosure, and there has been
13 no order, following the December submissions, that tells
14 us that you need to provide X, Y and Z or you will have
15 your claims struck. Instead, the order just goes
16 directly to striking those claims.

17 Now, I'd like to point out a few things about
18 the discovery that is now being cited in addition to the
19 July 2005 order which was the basis for the original
20 motion. Piggybacked on top of that has been discovery
21 requests. At tab 25 -- this is IBM's request -- their
22 interrogatory, principal interrogatory that is at issue
23 here, does ask for identification of product, file and
24 line of code. But it qualifies it with the words "where
25 appropriate," which is an important qualification because

1 if you don't have a source code disclosure, you can't
2 create coordinates.

3 Now, I'd like to turn, if I might, Your Honor,
4 to tab 29 and address what the Court found, what the
5 Magistrate Judge found to be the most important factor in
6 entering her order. And that was that at the beginning
7 of the case SCO defined -- identified in one of its
8 discovery requests, in a way which the Magistrate
9 believed would require providing these type of
10 coordinates for source code. And, first of all, this
11 issue was never briefed or argued below.

12 This came in on an expert witness declaration
13 that IBM sought leave to submit post-argument to respond
14 to our expert, was granted that leave, and then put into
15 that expert witness declaration our discovery request
16 that the Magistrate Judge then relied upon. Without
17 argument our motion to strike that declaration or to have
18 an opportunity to respond to that declaration was denied.

19 So the points here are ones that would have
20 come out, that those discovery requests qualified
21 "identify" to where that was appropriate, just like IBM
22 did in its interrogatory number 1. The order from the
23 Magistrate says that she assumes that if IBM hadn't given
24 us source code coordinates on all of this, there would
25 have been a motion to compel and that IBM must have done

1 that. And that, in fact, is not the case. IBM didn't do
2 that, but on these grounds no motion to compel was
3 brought.

4 This simply is not an appropriate basis, SCO's
5 discovery request at the beginning of the case and how it
6 defines "identify" on which any sanction order, let alone
7 a sanction order dismissing our claims, should be
8 evaluated. It shows that there is no clear order saying
9 nine coordinates of source information must be provided
10 on each technology item or it will be struck from the
11 case. And such an order would be inappropriate because
12 there is no finding that in order to make our case, in
13 order to prove our claims, you have to have that level of
14 detail.

15 There is an additional basis for why this order
16 should be reversed. And that is: There is no evidence
17 of willful noncompliance. At tab 30, repeat the case law
18 which includes U.S. Supreme Court cases, the Tenth
19 Circuit case involving Westinghouse, which says if you
20 are going impose a sanction like this, you have to have
21 willfulness, you have to have an intentional
22 noncompliance.

23 Now, IBM says that, well, we voluntarily
24 assembled these reports, so it must have been
25 intentional. That would make the standard meaningless.

1 Our position is: You have to show that we have
2 information within our ability to provide that we have
3 withheld and that then it becomes a willful action, and
4 there is no such evidence. There is simply no evidence
5 of that.

6 If one turns to tab 33, the June 28 order cites
7 no explicit evidence of willfulness. What the
8 Magistrate's order says is that there is no evidence
9 before the Court to indicate that SCO lacked the ability
10 to comply, and given our public statements, it would
11 appear that SCO had more than enough evidence to comply.
12 We submit that that point is wrong. First of all, there
13 is evidence that we have provided everything we have.
14 That's Mr. Rochkind's declaration that says that
15 expressly. And I quote certain parts of that declaration
16 at that exhibit number.

17 And, in addition, SCO's prior public statements
18 do not indicate and cannot be read to indicate that SCO
19 has source code coordinates for disputed items. It is
20 true SCO said, back when it --

21 THE COURT: What would be the best way to read
22 those public statements in your view?

23 MR. SINGER: I think that those were statements
24 saying we have a lot to offer in this case, a lot has
25 occurred. I think it involved statements which you

1 might -- the Court may have observed have not been made
2 in recent years because we believe that these statements
3 should be reserved in court. Those were statements in
4 reaction to a lot of public inquiry and a lot of
5 attention to this case, which said that we have a lot of
6 source code, we have a lot of technology items to talk
7 about.

8 We have defended each of those statements in an
9 appendix to the briefs in front of the Magistrate, and I
10 believe it's also in the briefing in front of this Court.
11 Those statements are true. Those statements were related
12 to source code contributions. Most of the items here are
13 method and concept contributions that were not unearthed
14 by our experts until 2005 when Mr. Rochkind and some of
15 our other experts, like Professor Ivey started working
16 with the discovery and starting drilling down on this.

17 And there certainly is no statement in any of
18 the public statements made by SCO in 2003 which says that
19 we have source code for these items, but, you know, we're
20 not going to tell you about them. Those items weren't
21 even identified until 2005. And, you know, we -- whether
22 or not those statements should have been made when they
23 had been made or whether or not the Court -- the case
24 should have been tried only in this courtroom, the fact
25 is that those statements do not support the finding here

1 of willfulness or the exclusion of 188 items of
2 technology disclosures that we have identified in this
3 case to IBM.

4 Now, I'd like to note that IBM's showing of
5 prejudice is also inadequate. They have -- it's
6 basically an analogy in the Magistrate's order to a
7 shoplifter from Neiman Marcus being caught outside the
8 store but not being told what he has taken. And that
9 clearly isn't the case here. We have provided tremendous
10 detail, in thousands of pages of exhibits and the types
11 of examples we have shown. It's more akin to that
12 shoplifter being told what he has taken but not being
13 able to, perhaps, cite the catalog number where it
14 appears in the Neiman Marcus catalog. That would be a
15 more apt analogy, we contend.

16 The final point I would like to make, Your
17 Honor, is discussed at tab 35 in this report is that this
18 ruling can be vacated without undue delay to the trial
19 schedule. We much want this case to go to trial on the
20 schedule that's set, February of 2007. SCO's expert
21 reports are complete on these issues. Our experts have
22 addressed all these items. We can limit the 188 items
23 going forward certainly to just those set forth in the
24 Rochkind and Ivey reports, which are not all of those.

25 We submit that IBM's experts should be able to

1 quickly respond to these expert reports because their
2 reports were due only three weeks after this order came
3 down. And one presumes that they would have been working
4 on those. They couldn't count on a judge striking these
5 items from our case. They should get at least those
6 three weeks. They should even get more time than three
7 weeks, within reason, and that should go forward along
8 with the summary judgment consideration that the Court is
9 engaged in now.

10 And, if there are any issues which then, at the
11 time of trial, relate to whether or not a specific
12 technology item has been identified sufficiently, those
13 can be raised either in connection with the Daubert
14 process of experts or at a pretrial conference
15 at that time, where you have a chance for an evidentiary
16 hearing and where it can be appropriately handled on a
17 full record. And we submit that that process would lead
18 to no delay or, at most, a very short delay in the trial
19 as currently scheduled and that that would be a fair and
20 appropriate way of dealing with these issues.

21 Thank you very much.

22 THE COURT: That you, Mr. Singer.

23 Mr. Marriott.

24 MR. MARRIOTT: Thank you, Your Honor. SCO is,
25 Your Honor, nothing, if not liberal in its accusations of

1 error. By my count SCO accuses Magistrate Judge Wells of
2 somewhere on the order of 20 separate errors, and despite
3 the number of those objections, Your Honor, there are in
4 fact three simple points that dispose of SCO's
5 objections, and it is on those points, with Your Honor's
6 permission, that I would like to focus.

7 Magistrate Judge Wells, in her order, focused
8 on two provisions of Rule 37. Rule 37(b)(2) and Rule
9 37(b)(3), and if Your Honor looks at the book, which has
10 been provided, at tabs 1, 2 and 3, you will see the
11 language from those orders -- from those rules, rather.
12 Under Rule 37(c), Your Honor, a party that fails to
13 disclose information required in discovery by a Court is
14 automatically precluded from using that evidence at trial
15 or at a hearing unless the party failing to make the
16 disclosure can show either a substantial justification
17 for its failure to provide the ordered information or
18 harmlessness.

19 And the three points I'd like to make, Your
20 Honor, flow from those -- from those rules. The first
21 point is that SCO failed to provide version, file and
22 line information as order by the Court and as required by
23 Rule 26(e). The second point I'd like to make is that
24 SCO failed to show substantial justification for its
25 failure to provide version, file and line information.

1 And finally, Your Honor, I'd like to demonstrate that SCO
2 failed to show that its failure to provide that
3 information was harmless.

4 Now, before I come to the first of those
5 points, Your Honor, if I may, I'd like to emphasize three
6 facts that are undisputed and say a word about the
7 standard of review. The first undisputed fact, Your
8 Honor, is that the crux of SCO's case is that IBM has
9 misused, in some respect, the elements of three separate
10 sets of operating systems, which we depicted, if I can
11 ask my colleague to hold the chart -- which we depict on
12 that chart which appears also in Your Honor's book.

13 IBM is alleged to have misused the elements of
14 UNIX System V on the one hand, AIX or Dynix on the other,
15 and Linux as a third set of operating systems. It is
16 undisputed, Judge, that those operating systems are
17 comprised of hundreds of versions, millions of files and
18 billions of lines of source codes, methods and concepts.

19 Second undisputed fact, Judge, is that because
20 of the size of the universe of potentially implicated
21 codes, methods and concepts, IBM propounded a series of
22 discovery requests which are illustrated at tab 5 of the
23 book in which, contrary to what Mr. Singer just argued,
24 IBM asked in very specific terms for. And I will walk
25 Your Honor through this, with the Court's permission,

1 momentarily; version, file and line information with
2 respect to every one of the allegedly misused operating
3 system elements.

4 Undisputed fact number 3, Judge. In response
5 to IBM's discovery requests, in SCO's final disclosures
6 of allegedly misused information, SCO failed, as to 187
7 of its 294 items, to identify even the most basic
8 identifying information, version, file and line
9 information.

10 And if Your Honor will look at tab 6 of the
11 book which we've provided, you will see there an
12 illustration of SCO's failings in this respect. As to
13 not a single one, Judge, of the 187 items did SCO provide
14 line information relating to System V. Not a single line
15 of System V code is identified with respect to any of
16 those 187 items. As to AIX and Dynix, which are
17 alternative categories, if you look at the middle two
18 columns, not a single line of AIX or Dynix code is
19 provided with respect to those two sets of operating
20 systems.

21 And finally, now, with respect to Linux, SCO
22 provided line information with respect to three of the
23 187 items of allegedly misused information. And, as to
24 those three, Judge, they failed to provide even version
25 information for the supposed improper disclosures. There

1 are, by rough estimation, a hundred -- 500 plus versions
2 of Linux.

3 Those are the three undisputed facts I would
4 submit are of great consequence to this motion.

5 Now, as to the standard of review. SCO argues
6 that Magistrate Judge Wells' decision is entitled to no
7 deference, and that is wrong for at least two reasons.
8 The first reason, Your Honor, is that Magistrate Judge
9 Wells' decision was, contrary to Mr. Singer's contention,
10 a non-dispositive order. Non-dispositive orders are
11 reviewed, as Your Honor knows, pursuant to the clearly
12 erroneous or clear error standard. A firm and definite
13 conviction of error is required.

14 As the Seventh Circuit puts it: The decision
15 must have the stench of a five-week-old dead,
16 unrefrigerated fish. Whether or not the Tenth Circuit
17 has adopted the same language, Your Honor, the fact of
18 the matter remains: The decision must stink under that
19 standard in order to be reversed.

20 Even if, Your Honor -- even if the standard of
21 review here were de novo, as I propose now to show, Judge
22 Wells' decision which, frankly, is proper, I would
23 submit, under any standard of review, should be affirmed.

24 Let me take you now to the question of whether
25 the order here was dispositive. An order is dispositive

1 under the rules and under the governing cases if it
2 disposes of a claim or a defense in an action. Claim,
3 for this purpose, is defined, Your Honor, as cause of
4 action. In SCO's operative Complaint, it asserts nine
5 cause of action. In its operative Answer to IBM's
6 Counterclaim, it asserts 14 affirmative defenses.
7 Magistrate Judge Wells' order does not dismiss, strike or
8 remove from the case any one of SCO's nine claims for
9 relief. Nor does it dismiss, remove or strike from the
10 case any one of SCO's affirmative defenses.

11 Magistrate Judge Wells entered her order not
12 prusuant to Rule 12 or Rule 56, she entered her order
13 pursuant to Rule 37 and Rule 26. Every one of SCO's
14 claims is, as SCO publicly acknowledged following the
15 entry of Magistrate Judge Wells' order, in the case. Now
16 SCO offers several arguments, Judge, as to why that isn't
17 true.

18 First. Mr. Singer said this morning that IBM
19 styled its motion as a motion to limit the scope of SCO's
20 claims. As Mr. Singer himself pointed out, Judge, the
21 cases are perfectly clear that it is not the relief
22 requested, but it is the order entered that determines
23 whether an issue is dispositive and, in any event, if
24 Mr. Singer had read the continued title of IBM's motion,
25 it is about limiting the scope of SCO's claims to the

1 items properly disclosed in SCO's final disclosures.

2 Second. Mr. Singer and SCO in their papers
3 contend that the order was dispositive because it was,
4 quote, plainly intended to be dispositive. And I refer
5 Your Honor to page 13 of SCO's reply for that argument.
6 That is simply not true. The motion IBM brought was
7 brought under Rules 1, 26, 30 and 37. The order was
8 decided under Rule 37 and Rule 26. Magistrate Judge
9 Wells issued an order. She did not issue a report and
10 recommendation, as one would expect of a Judge who
11 believed she was issuing a dispositive order.

12 Moreover, Your Honor's order of reference,
13 which you will find at page 11 of the book before you, is
14 quite clear that Magistrate Judge Wells was to proceed
15 only with respect to non-dispositive matters. And I
16 would respectfully submit that if SCO had believed, when
17 it received IBM's motion requesting the relief that it
18 requested and when SCO argued that motion before
19 Magistrate Judge Wells, if it had believed Magistrate
20 Judge Wells could not properly hear that motion, as SCO
21 now contends is the case, it would have, should have and
22 could have then objected. It didn't because the relief
23 suggested is not dispositive.

24 Next, Your Honor, SCO contends that the order
25 is dispositive because it affects what Mr. Singer calls

1 claims or causes of action in SCO's final disclosures.
2 That, Your Honor, is an interesting effort at relabeling.
3 SCO's final disclosures contain 294, by SCO's own words,
4 items. Those items represent collections of evidence to
5 support SCO's claims. Now, in its papers here, they are
6 renamed claims with the argument that any effort to touch
7 upon a claim causes it to represent a cause of action.

8 That is simply not what Magistrate Judge Wells
9 was doing, and I would refer you, Your Honor, to page 12
10 of the book before you where, in her order, Magistrate
11 Judge Wells, at page 2, made perfectly clear what she was
12 doing.

13 Sorry, Judge. This is tab 12 of the book.

14 THE COURT: All right.

15 MR. MARRIOTT: She says in her quote at the
16 outset that all evidence needs to be on the table, and,
17 after it's on the table, there will be a decision. Then
18 she says: "The current motion focuses on the
19 interpretation of the Court's prior orders and exactly
20 what evidence should have been provided. The sanction
21 IBM seeks --" and she describes it -- "precluding SCO
22 from using certain alleged misappropriated items."

23 And I would respectfully submit, Your Honor,
24 that any reasonable reading of SCO's final disclosures,
25 under any reasonable reading of SCO's disclosures, they

1 are collections of items of evidence. They are not
2 causes of action. If they were causes of action, Your
3 Honor, SCO would have been required under Rule 15 to make
4 an amendment to amend its Complaint to assert these new
5 causes of action. The deadline to make amendments to
6 pleadings had passed. SCO had sought leave of Court to
7 make an amendment to the pleading, and it wasn't
8 permitted.

9 Finally, Your Honor, SCO suggests that the
10 cases are supportive of SCO's view that the order here at
11 issue was a dispositive one, and I would respectfully
12 submit that that is not the case. If you look at
13 Mr. Singer's exhibit, Your Honor, where he lays out three
14 cases which he says support the idea that the review here
15 is dispositive, he cites Ocelot, Smith and Lister.
16 Ocelot, Your Honor, struck a cause of action. Smith
17 remanded a case and effectively, in doing so, dismissed
18 it. And the Lister decision denied IFP status and
19 effectively, in so doing, dismissed the action.

20 None of these cases stand for the proposition
21 that an order limiting the scope of claims, like limiting
22 the scope of evidence permitted to be submitted in
23 support of SCO's claims is dispositive.

24 Now, finally, one additional point on the
25 standard of review. Magistrate Judge Wells' order, Your

1 Honor, did essentially, as I read it, four things. One.
2 It found that SCO violated the Court's orders in Rule
3 26(e). Two. It found that SCO acted willfully. Three.
4 It found prejudice. And, four. It entered a sanction.
5 It said SCO would not be allowed to proceed as to
6 those -- as to those items not properly disclosed.

7 If you think about it, Your Honor, each of the
8 three predicates to the actual relief order, none of them
9 could possibly be considered dispositive in form.
10 Magistrate Judge Wells construed her own orders and an
11 order of this Court. Magistrate Judge Wells found that
12 SCO acted willfully, and Magistrate Judge Wells found
13 that IBM would have been prejudiced. The sanction could
14 well have been, Judge, that SCO was to pay a hundred
15 thousand dollars penalty for having done that. That
16 alone, the penalty, would be what, under SCO's reading,
17 would convert the order into something that is
18 dispositive.

19 But under Rule 37(c), Judge, where you have a
20 failure to provide, supported by Magistrate Judge Wells'
21 other findings, the sanction of being unable to use
22 evidence in support of your case at trial is automatic.
23 Magistrate Judge Wells could have said nothing further
24 other than: Violation of order. Acted willfully.
25 Prejudice to IBM. And the sanction which now SCO claims

1 converts her order into a dispositive order would have
2 been automatic under the rules.

3 That brings me, Judge, if I may, to the first
4 of the points I'd like to make, which is that SCO failed
5 to provide version, file and line information as ordered
6 by the Court. And for this purpose, I'd like to point
7 you to tab 16 of the book before Your Honor. You will
8 see there, Judge, a fold out of an exhibit illustrating
9 the orders of the Court. There are three orders at issue
10 here, and there's Rule 26(e).

11 Mr. Singer said that the orders did not require
12 and that IBM effectively has made up this idea that SCO
13 is required to provide version, file and line
14 information, and I would like, with your permission, Your
15 Honor, to walk you through these orders and to show you
16 how it is that these orders, each of them, expressly,
17 unequivocally required SCO to provide version, file and
18 line information with respect to each of the supposedly
19 misused operating system elements.

20 In her first order of December of '03,
21 Magistrate Judge Wells required SCO to identify and state
22 with specificity the source codes underlying its case.
23 Then she went on, Judge, as reflected in the second
24 bullet, to require SCO to respond fully and in detail to
25 IBM's interrogatories; first as to 1 through 9, and then

1 second, if you look at the third bullet, to 12 and 13.
2 And I emphasize, SCO was ordered to respond as stated in
3 IBM's interrogatories.

4 IBM's interrogatories define the term
5 "identify," to begin, Judge, and that definition is
6 included here in the book, and I won't walk Your Honor
7 through it except to emphasize that it makes perfectly
8 clear that what is required is a detailed -- and I
9 underscore the word "complete" description of the
10 allegedly misused information. It simply cannot be that
11 one can provide a detailed and complete description of
12 allegedly misused information without providing version,
13 file and line information. And the definition goes on to
14 be -- to specifically mention the provision of line
15 information and file information, in any event.

16 But put aside, if you would, Your Honor, the
17 definition altogether. Forget the definition exists in
18 IBM's discovery requests and look, if you would, simply
19 at the requests themselves. Let me read you, Your
20 Honor -- not to read all of these to you, but take you,
21 if I may, Your Honor, to interrogatory number 12. And
22 this can be done with respect to each of these
23 interrogatories. In the interest of time, I will do it
24 only with respect to number 12.

25 SCO is required, Judge, to identify with

1 specificity, by file and line of code: A. All source
2 code and other material in Linux.

3 Let me pause there. If you look at the chart,
4 Your Honor, by file and line of code, all source code and
5 other material that would include methods and concepts in
6 Linux. A file and line information is expressly called
7 out, despite what Mr. Singer said, in the order.

8 Now, Your Honor, it is true that the order
9 doesn't mention version information, but it is impossible
10 to provide file information and line information without
11 providing version information because it's as if you had
12 a street address. You can't give somebody -- you can't
13 say to somebody, "I live at number 20." You need to tell
14 them 20 of what street, and you need to tell them where
15 the street is located. Version information is
16 indisputably required.

17 SCO has never argued to the contrary.
18 Magistrate Judge Wells expressly found version
19 information is required. That, you can contend, is at
20 least fairly implied. There is, looking at interrogatory
21 number 12 alone, therefore, an express requirement that
22 version, file and line information be provided with
23 respect to Linux. Now, to continue on in the same single
24 interrogatory. Now, again: Please identify with
25 specificity, by file and line of code, how the code and

1 other material derives from UNIX. This, for that
2 purpose, Your Honor, is UNIX. SCO contends that AIX and
3 Dynix are derivatives of UNIX System V, versions of
4 those, and that IBM has, in one respect or another,
5 misused these

6 So interrogatory 12 expressly calls for, again,
7 files and lines as to these operating systems. File and
8 line. And, in any given item, SCO would be required to
9 provide file and line for either AIX or Dynix. It's not
10 both in any given instance. So, again, file and line
11 with, I respectfully submit, version, being an absolute
12 minimum fairly implied. A single interrogatory, Your
13 Honor, incorporated as written, without any regard to
14 IBM's definition of identify, expressly required the
15 provision of version, file and line information.

16 And, again, I won't take the time to do it. It
17 can be done with respect to every one of these
18 interrogatories.

19 Now, if you would, Your Honor, take a look at
20 the second of the orders on this list, Magistrate Judge
21 Wells' 3/3/04 order, March 3, '04 order. Magistrate Judge
22 Wells begins by requiring SCO to fully comply with her
23 prior order within 45 days because, as IBM pointed out to
24 her, SCO then had not complied. The requirements of
25 interrogatory 12, as incorporated into the first order,

1 are expressly, then, repeated and included into the
2 3/3/04 order.

3 But forget that, Judge. Forget entirely the
4 incorporation of the prior reference and look at the
5 highlighted text. These are express quotes from
6 Magistrate Judge Wells' order of March. Let's start with
7 the red text. "SCO is to provide and identify all
8 specific lines of code from UNIX System V from which
9 IBM's contributions --" again, contribution is not just
10 code. It could be method or concept "-- from AIX or
11 Dynix are alleged to be derived." So, again specific
12 lines are required.

13 So, if this is the March order, if this is the
14 '03 order, Judge, now we have the '04 order. Lines are
15 expressly required as to System V. And, again, I would
16 argue you can't provide line information without
17 providing file and version information. It is simply
18 meaningless without that. Look at the next text, AIX and
19 Dynix. "As previously ordered, SCO is to provide and
20 identify all specific lines of code that IBM is alleged
21 to have contributed to Linux from either AIX or Dynix."

22 All specific lines. Again, lines required
23 expressly. Version and file fairly reasonably implied.

24 And finally, as to Linux: "SCO is to provide
25 and identify with specificity all lines of code in Linux

1 that it claims rights to." Again, lines, not just files,
2 as SCO suggests is sufficient, are expressly,
3 unequivocally required.

4 Now, two provisions there required it. Seven
5 provisions from the earlier order required it. Now this
6 Court's -- this Court's 7/1/05 order in which Your Honor
7 requires SCO simply, in effect, to provide specific
8 disclosures of the allegedly misused material and to
9 update its interrogatories accordingly. Again, I would
10 argue there is no reasonable reading of Your Honor's
11 order except to say that it requires disclosures at least
12 along the same lines of specificity as were required by
13 the prior orders.

14 Now, entirely independent of the Court's
15 orders, under Rule 26(e), SCO had an obligation to update
16 its interrogatories seasonably, which updating obligation
17 would have required the same information. So you have
18 three orders and Rule 26(e). The orders have multiple
19 provisions which, on their terms, without even looking at
20 the definition of identify, make perfectly clear that
21 version, file and line information was to be provided.

22 Now, what does SCO argue, Your Honor, with
23 respect to these orders? With respect to the early
24 order, the December 12, '03 order, in fact SCO says
25 nothing in its opening papers of consequence, if anything

1 at all, about interrogatories 3 and 6. And I would
2 submit that any complaint about those is therefore
3 waived. With respect to interrogatories 12 and 13 -- and
4 we talked about 12 -- nothing of any consequence is said,
5 Your Honor, about interrogatories 12 and 13. And I would
6 invite you to go back and look at SCO's opening papers
7 about interrogatory 12 and 13.

8 Magistrate Judge Wells issued the '03 order and
9 the '04 order in '03 and '04. Any complaint or
10 objection, any uncertainty that SCO had with respect to
11 the meaning of those orders is a complaint that should
12 have been raised within ten days of the entry of those
13 orders, and an effort now to end run that by arguing that
14 SCO was surprised to learn or apparently even today still
15 doesn't believe it is required to provide version, file
16 and line information, when it is expressly called for in
17 the Courts' orders.

18 Now, SCO argues, Judge, that the provisions
19 simply don't apply to methods and concepts. Mr. Singer
20 said that this morning, and that has been repeated in
21 SCO's papers. Two points in that regard: First.
22 Contrary to SCO's suggestion, many, many of these items
23 are expressly about source code, and I will come back to
24 that, eventually, in my second point.

25 In any case, IBM's requests and the Courts'

1 orders are plain on their face that they are not limited
2 to requesting information about code, they apply to all
3 material in these operating systems, whether you want to
4 call it code, method or concept. The definition of
5 identify is clear in that regard as are the requests.
6 Interrogatory number 1 calls for specificity as to
7 confidential or proprietary information. Interrogatory 3
8 talks about information. Interrogatory 4 talks code or
9 methods. Interrogatory 6, code or methods.
10 Interrogatory 12, code and other material, and so on.

11 The arguments raised, Your Honor, in objection
12 to the proposition that this order is somehow unclear are
13 simply untenable. And Mr. Singer finally says, with
14 respect to this Court's '05 order, that that couldn't
15 possibly require specificity along the lines that I've
16 just argued because IBM proposed in a proposed order to
17 the Court the inclusion of version, file and line
18 information. Therefore, he says, the fact the Court
19 didn't include it is the best indication that the Court
20 did not intend to require it.

21 I would submit, Your Honor, that that reads far
22 too much into the submission of a proposed wording for an
23 order and is, in any event, irrelevant. The fact of the
24 matter is that this Court entered its order in July,
25 which is only one of three pronged orders that underlie

1 Judge Wells' decision here at a time when the landscape
2 and requirements of the Court were clear.

3 Moreover, I don't believe the argument that the
4 footnote was somehow left out had some significance was
5 ever raised in front of Magistrate Judge Wells, and for
6 that reason, independently, it is not properly raised
7 here.

8 The second point, Judge, which I'd like to make
9 is that SCO's failure to -- that SCO failed to
10 substantially justify its failure to provide version,
11 file and line information. In this regard, SCO provides
12 three arguments. And let me walk through these quickly.
13 First of all, Your Honor, as a predicate to this,
14 contrary to SCO's suggestion, it is SCO, under Rule 37(c)
15 that bears the burden to show substantial justification.
16 It is not, as he seems to suggest, IBM.

17 The justifications at issue here supposedly are
18 the following: SCO says the order is ambiguous.
19 Plainly, Judge, that is not true, and any contention that
20 it is has been waived. I won't repeat what I just said.

21 The second argument SCO makes is that version,
22 file and line information is simply not available. It
23 cannot be provided, they say, with respect to methods and
24 concepts. Well, again, as I said I would come to, not
25 all of the items at issue here are methods and concepts.

1 A substantial number of them are, by SCO's own words,
2 Judge, code. And I would refer Your Honor to tab 18 of
3 the book before you.

4 A full list is set out in Exhibit C to the
5 reply declaration of Randy Davis in support of IBM's
6 proclusion motion. Here are the words, SCO's words,
7 describing items that are at issue on this motion. Item
8 17. Quote, port of discontinuous memory code from ptx to
9 Linux, close quote. Item 22. Port of PTX NUMA code to
10 Linux, close quote. And so on. The list of these, Your
11 Honor, is fuller. It's professor Davis' declaration, and
12 it demonstrates with, I think, no equivocation that many,
13 many of the items at issue with Magistrate Judge Wells'
14 order concern, by their own terms, by SCO's terms, code
15 and not methods and concepts.

16 In any event, it makes no difference, Judge,
17 because there is absolutely no reason why SCO could not
18 have provided version, file and line information with
19 respect to methods and concepts. Professor Davis, in his
20 declaration, makes perfectly clear, common sense
21 dictates: Methods and concepts do not exist in the
22 ether. They exist in an operating system, insofar as
23 they are embodied in source code.

24 And I refer Your Honor to tab 19 of the book.
25 As Professor Davis says: "There must be lines of source

1 code in the program that implement the method or concept.
2 Methods and concepts employed in an operating system or
3 any computer program are in the source codes. It could
4 not be otherwise."

5 SCO's own technology officer, Your Honor, in
6 testifying in this case said -- Gupta, G-u-p-t-a, had
7 indicated in his deposition that the provision of source
8 code is important to understanding version and file. It
9 is important to understanding methods and concepts.
10 Mr. Rochkind, of whom Mr. Singer speaks, SCO's expert,
11 has written on the subject of operating systems and used
12 in his writing on operating systems source code to
13 describe methods and concepts. Whether or not it is
14 available in every circumstance, it is beyond debate that
15 methods and concepts can be and must be, if to be
16 understood precisely, understood in terms of the source
17 code that embodies them.

18 Now, finally, Mr. Singer says in this
19 connection that the problem with Magistrate Judge Wells'
20 order, Judge, is that it requires SCO to read IBM's mind,
21 that SCO has no means to figure out what it is that IBM
22 supposedly did wrong because IBM hasn't told them. That,
23 Your Honor, is, I respectfully submit, a frolick and a
24 detour into the irrelevant.

25 And that is simply because what IBM's discovery

1 requests ask for is SCO's allegations. What is it, after
2 all the billions of lines of code that have been
3 produced, the millions of pages of paper that have been
4 produced and all the depositions taken, what is it
5 precisely that IBM is supposed to have done, so that IBM
6 can prepare a defense with respect to that. That's what
7 was asked for. That's what was required, and that's what
8 the evidence, I would submit, unequivocally demonstrates
9 could be provided if SCO would disclose what its
10 allegations are.

11 That is what has been withheld, its allegations
12 about what IBM has supposedly done. In any event, Your
13 Honor, SCO raised this argument that it shouldn't be --
14 it couldn't possibly be required to tell IBM the
15 particularity of its claims in advance of IBM telling SCO
16 what IBM had supposedly done in 2003 and 2004.
17 Magistrate Judge Wells rejected the argument then. SCO
18 didn't appeal from the order, and it is not an argument
19 that can be timely raised now.

20 And, finally, with respect to willfulness, SCO
21 suggests, in an effort to justify its failure to comply,
22 it acted in good faith and that it didn't act willfully.
23 Again, here, if anyone bears the burden to demonstrate
24 the justification for SCO's failure, it's SCO. And the
25 record evidence here, I would respectfully submit, is

1 overwhelming that SCO acted willfully. Indeed, Your
2 Honor, I believe that evidence fairly can be read to
3 create inference of that faith.

4 IBM repeatedly requested the disclosure of
5 version, file and line information over the course of
6 years. IBM made motions to dismiss. This is not an item
7 buried somewhere in a footnote. This is not an item that
8 came up by surprise. From the beginning of this
9 litigation, we have been seeking version, file and line
10 information. Two motions to compel were made. Three
11 orders of the Court were entered. IBM, during this
12 period of time, communicated with SCO and indicated to
13 SCO that we believed SCO was not in compliance; that we
14 would bring this motion if SCO did not bring itself into
15 compliance.

16 Magistrate Judge Wells made perfectly clear,
17 warning SCO in chambers at the beginning of the case and
18 on the record later in the case, that the evidence must
19 be put on the table, that evidence not put on the table
20 would not be allowed to be used.

21 SCO asked nothing less of IBM in its discovery
22 requests where, with respect to methods and concepts, it
23 defined the term "identify" to include version, file and
24 line information. Without the information requested,
25 Your Honor, it simply is not possible for IBM to be in a

1 position to defend itself. The mere fact, which I submit
2 is not supported by the record, that SCO believes that it
3 it subjectively thought it was in compliance is not
4 enough to justify SCO's failure here to comply.

5 There is not evidence of subjective compliance,
6 and, in any event, the mere subjective belief that a
7 person is compliant with a Court order is not, by itself,
8 sufficient to justify its failure to comply. It simply
9 cannot be that they can not comply with three orders of
10 the Court and then shift, on the strength of an argument
11 that, gee, we thought we could, the burden to IBM, the
12 impossible burden to IBM of having to figure out for
13 itself what it is SCO's case is about.

14 SCO asks, in effect, Judge, to be rewarded for
15 its failure to comply and have IBM punished by an
16 inability to figure out what SCO's case is about.

17 Last point, Judge. I'm getting close.

18 THE COURT REPORTER: But you don't have to
19 hurry.

20 MR. MARRIOTT: Okay. Last point.

21 THE COURT: She says.

22 MR. MARRIOTT: I will hurry, but I will hurry
23 slowly.

24 THE COURT REPORTER: Thank you.

25 MR. MARRIOTT: Point 3. SCO failed to

1 demonstrate that its error here was harmless. Here,
2 again, the burden is on SCO, and even if it weren't,
3 Judge, the record here amply demonstrates prejudice
4 following SCO's disclosures. The argument seems to be
5 that IBM can figure out for itself what it did because,
6 again, it did it, so nobody knows better than IBM.

7 "And, by the way," SCO says, "we've given them
8 a whole bunch of stuff, and it's enough stuff for them to
9 generally figure out what we're talking about, and if
10 they haven't figured it out, they can go and get their
11 developers to sit down in a room and talk to them about
12 it, and they will tell IBM what they actually did."

13 Your Honor, let me refer you to tab 92 of the
14 book. Mr. Singer talked about -- I'm sorry. It's not
15 tab 92, it's item 92, which appears at tab 26, item 92 of
16 SCO's final disclosures.

17 In the spirit of giving Your Honor a flavor for
18 SCO's allegations, this is item 92. It says that IBM
19 contributed Dynix/ptx code to Linux from Michael, who
20 appears to be a former Sequent employee. So the
21 allegation -- what we're told in this final set of final
22 disclosures, which SCO argues has all the specificity
23 required by Magistrate Judge Wells, all the specificity
24 that could reasonably be required, all that IBM needs to
25 defend itself, we're told what we were told in the

1 Complaint. IBM took code from Dynix and it put it into
2 Linux.

3 Now look, if you would, Your Honor, at the next
4 page. Much of SCO's argument is: Judge, we have given
5 them the actual disclosures. What do they want from us?
6 They have been handed the documents.

7 This is one of the documents we have been
8 handed, not unique among the particularity provided: An
9 anonymous posting somewhere on the internet by a person
10 purported to be called Michael, purported to have been a
11 former employee of IBM saying that Sequent didn't get
12 into the business of contributing Dynix/ptx code to
13 Linux, IBM did. That's it.

14 Now, contrast that, Your Honor, with the
15 scope -- look at tab 24, if you would, of the book.
16 Again, to end where I began. The scope of code
17 implicated by SCO's claims is substantial. Millions of
18 files. Billions of lines of code. And IBM is told:
19 Your guys did it. Figure it out for yourself. SCO
20 declined to provide version, file and line information.
21 That is undisputed. And the table laid out in this book,
22 I think, makes that clear.

23 It is simply not possible, contrary to
24 Mr. Singer's suggestion, for IBM to simply figure out for
25 itself what is at issue. The haystack is enormous, and

1 while we could in theory search the haystack of this code
2 for the allegedly misused information, the real problem
3 here, Your Honor, is that the needles that we have been
4 sent to find are undefined needles, as defined in item 92
5 of SCO's final disclosures.

6 There are numerous additional reasons why the
7 complaints made here lack merit. They are set out in our
8 papers, Your Honor. Magistrate Judge Wells' order did
9 all that it could properly have done with respect to the
10 187 items at issue here. It granted IBM's motion. It
11 afforded relief that was, in any event, automatic under
12 Rule 37(c). Your Honor should, respectfully, overrule
13 SCO's objections. Thank you.

14 THE COURT: Thank you.

15 Mr. Singer?

16 MR. SINGER: Your Honor, I'd like to start by
17 talking about one of the points which Mr. Marriott
18 mentions in quoting from the Magistrate in trying to
19 argue the order concerned evidence, not claims, refers to
20 the Magistrate saying, "I don't want either side to use
21 information that has been withheld. I want all the
22 evidence to be on the table for the other party to
23 analyze and take a look at."

24 But the order here does not do that. The order
25 takes the evidence we have put on the table, takes the

1 items that relate to that evidence and says we cannot
2 take those to trial. It takes the items we have
3 disclosed and excludes them from the case, and the
4 evidence relating to those items, none of which could be
5 used to support it and takes them out of the case.

6 It doesn't say: The things which you haven't
7 disclosed, you can't use. And, similarly, Rule 37(c),
8 which, first of all, a sanction like this is not
9 automatic. There is no case law or anything indicating
10 there is anything automatic about precluding claims, but
11 Rule 37(c), which Mr. Marriott points to, says that when
12 a party without substantial justification fails to
13 disclose information required by Rule 26 or to amend a
14 response to discovery then, unless its harmless, it shall
15 not be permitted to use as evidence at trial any witness
16 or information not so disclosed.

17 It doesn't say anything about putting an order
18 saying that your claims aren't in the case, that you can
19 limit and exclude all this evidence on all these claims
20 that are on the table, which goes directly to the point
21 we have made. We are not sandbagging anyone, but the
22 remedy for a party that sandbags in litigation is at the
23 time when the evidence comes out of the bag and in open
24 court it's excluded. It's not an order which takes all
25 the evidence we have presented, all the items we have

1 presented and says those are out of the case.

2 The second point we'd like to make is that, as
3 indicated by IBM's own chart, it is IBM that uniquely
4 would have origin information. And most of the dispute
5 here is really about origin information on methods and
6 concepts because IBM has never shown, and Mr. Marriott
7 doesn't suggest that on the methods and concepts that
8 have been disclosed -- there is origin information that
9 we simply haven't provided because we have quoted the
10 whole disclosure. If it's too general, if it's too
11 imprecise to be actionable, they can make a motion for
12 summary judgment on it. They can move later that it be
13 excluded as too general.

14 Perhaps the example, tab 92, which is raised by
15 Mr. Marriott the first time here -- it hasn't been raised
16 below. It hasn't been raised in briefing. This is the
17 first time that example comes up -- if that one is too
18 general, it should be excluded, but you don't throw out
19 all these parts of our case.

20 Dynix and AIX are operating systems that IBM or
21 Sequent, which IBM bought, developed. They developed
22 them under licenses that said they cannot disclose
23 information that comes from derivative systems. That is
24 our contract argument. The individuals who worked on
25 making these disclosures from Dynix and AIX into Linux

1 are people at IBM. They are the ones who, if you can say
2 what line of code I was thinking about in Dynix when I
3 was making that method and concept disclosure, it is an
4 IBM engineer.

5 Now, on that point, what does Mr. Marriott say
6 near the end of his presentation? He says, "Well, SCO is
7 the one who has to specify its allegations." We have
8 done that.

9 We have said, "It is the disclosure of this
10 method and concept that is wrong, and here is the whole
11 disclosure."

12 But we can't tell IBM what Mr. Hysega, who
13 works for IBM, had in his mind when he said, "This came
14 from Dynix, and I'm disclosing it." if he didn't put that
15 in writing in his disclosure. Either no one knows that
16 because it didn't come from a specific place in code or,
17 if it is known, it's known uniquely to Mr. Hysega. The
18 same is true for Mr. Wright and all the other developers
19 for IBM.

20 Mr. Marriott said nothing about what we have
21 said throughout this case -- or throughout this motion.
22 They have not addressed the fact that they even asked
23 their developers, "Where in Dynix or AIX did you get that
24 method or concept?" Where is the record saying that
25 those people don't know? And if they don't know, how

1 does SCO know that origin information?

2 Now, the destination information is different.
3 We admit that interrogatory 12 calls for destination
4 information in Linux. We have provided file information.
5 With respect to versions, they weren't expressly called
6 for by the order. Mr. Rochkind, in his declaration, said
7 that the disclosures apply to all versions of Linux after
8 that disclosure has been made. And there is no showing
9 anywhere that that is somehow unworkable for IBM to deal
10 with. And as to lines, we have identified the files.
11 That refers to all the lines in those files.

12 There is no showing that we had more specific
13 information within a given file of Linux and we didn't
14 disclose it. There is no showing that IBM or its experts
15 can't work with the file information that has been
16 provided and that that is a basis for throwing out these
17 claims relating to those disclosures.

18 Now, one of the points which has been made is
19 that de novo review, they suggest, is not required here
20 because we are not dealing with evidence -- we are not
21 dealing with claims, we are just dealing with evidence.
22 The fact of the matter is, is the Courts that we have
23 cited at tab 16, when you throw out all the evidence
24 relating to a claim, you have disposed of that claim.
25 These are claims that, if we prove they have breached 188

1 methods and concepts or even some subset of those that
2 have been excluded, that can support our contract breach,
3 independent of the claims that haven't been excluded,
4 just like the case we cite which threw out -- which said
5 you had to use a dispositive, de novo scope of review
6 when just one patent claim, of a number of patent claims,
7 was resolved. The cases cited at tab 16 involve
8 sanctions and deal with de novo review.

9 I'm not going to belabor the standard of review
10 point. I think that it's clear that there is no legal
11 support in this Circuit for what one Court characterizes
12 as a dead fish standard, but the standard is de novo
13 review if it has this effect. It is not denied that it's
14 de novo with respect to legal issues. And what is the
15 significance of that? Mr. Marriott does not address the
16 fact that you need particularized findings. It's simply
17 not enough to say that all of these are grouped together
18 and then to talk about an example here, one example out
19 of 188.

20 Did Mr. Marriott address any of the five
21 examples that we addressed here, which have been
22 addressed earlier, including example 146, where the only
23 source code known is hiding behind an IBM fire wall that
24 we can't get at, but that's been struck from our case?
25 Has it addressed any of the other examples that are in

1 our papers or the appendix, dozens of examples? It
2 hasn't. You have to decide an issue like this on an
3 item-by-item basis, and that is the type of
4 particularized finding that the Tenth Circuit has
5 required.

6 There should be an evidentiary hearing if you
7 are going to go down this path before striking these.
8 That also is not responded to. There needs to be a
9 consideration of alternatives, the Tenth Circuit says, to
10 the sanction of striking a claim. Here, the very
11 authorities that Mr. Marriott points to, Rule 37 and the
12 colloquy with the Magistrate, as well as Rule 26, talk
13 about a lesser sanction that is perfectly appropriate
14 for the concern they have.

15 If we seek to use information that hasn't been
16 disclosed, they can object and say that should have been
17 disclosed earlier. It is not, however, a basis for
18 preventing arguments for what has been put on the table
19 and the information that we have.

20 Now, in addition, I'd like to turn to the issue
21 of whether or not this order required disclosure of the
22 nine coordinates. First of all, I think it's clear that
23 the nine coordinates is something which IBM has derived
24 from the various interrogatory requests that was not
25 required. This Court's order in July talks about

1 specificity. IBM suggests it's irrelevant that the Court
2 didn't adopt its language. I ask: If that's so, why did
3 they propose it? If it was irrelevant, why did they ask
4 the Court to enter into it?

5 We think that -- and the briefs pars through
6 all of the orders and interrogatories if you look at them
7 closely. Our position is: While we have provided
8 everything, they certainly never had a requirement that
9 for a method and concept disclosure that SCO identifies
10 what was disclosed, we had to go back and say where that
11 is found by line in AIX or Dynix or face dismissal of our
12 case on those items. That never happened.

13 What happens is you have interrogatory 1 that
14 expressly used the language, "modify where appropriate."
15 We have interrogatories 3 and 4 which, at tab 27, we
16 address. They refer back to the information in
17 interrogatory 1, and they don't seek identification of
18 product file and line information. And that's true of
19 interrogatory 6 as well. That identifies the products in
20 which the code is included, and we have admissions here,
21 admissions we contend of liability, saying this comes
22 from Dynix, that is both sufficient to answer
23 interrogatory 6 and is as complete information as SCO
24 has.

25 On interrogatory 12 and 13, we address that at

1 tab 28 as well as in our briefs. Tab 12 addresses Linux
2 files, where we have provided all the information in
3 Linux that we have as to where that is located, and there
4 is no denial as to the file-specific level of
5 information. In interrogatory 13, which says, "Describe
6 how IBM is alleged to have infringed plaintiff's rights,"
7 that interrogatory made no mention of version, file and
8 line information.

9 If you look at their own exhibit, tab 16, and
10 the AIX and Dynix part in blue, what is asked for? SCO
11 is ordered to provide and identify all specific lines of
12 code that IBM is alleged to have contributed to Linux
13 from either AIX or Dynix. And we have done that. Where
14 there is an allegation that code has been contributed,
15 that has been specific. For example, disclosures of JFS,
16 a whole file system, are done specifically. It's not
17 subject to this motion. The issue here is not where IBM
18 is alleged to have contributed code from AIX or Dynix,
19 but to have used methods and concepts, through knowledge
20 of those systems, to disclose confidential information,
21 to talk about a method and concept, like those five
22 examples illustrated. And that can be done without code,
23 as Mr. Rochkind indicated in his declaration.

24 There is an issue raised that we have waived
25 this because we didn't object to these discovery requests

1 in 2004 or 2003. Our objection is not to the discovery
2 requests, as such. It is the interpretation that is
3 being placed on them here and is part of the motion to
4 throw these claims out of Court, that if we don't have
5 this information, that it's our obligation with respect
6 to methods and concepts, that IBM shouldn't be expected
7 to ask its own employees, who made those disclosures:
8 Where did they come from?

9 Those items have only come up since the
10 December disclosures have been made, and they have come
11 up in this motion. There has never been any earlier
12 orders to deal with that. And certainly, with respect to
13 the issue of whether or not the sanction is appropriate,
14 whether or not this order is appropriate, we are on
15 direct review of that, and none of those issues are
16 waived.

17 Mr. Marriott says that SCO has not justified
18 its failure because he points to one example of an item
19 which he says is too generally provided, too abstractly
20 provided, never going through item-by-item either the
21 examples we give, and what he has actually proven, we
22 submit, Your Honor, is the need, if you're going to go
23 down this road, for some type of item-by-item process to
24 look at those. And the way in which we submit it is
25 appropriate to do that, if you're going down that road,

1 is after the expert reports are considered and after
2 expert discovery addresses that, which is where we are at
3 now.

4 And then, if they want to make a motion before
5 trial saying that item number 92 still remains too
6 general for us to properly form a defense, then you deal
7 with that item and, if they're right, that item doesn't
8 come in. But it doesn't mean that all the items which
9 are specific and where we have provided all the
10 information we have, that those items are out of the
11 case.

12 He refers to Mr. Gupta. How did Mr. Gupta's
13 testimony come in? It came in not in the Magistrate's
14 hearing or in papers filed by IBM. It comes in in the
15 Davis declaration submitted post-argument, appended to
16 it. And it's clear that Mr. Gupta, throughout his
17 deposition says and identifies a lot of methods and
18 concepts without using source code to do so. And he
19 says, which is true, that you can do so more accurately
20 when you have the source code.

21 It doesn't mean that there are methods and
22 concepts which you can't talk about and identify without
23 source code or that SCO has or should be expected to know
24 everything in IBM's mind about the source code they were
25 thinking about when making a method and concept

1 disclosure that didn't involve source code specifically.

2 In any event, how is it appropriate for, in a
3 non-evidentiary setting, in a non-adversarial setting,
4 since we weren't even allowed to respond to Mr. Davis'
5 declaration, which submitted parts of Mr. Gupta's
6 testimony, for now that can become the basis for
7 supporting a sanction order? How is it appropriate --
8 and Mr. Marriott doesn't even address the issue -- for
9 the Court to look at a discovery request SCO made in June
10 of 2003, which talked about identify, and which the
11 Magistrate Judge said was the most important factor in
12 her decision, when that comes in after argument in Davis'
13 declaration? And when you look at all the circumstances,
14 it's clear it didn't support that decision because it
15 also was modified by the terms "where appropriate" in
16 providing sources.

17 With respect to willfulness, there is not one
18 example on this record, Your Honor, of where any
19 information has been proven to exist with SCO which has
20 not been turned over. The Rochkind declaration is the
21 only evidence on this record that addresses that. And
22 that says, "I was instructed by SCO's counsel to provide
23 everything we had, and we provided everything we had."
24 Faced with that, how is there support for finding that we
25 were willfully withholding information? The two sources

1 of support that the Magistrate refers to don't support
2 that.

3 There is the reference to the public
4 statements, which don't relate to that, and there is the
5 reference to the fact that you have certain source code
6 disclosures and for source code disclosures, you make
7 that. There is no proof of anything we are withholding,
8 and we don't know what more we can do, other than an
9 evidentiary hearing, put our witnesses on to say that.
10 There is no case which we're aware of, and there is no
11 example IBM has provided where a sanction striking claims
12 has been ordered where a party has provided the type of
13 information we have provided, saying what our allegations
14 are, identifying these are the method and concept
15 disclosures that we are talking about, none others, but
16 where the party, because it hasn't been able to go back
17 and relate those to a particular underlying program with
18 the specificity that one would in an ideal world perhaps
19 have, where that results in those claims being struck.
20 There is no precedent for a Draconian sanction like that.

21 So, procedurally, there is no basis for it.
22 Substantively, there isn't a record to support that, and
23 the decision would be without precedent. Your Honor,
24 these claims should be resolved on their merits at trial.
25 Thank you.

1 THE COURT: Thank you.

2 Mr. Marriott, let me ask you about a couple of
3 Mr. Singer's complaints. He complains that Judge Wells
4 did not make particularized findings. I'd like you to
5 briefly talk to me about that. He complains that SCO
6 requested an evidentiary hearing and didn't get one.
7 Could you talk to me briefly about that. And, also, it's
8 clear from his argument that he believes that claims have
9 been stricken, and it's clear from yours that you don't
10 believe claims have been. Talk to me briefly about that.

11 MR. MARRIOTT: Sure, Your Honor. Thank you
12 for the opportunity. First, with respect to
13 particularized findings. Particularized findings are not
14 required, and I would refer Your Honor to the Penn
15 decision from the Tenth Circuit, 528 F.2d 1181, 1975.
16 Magistrate Judge Wells issued -- and additional cases,
17 Your Honor, I believe are in our papers. Magistrate
18 Judge Wells issued a 39-page opinion which makes
19 abundantly clear that she looked at the items in
20 question. The only findings that matter as to
21 particularity are whether or not SCO provided that which
22 was required and which was put at issue in IBM's motion.

23 What was that? We asked for version, file and
24 line information. It's undisputed they didn't provide
25 precisely what we asked for, Your Honor. There is not

1 any debate about that. If you look at Exhibit 6 to the
2 book, is there a single line of System V code provided
3 for any of the 187 items? No. Undisputed. Magistrate
4 Judge Wells acknowledged that. What more particularized
5 finding could there be? With respect to AIX and Dynix,
6 were there any lines of AIX and Dynix code provided?
7 None. Zero. Nil. Not a single one was provided. What
8 more particular finding could one enter?

9 With respect to Linux, as to the 187 items,
10 Your Honor, three of the items identified lines of code.
11 Three. And as to those three items, there were no
12 versions provided. So there was no need, Your Honor,
13 for a particularized set of findings here. It is not
14 required in the cases, only that level of findings
15 necessary to permit this Court to undertake review. But,
16 in any event, Magistrate Judge Wells did do precisely the
17 type of particularized finding that one could do. She
18 could have done no more. She found there was no version,
19 file and line information.

20 THE COURT: What about the request for an
21 evidentiary hearing?

22 MR. MARRIOTT: Yes, Your Honor. As to the
23 request for an evidentiary hearing; again, to begin,
24 there was no request for an evidentiary hearing made
25 until SCO's reply papers. Having failed to request an

1 evidentiary hearing until then, Your Honor, the request
2 was waived. There is no need here for an evidentiary
3 hearing anymore than there is for particularized findings
4 different from what Magistrate Judge Wells did because
5 those findings are not in dispute. And I would refer
6 Your Honor, for cases for the proposition that a hearing
7 is not required, to page 55 of IBM's opposition brief.
8 An evidentiary hearing was not required.

9 Now, finally, Your Honor, you asked about
10 claims. Mr. Singer cited again, in his rebuttal remarks,
11 the Mopex case from the Southern District of New York.
12 And he says that what's so dramatically different here is
13 that Judge Wells has taken SCO's claims, ripped them from
14 the final disclosures and thrown them from the case, and
15 they will never be seen again. That's absolutely not
16 what happened. The claims are in the Complaint. The
17 theories of liability exist in the Complaint. In its
18 Complaint, SCO says IBM breached the agreement, this
19 agreement or that agreement, by violating Version 7.06 of
20 the IBM and Sequent agreements with AT&T, by violating
21 Section 2.01 and so on. Specific provisions are
22 identified as having been breached by IBM.

23 Magistrate Judge Wells didn't touch any of
24 those provisions. SCO can proceed with its case with
25 respect to any theory of liability that it has that is

1 laid out in the Complaint, notwithstanding what
2 Magistrate Judge Wells did in her order.

3 Now, the Mopex case, this case from the
4 Southern District of New York, Judge Shindler, the Mopex
5 case supports IBM's view, not SCO's, as to whether the
6 relief here is dispositive. Why is that the case? Mopex
7 was a patent case. It involved at least 34 independent
8 claims of a patent. The Magistrate Judge in the case
9 found that one of the claims should not be permitted and,
10 pursuant to Report and Recommendation, said the plaintiff
11 in the case shouldn't be allowed to proceed as to that
12 claim. But the patent claim, Judge, is comparable, if
13 anything, to the provision of the IBM agreements that IBM
14 is said to have breached. Did we breach Section 7.06?
15 Did we breach Section 2.01? Magistrate Judge Wells
16 didn't touch those. Those remain in the case, and the
17 other remaining items that SCO has in support of its case
18 can be used to the extent they apply to support those
19 theories of recovery.

20 SCO has not lost any claims, however many times
21 it wants to call its evidence claims, Judge. The
22 Complaint is intact. The claims are intact. The
23 theories of liability are intact. And Mopex does not
24 support that view. In fact, if anything, Your Honor, if
25 you look carefully at Mopex, you will see that under

1 circumstances far less severe than these, where the
2 violations were far less significant than those of SCO,
3 the Magistrate Judge in that case found the preclusion
4 should be entered on a far lesser showing, where the
5 Court more readily than ever would be required here,
6 found a basis for the relief and request.

7 Now, if I may make just two additional points
8 while I'm here, Your Honor. It was suggested that I
9 failed to describe in detail all of the items laid out by
10 Mr. Singer. As you well know, time doesn't permit that,
11 but one of them deserves at least some mention because it
12 has now been mentioned twice. SCO contends IBM -- it
13 couldn't provide any additional information because,
14 again, it's in the minds of the IBM developers. "Who
15 knows better than IBM," says Mr. Singer, "about the
16 coordinates within AIX and Dynix?"

17 Your Honor may remember something called CMVC,
18 the many billions of lines of code which it was insistent
19 that IBM produce to put SCO in the position to tell IBM
20 exactly where it is the code is found. The argument to
21 get that code at that expense and that effort was so SCO
22 could be in a position to tell IBM what IBM had been
23 requesting. We gave the information, Your Honor, as the
24 court ordered us to do. We, nevertheless, don't have a
25 single line of code from either AIX or Dynix.

1 As to the minds of these developers, that's
2 what depositions are for. The one example Mr. Singer
3 mentioned, Mr. Hysega, is the only developer I believe
4 SCO deposed. It was as free as IBM to ask Mr. Hysega
5 whatever it wanted about what it relied upon or didn't
6 rely upon. At the end of the day, SCO has to stand up
7 for any claims that survive the Court's order and be able
8 to explain and put IBM in a position to respond to what
9 it is that IBM supposedly did to injure SCO. To simply
10 say that you took code from here and you put it there
11 tells us nothing about what that code's value might be,
12 what impact it could potentially have and so on.

13 Moreover, Judge, the supposed fire wall, the
14 document that can't be found? IBM produced the document
15 to SCO at SCO -- at Bates range 1910678798 through
16 1910678885, and so far as we have any idea what they are
17 talking about, this appears to be the document. There is
18 no reason they couldn't have discovered what's been asked
19 for in discovery, and notably, at no point, never,
20 despite IBM's repeated requests about what was required,
21 did SCO come to Magistrate Judge Wells and say, "We can't
22 do this. You have ordered version, file and line
23 information, but it can't be done. It's not possible,
24 Judge."

25 That never happened, Your Honor,

1 notwithstanding IBM's assertions that SCO was in
2 violation and that it would bring this motion.

3 Thank you.

4 THE COURT: Thank you.

5 Mr. Singer, you get the last word. This is
6 your motion.

7 MR. SINGER: Thank you, Your Honor. I'd like
8 to address the particular issues that the Court asked
9 Mr. Marriott about. Particularized findings.
10 Mr. Marriott said, "Well, what is it that the Court could
11 be expected to say?".

12 Well, first of all, the Court could be expected
13 to address the other items in the way in which it
14 addressed a handful of items near the end of her order
15 and actually left a number of those in the case. The
16 Court could be expected to address the prejudice to IBM,
17 whether or not on a specific item it has enough
18 specificity or not to go forward and defend that item.
19 The Court could be expected to address whether there's
20 any evidence in the record that we had the ability to
21 provide more specific information on that item. There is
22 no holding by this Court or anywhere else that in order
23 to prove our case we have to have the file, line and
24 version relating to these items. And if it's in the CMV
25 system regarding AIX and Dynix, IBM has it already.

1 Our -- a factual finding would deal with why it
2 is that we should be expected to know, on a given item,
3 what's in Mr. Hysega's mind on that if he works for IBM.
4 But IBM doesn't know it? There has never been a ruling
5 saying that a party's claims are thrown out of Court
6 because they didn't ask in deposition questions,
7 something of the other side's witness which the other
8 side already knows. There is no basis for that. So,
9 there's plenty of factual issues that particularized
10 findings would be appropriate for her.

11 The evidentiary hearing. Mr. Marriott is
12 suggesting that we requested it too late in our reply
13 brief. Well, first of all, it didn't come in a reply
14 brief. We never got a reply brief. He was the moving
15 party on the motion. He got a reply brief. It came in
16 the argument where in their reply brief, for the first
17 time, some evidentiary matters were introduced into the
18 motion. IBM filed a ten-page motion without any
19 supporting materials. That's what set this process in
20 place. We responded.

21 In IBM's reply, they offered Mr. Davis'
22 declaration, which was evidence. At that point, we moved
23 for leave to supply the Court with Mr. Rochkind's counter
24 declaration. And then, at our first opportunity, which
25 was the argument before the Magistrate, we expressly

1 called for an evidentiary hearing, which we are entitled
2 to before all of these type of factual findings that we
3 have information, that we haven't disclosed it, and the
4 like, are being made.

5 The third question that's being asked: Are
6 claims being stricken or just evidence being precluded?
7 Well, you have a motion here which says, "Limit SCO's
8 claims." You have a ruling here that grants that motion.
9 You have the effect of the ruling that on 188 items, any
10 one of which would show a disclosure that a jury could
11 find, if we're right, breached a contract and could
12 support certain findings. We can't bring those to the
13 jury now. We are left with the others. Those are, we
14 think, exactly analogous to the Mopex case, when the
15 Court is dealing with claims, many claims in a patent,
16 and a new claim comes along, number 34, that the Court
17 finds is untimely or the Magistrate found is untimely and
18 says, "That one you can't proceed on. You have other
19 claims of breach of infringement of the patent," just
20 like we have other claims for breach of copyright. They
21 fall within the same cause of action. But because this
22 would have independently supported liability of patent
23 infringement, just like these 188 items could
24 individually or collectively support findings of breach
25 of contract, a ruling that excludes those is a

1 dispositive ruling.

2 This is not a ruling saying certain categories
3 of evidence in support of those items can't be used. It
4 is not a ruling saying things you haven't told us about
5 in support of these items can't be used. It's saying
6 those claims are out of the case. That is a dispositive
7 ruling which this Court is required to review de novo.

8 I'd like to briefly address the last two items
9 that Mr. Marriott addressed at the end of the questions.

10 THE COURT: Go ahead.

11 MR. SINGER: He said that the CMVC system was
12 produced. And we have used that, and our experts, as
13 they have testified, including Mr. Rochkind in his
14 declaration, used that a great deal to identify code
15 disclosures. IBM has not pointed to anything in CMVC or
16 anywhere else that would allow us to say that when these
17 method or concept disclosures have been made from Dynix
18 to Linux, we know what their developers had in their mind
19 as the origins in Dynix.

20 And they are not being asked to just search for
21 needles in a haystack. They have the disclosure of the
22 actual disclosures of the method and concept to the Linux
23 world. If it was complete and detailed enough to be
24 valuable, they have the entire disclosure to work with;
25 to argue it wasn't valuable, to argue the information was

1 available from other sources. They have as much there as
2 the Linux world relied on and which we argue was
3 sufficient to create liability.

4 The last point which was suggested is that
5 there is an example of item 146, where we could find that
6 at some page. All I can say, Your Honor, is that we have
7 been arguing about Exhibit 146 back since they first
8 raised it in the Davis declaration. And this is the
9 first time now, in what everyone calls that, a
10 sur-rebuttal reply, that that has been referenced. And,
11 if anything, it shows that if you're going make decisions
12 on these types of issues, they have to be made on an
13 item-by-item basis on an evidentiary record.

14 Thank you very much.

15 THE COURT: Thank you. Well, I'll take this
16 happy matter under advisement.

17 Let me ask you briefly about a couple of other
18 things. We currently have a trial beginning February 26.
19 Originally, in the July 1, 2005 scheduling order, I set a
20 dispositive motion deadline for July 28 of 2006 and, with
21 that deadline, all the motions would have been briefed by
22 September 29. They would already be briefed, which was
23 five months before trial. Now, through several
24 stipulated extensions, which were taken from you folks,
25 although I suppose I approved them, so I suppose I'm

1 partly at fault here, the dispositive motion deadline is
2 the 25th of September -- was the 25th of September. And
3 the motions won't be briefed until December 8.

4 Now, there are ten motions at this point, which
5 will be briefed by December 8, I assume, but first they
6 have to be heard and then they have to be decided.
7 That's not a lot of time to get them heard and decided
8 before we're all in full scale trial prep.

9 Any quick thoughts about that? So now, instead
10 of five months, we have, what, two-and-a-half months
11 between fully-briefed dispositive motions and a trial
12 date? And we have ten motions. It's not like it's one
13 simple motion.

14 MR. SINGER: Your Honor, we would not minimize
15 the burden that's on the Court. We've filed four of
16 those motions. They are each supported by memos of -- I
17 don't know an exact length, but 20 -- I think 30 pages.
18 One might be longer, but in that range. IBM has filed
19 six motions which have over 400 pages of briefing and
20 over 40,000 pages of exhibits supporting. Faced with
21 that, we asked for one additional week beyond with what
22 we had previously agreed to deal with that.

23 And the reason we only asked for a week is
24 because we understand the Court needs as much time as
25 possible to review that before trial, and it is important

1 to SCO -- we want to get to trial as quickly as possible.

2 I don't have a specific solution in mind on
3 that, other than preceding to have an argument, and
4 perhaps if there are particular issues that come out of
5 the argument after that, the parties could be directed to
6 file very short, two to three-page summary briefs that
7 extract from this larger material what would be relevant
8 to those particular issues that might help focus the
9 Court then on being able to extract from this mountain of
10 paper those items that may be relevant in deciding
11 whether, in a case of this dimension, there really are no
12 disputed material facts. We would hate very much to lose
13 that February trial date.

14 THE COURT: Thank you.

15 Mr. Marriott.

16 MR. MARRIOTT: With respect, Your Honor, I
17 think the last thing we need is more briefs. I, like
18 Mr. Singer, am eager to have this matter resolved. That
19 said, candidly, I don't know how realistic it is, in view
20 of the filing of those ten motions and the current
21 schedule, to expect that the Court would have time to
22 hold the hearing and to resolve it and that the parties
23 would then have the time to deal with that.

24 THE COURT: In that connection, how long do you
25 think it would -- how long would it take to hear argument

1 on ten dispositive motions?

2 MR. MARRIOTT: Well, I suppose that depends on
3 how much time Your Honor alots per argument.

4 THE COURT: How much would you folks want, if
5 you had your wishes granted?

6 MR. MARRIOTT: Well, that's an excellent
7 question, one that I, candidly, haven't spent a lot of
8 time thinking about. Off the top of my head, Your Honor,
9 what I would say is that it would vary quite a bit. My
10 motion -- some of these motions are much more involved
11 than others. I think, at the end of the day, there will
12 be truly very few facts that are in dispute as to these
13 motions, and I would like to believe that the issues the
14 Court would actually hear are relatively straightforward.
15 I would think any one of these motions, Your Honor, could
16 be and should be argued in no more than an hour and a
17 half.

18 THE COURT: Total?

19 MR. MARRIOTT: Correct. Both sides.

20 THE COURT: What do you say to that?

21 MR. SINGER: Your Honor, my estimate would not
22 be much different than that. I think if the Court would
23 set aside a day for arguing SCO's motions for summary
24 judgment, equally divided time between the parties that
25 would be available, I think that would be a reasonable

1 amount of time. It might be a little bit less than an
2 hour per motion, but some of these motions don't require
3 an hour. Some of them probably do.

4 THE COURT: So we might be talking about,
5 basically, two full days to argue the motions, right?

6 MR. SINGER: I was suggesting one full day,
7 Your Honor.

8 THE COURT: Ten motions. I thought you said
9 one day for SCO's motions.

10 MR. SINGER: I was thinking one day for both
11 sets of motions.

12 THE COURT: Well, if Mr. Marriott is right with
13 his estimate, that would be 15 hours of argument, and
14 people might want to eat and go to the bathroom.

15 MR. SINGER: We have been known to want to do
16 that occasionally. I agree with Mr. Marriott that on
17 some of these motions, like there is a contract motion
18 and others, an hour, hour and a half of argument divided
19 between the parties makes sense. I think on some of
20 these, I'm not sure that much time is required, given it
21 is a much more focused motion.

22 THE COURT: And one could -- the most brilliant
23 jurist on earth, I would think, could hardly be expected
24 to say, on December 9 and 10, when all the briefing is
25 done by the 8th -- did you say you were asking for

1 another week?

2 MR. SINGER: That's already accounted for in
3 the 8th.

4 THE COURT: In the 8th. All right. -- could
5 be properly prepared to hear the arguments. There's got
6 to be some reasonable period of time between the 8th and
7 the arguments, doesn't there?

8 MR. MARRIOTT: As eager as I am to have it
9 resolved, Your Honor, I don't, candidly, think it's
10 realistic to expect that the trial date can hold, and I
11 really think it's not feasible, if there is to be any
12 meaningful opportunity for the Court to prepare, for the
13 parties to argue, and for the Court to have some time to
14 consider the motions.

15 THE COURT: And decide them.

16 MR. MARRIOTT: And then decide them. And then
17 whatever is decided is decided, and there may be well be
18 actions the parties need to take as a result of those.
19 So, if your bottom-line question is, Judge: Should the
20 trial date slip?

21 I think the answer is: Yes, it should.

22 And, as to the scheduling of oral argument, we
23 are available to do it at the Court's leisure. It may
24 well be that counsel can collaborate and coordinate as to
25 what we believe by way of proposal each side would

1 require by way of arguments on each motion and propose
2 that to Your Honor for your consideration.

3 THE COURT: Why don't you do that. Apparently
4 you're still talking with each other. This is good. Why
5 don't you talk to each other before you get away from
6 town here and send me a proposal about how long you think
7 it would take to argue these ten motions, and that will
8 help me find the time necessary to do it, and a
9 reasonable period of time that I can get ready after the
10 8th of December.

11 MR. SINGER: Your Honor, in connection with
12 that, would your office be able to tell us if there --
13 what your trial schedule looks like? I mean, we hate to
14 lose February 26.

15 THE COURT: But it sounds to me like -- I
16 think you're going -- I think we're going to lose it. I
17 don't think we have any choice about that if we want to
18 give any intelligent consideration to these motions, and
19 we do. But I'm not prepared to -- I need to think about
20 how far out it needs to go, and you maybe should suggest
21 that also in whatever you give to me.

22 MR. SINGER: I think that the parties, if we
23 knew for example that there would be -- three months out
24 on the Court's schedule, there would be time for a
25 five-week jury trial, we could work back from that.

1 THE COURT: There's always a whole bunch of
2 trials set, and who knows what's going to go and what
3 isn't. We'll just have to figure out the time we're
4 going to have to do this and plunk it down in there and
5 work around it. All right.

6 MR. MARRIOTT: If it makes you feel any
7 better, Your Honor, we have at least committed with one
8 another that there will be no extensions of the
9 opposition dates for responding to the motions.

10 THE COURT: So December 8?

11 MR. MARRIOTT: The 8th is fixed, so those
12 dates are not moving, so that at least is one fixed mark
13 in this whole affair.

14 THE COURT: I wonder if I could get ready to
15 hear these motions on December 23 and 24? No. I'm
16 kidding.

17 I've asked Judge Wells to hear IBM's motion to
18 strike the allegations in excess of the final
19 disclosures.

20 Here's another thing I want to get your quick
21 reaction to. Novell isn't here, but you both know
22 there's another case. Is there an argument that that
23 case ought to be tried first, at least from you two
24 folks? I'm not asking Novell that. They are not here --
25 or it is not here. Do you have a reaction to that

1 question?

2 MR. SINGER: My immediate reaction would be
3 that the IBM case should come first, that the contract
4 claims shouldn't be affected by the issues there. The
5 copyright claim on which IBM is seeking a declaratory
6 judgment, and we simply have a similar copyright claim,
7 that is affected by the question of whether or not those
8 copyrights were transferred from Novell to SCO. That
9 issue is one which is -- if that was decided adversely to
10 us would moot out that aspect of this case.

11 THE COURT: Do you have a comment?

12 MR. MARRIOTT: I do, Your Honor. There is, I
13 think, an excellent argument that the trial of that
14 matter should come first because there are issues, as
15 Your Honor well knows, there that would dispose entirely
16 of causes of action and claims in the IBM case. Just by
17 way of example: The ownership of the copyrights is an
18 issue in those cases. If it's found in that case that
19 Novell, not SCO, owns the copyrights, that cleans up -- a
20 lot of IBM's motion for declaration of non-infringement
21 of Linux, for example disappears.

22 THE COURT: "Cleans up" is your phrase, not
23 Mr. Singer's?

24 MR. MARRIOTT: I suspect that's right, Judge.

25 MR. SINGER: Absolutely.

1 MR. MARRIOTT: A second issue is that in IBM's
2 motion for summary judgment on its contract claims, we
3 have argued and believe that Novell has, by way of the
4 rights it has under its asset purchase agreement with
5 Santa Cruse, the predecessor of the Park Corporation of
6 SCO, has the right to waive the alleged violations of the
7 contract, and that issue is another issue raised in the
8 Novell matter and, if decided in favor of Novell, would
9 preclude relief sought here.

10 MR. SINGER: Well, that's an issue that we
11 think is relevant to the IBM matter but not really to the
12 Novell matter. That is being litigatged -- it concerns
13 Novell, but it is being litigated in the IBM case because
14 the claims Novell has purported to exercise the right to
15 waive are claims against IBM that are relevant here.
16 They are not relevant to the claims between SCO and
17 Novell.

18 MR. MARRIOTT: I agree it's an issue here. I
19 think it's also an issue there.

20 THE COURT: All right. Thank you both.
21 Thank you all. We'll be in recess on this matter.

22 MR. SINGER: Thank you, Your Honor.

23 THE COURT: I'll hear from the two of you in a
24 few days.

25 MR. SINGER: Your Honor, may I, before we

1 leave, just hold out one item Mr. Marriott raised. We
2 worked -- we asked for only one week to December 1
3 because we were trying our best to hold the trial
4 schedule for February 26. There are over 400 pages of
5 IBM motions. There are 40,000 pages of exhibits, over a
6 hundred declarations. If, as part of this
7 consultation -- and we're looking at a schedule that
8 pushes this out further, as it looks like now is going to
9 happen, we would like to ask the Court for at least the
10 opportunity, if we think we need it, to ask for an
11 additional week in responding to these motions if this
12 whole schedule is going to require this additional time.

13 MR. MARRIOTT: Well, if it's an additional
14 week, Your Honor, I think I could live with that. I
15 wouldn't want it to be much more than that because, of
16 course, then it runs into the holidays on our reply, but
17 an additional week is fine by me.

18 MR. SINGER: Thank you.

19 THE COURT: All right. The 15th? But that
20 means we are going to get replies when?

21 MR. MARRIOTT: We could endeavor to do our
22 replies a week earlier than the schedule and so we could
23 make the proposal to the Court.

24 THE COURT: All right.

25 MR. MARRIOTT: I don't know what I'm getting,

1 which is the challenge in committing to the time schedule
2 for the replies, but I think so long as we can work
3 together to have them briefed by the holidays, that would
4 probably be fine. That would hopefully meet everyone's
5 needs.

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

8 MR. SINGER: Thank you.

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25 (Whereupon the proceedings were concluded.)

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REPORTER'S CERTIFICATE

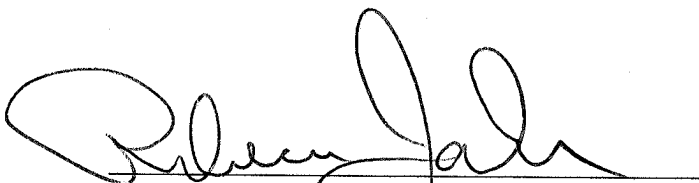
STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

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

That as such Reporter I attended the hearing of the foregoing matter on October 24, 2006, and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting, and the foregoing pages numbered 1 through 89; constitute a full, true and correct record of the proceedings transcribed.

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

And hereby set my hand and seal this 30th day of October, 2006.


REBECCA JANKE, CSR, RPR, RMR